IN THE COURT OF APPEAL
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AC 9 of 2020
(CR 39/20 & CR 168/20)

TEVITA VALIKOULA

-v-

REX

JUDGMENT

Coram: Whitten P
Moore J
Randerson J

Counsel: Mr S. Fili for the Appellant
Mr J. Lutui DPP for the Respondent

Date of hearing: 23 March 2021
Date of judgment: 30 March 2021

Introduction

1. In June 2020, the Appellant was tried before Niu J on one count of receiving various goods stolen by one, Sione Mafi Lolohea ("***Lolohea***"), in June 2019, valued at $19,400. On 18 August 2020, the Appellant was convicted.

2. In July 2020, the Appellant was tried, again before Niu J, on one count of abetment to theft in that in May 2019, he encouraged Lolohea to steal 85 kava plants valued at $17,000. On 20 August 2020, the Appellant was again convicted.

3. On 13 October 2020, Niu J sentenced the Appellant to 5 years and 3 months imprisonment on each count, to be served concurrently and without suspension.

Grounds

4. In this proceeding, the Appellant seeks leave to appeal against the sentences.[1] Should leave be granted, we will deal with the appeal instanter.

5. From the Notice of Appeal and the Appellant's Arguments, as filed, the grounds of appeal may be summarised as follows:

   (a) the sentences were excessive;

   (b) the Appellant's time in custody on remand was not taken into account;

   (c) the Judge took into account 'ulterior factors' and proceeded on a 'mistake of fact' by considering that the Appellant had lied to the probation officer when interviewed for his pre-sentence report;

   (d) the sentence is inconsistent with the principle stated by this Court in *Mo'unga v R* [198] Tonga LR 154 ("***Mo'unga***") to effect that imprisonment for a purely property offence is not appropriate unless there are unusual circumstances that render imprisonment necessary;

   (e) the Appellant should not have received the same sentence the Judge imposed on Lolohea for the actual theft of the goods;

   (f) consistency with comparable sentences requires the sentence to be reduced to about three years; and

   (g) since his release from prison in 2016, until the instant offending,[2] the Appellant had been a 'gentleman of characters' who had behaved himself as a law-abiding citizen.

The Judge's sentencing remarks

6. In his sentencing remarks, the Judge noted[3] that Lolohea had pleaded guilty to both thefts and had already been sentenced. His Honour then recited a summary

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[1] As required by s.16(c) of the *Court of Appeal Act*.
[2] Erroneously described as 2020.
[3] [2].

of the facts for each of the Appellant's offences relative to the two thefts committed by Lolohea. In relation to the first, the Judge found that the Appellant drove Lolohea near to the complainant's home into which Lolohea subsequently broke and entered and that the Appellant transported the stolen goods away in his vehicle. In relation to the second, the Appellant was effectively the mastermind in identifying the allotment from the which the kava was stolen by Lolohea and encouraging him to do so. His Honour then considered the probation report. In it, the Appellant was recorded as saying that he had nothing to do with either offence, that he knew nothing about the thefts and that he was completely innocent of them. The Judge observed that the Appellant had elected not to given evidence in Court to that effect.

7. The probation report set out details of the Appellant being married with nine children. We will return to that part of the report and the Judge's reaction to it further below.

8. The report also contained reference to the Appellant having a number of health problems including diabetes, high blood pressure and cardiac pathology. Notwithstanding, the Appellant was able to continue his occupation as a taxi driver.

9. The town officer of the village in which the Appellant was born and raised knew the Appellant but had nothing to say in support of him. Conversely, the report referred to the town officer of the village to which the appellant had recently moved as not knowing him well, and that since the Appellant had moved to the village, various crimes had occurred there.

10. The only positive comment obtained by the probation officer was from the Bishop of the LDS church at the Appellant's birth village, who was reported as having seen "a big change and big repentance" in the Appellant's life. The Bishop asked for the Appellant to remain in his care to ensure those changes continued and became permanent. The Judge noted however that the Bishop gave "no detail or example of such big change or big repentance".

11. In its submissions below, the Crown contended that the appropriate sentence was 3½ years imprisonment on each count with no suspension. The Crown relied

on four comparable sentences. Two involved sentences for theft of 2 ½ years imprisonment.[4] The third resulted in a sentence for theft of two years with the last six months suspended[5] and the fourth was the sentence in Lolohea. The Appellant's previous convictions were noted, as was the fact that he then had an outstanding charge for possession of illicit drugs.

12. The Judge summarised Mr Fili's submissions below as a plea for leniency on account of the Appellant's age and medical condition. Further, Mr Fili submitted that those physical conditions had affected the Appellant's mind to the extent that he believed he had nothing to do with the offences and that he never knew about the stolen items until the police showed them to him during their search. He conveyed the Appellant's promise to change his life, to be religious, to be more caring for his family and to become a better member of society. On that basis, Mr Fili submitted that the Appellant be given a suspended sentence.

13. The Judge then declared that the Appellant had deliberately lied in his statement to the probation officer that he and his family had migrated to Hawaii in 2000 and that he had returned to Tonga in 2019 to attend his father's funeral. The Appellant told the officer that whilst here for the funeral, he had an affair with another woman and that when his wife and children found out about it, they no longer wanted anything to do with him. The Judge identified the lie by reference to the Appellant's criminal history. In Tonga, in 2012, the Appellant was sentenced to eight years for incest on his youngest daughter and four years each for four counts of indecently assaulting her between 2005 and 2010. The last two years of the head sentence were suspended. He was released from prison in 2016.

14. The Judge also considered that the Appellant had exploited Lolohea, whom he described as a person who made his living by housebreaking and theft, to the Appellant's own advantage.

15. At paragraphs 23 and 24 of his remarks, his Honour stated:

> *[23] By right, you should be punished as he has been punished, because he would not have committed the housebreaking and the thefts if you had not directed and helped him to do it. The law says that. Section 8 of the Criminal*

[4] Maile (CR 133/2019) and 'Ealelei (CR 162/2018).
[5] Malafu (CR 133/2016).

Offences Act provides that every person who directly or indirectly encourages another person to commit an offence and the person commits the offence shall be liable to the same punishment as if he himself had actually committed the offence. And S.148 (1) of the same Act provides that any person who receives any property believing it to have been stolen shall be liable to the same punishment as if he had committed the theft himself.

[24] In respect of the thefts, the maximum sentence is 7 years imprisonment, and I have sentenced Sione Mafi Lolohea for stealing 'Ilaisaane Kailahi's Tongan koloa to 5 years 3 months imprisonment for the theft of 'Ilaisaane's properties. I do not see any reason why you should not be sentenced to the same period of imprisonment. In fact I see every reason to sentence you to the same period because you knew his history of housebreaking and thefts. That was why you used him."

Crown's position

16. The Crown does not oppose the appeal. Further, it submits that the sentences imposed were "wrong in principle" and "manifestly excessive".

17. For the reasons which follow, we agree.

Consideration

18. By imposing the sentences he did, the Judge failed to have regard to the comparable sentences presented which, assuming imprisonment for first property related offences was appropriate, set a range of two to three years imprisonment.

19. Sections 8(a) and 148(1) of the *Criminal Offences Act* provide to the effect that the Appellant here was liable to the same punishment as if he had committed the thefts. That simply means that the maximum penalty will be the same as for theft and that the offender will be liable to an appropriate sentence as if he/she committed the theft which the offender abetted or from which he/she received stolen goods. That does not automatically mean that in a case of a thief supplying stolen goods to a receiver (or 'fence'), the receiver must receive the same sentence as the thief. There may be cases where the respective starting points differ by reference to differing levels of culpability. Differences in mitigating factors such as where one pleads guilty at the earliest opportunity whereas the other is convicted at trial may also result in differences in sentences. In almost all cases, each offender's personal circumstances and relevant antecedents, in particular,

where one has a significant and relevant previous criminal record and the other does not, will also have a material effect on the resulting sentences for each.

20. The Appellant's degree of culpability for his conduct on the receiving charge was less than that to be ascribed to the principal housebreaking and theft by Lolohea.

21. Similarly, the Appellant's degree of culpability for his conduct on the abetment charge was less than that ascribed to the principal theft of the kava by Lolohea.

22. Finally, the Judge failed to have regard to the differences between Lolohea's criminal record and the Appellant's. His Honour sentenced Lolohea to 7½ years imprisonment for the serious housebreaking (which produced the goods the Appellant here received) and five years and three months imprisonment for the theft (to which the Appellant here was convicted of abetment).[6] However, at then age 34, Lolohea had been in and out of prison since he was 14 years of age, having racked up an unenviable record of some 37 convictions, the vast majority of which were for housebreaking and theft. That feature was clearly the principal basis for his Honour's view in that case that the "*sentence should be at least three-quarters of the maximum sentence provided by the law...*".[7] By comparison, the Appellant here, who was 58 years of age at the time of his sentencing, had only one significant, albeit very serious, entry in his criminal record, as described above.

23. The approach adopted by the Judge had the effect of sentencing the Appellant, not on the basis as if he had committed the principal thefts, but on the same basis as he sentenced Lolohea, who had committed the thefts, with his extensive criminal record.

24. For those reasons, his Honour misdirected himself, his discretion miscarried, and the sentences must be set aside.

25. For completeness, we make two further observations.

26. Firstly, and if it was the case, the Appellant's election not to give evidence at his

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[6] *R v Lolohea* [2020] TOSC 43 (19 June 2020).
[7] [24].

trial could not be regarded as a circumstance of aggravation in his subsequent sentencing. His conviction at trial simply resulted in him losing the benefit of any discount which might have been available had he pleaded guilty earlier.

27. Secondly, the Judge's finding that the Appellant had lied to the probation officer, and that therefore he was not to be believed about anything he said (presumably through the probation officer or Mr Fili), in fact, went nowhere. It is not clear what, if any, consequence that finding brought to bear on the ultimate sentence imposed. The Judge's reasons do not reveal any connection. For that reason, we disregard it.

28. We now turn to the approach which ought to have been followed in determining the appropriate substitute sentence.

29. The Judge's remarks did not include reference to the decision of this Court in *Mo'unga*, either in respect of whether imprisonment was appropriate for purely property related offences or on the issue of suspension of any term of imprisonment to be imposed. The Crown's submissions below tangentially touched on the first issue and directly on the second. Mr Fili's submissions did not address either.

30. Had the Judge considered the first guiding principle, his focus would have been directed to the task of identifying whether there were any unusual circumstances in the matters before him which rendered imprisonment necessary.

31. In our view, there were. Much like the circumstances in Mo'unga, here, the Appellant was significantly involved in both thefts, which were premeditated, carefully planned and co-ordinated, and he exploited Lolohea, whom he knew to be a professional thief, to execute the thefts. Accordingly, a sentence of imprisonment is necessary.

32. In determining appropriate starting points, we have regard to:

    (a) the seriousness of the offences, particularly, by reference to the value of the goods stolen;

    (b) the comparable sentences presented below;

(c) the Appellant's degree of involvement and culpability; and

(d) the operation of ss 8(a) and 148(1) of the *Criminal Offences Act*.

33. As a result, we do not see any justification for differentiating between the two offences. But for the Appellant's involvement as the effective instigator, it is likely Lolohea would not have committed the serious housebreaking and thefts, at least not at the time or in the manner they were committed.

34. Accordingly, we set a starting point of three years imprisonment on each count.

35. The Crown submitted below that there were no mitigating factors for either count. The bulk of the stolen goods were never recovered. The Appellant has not offered compensation. He has shown no remorse and has sought to maintain his innocence throughout, including after verdict, when he told the probation officer he had nothing to do with the principal offences. On this appeal, none of that has changed.

36. Mr Fili submitted that the Appellant has been a law-abiding citizen since his release from prison in 2016. When viewed in its correct temporal context, that submission is unsustainable.

37. The Appellant's earlier prison term was ordered by Shuster J to commence on 30 April 2012. According to Niu J's remarks, the Appellant was released on 10 September 2016, which is only 4½ years of the six-year term he was to serve out of the eight-year head sentence. The early release was not explained. Presumably, it was the result of the Commissioner of Police exercising his power of remission under Division 7 of the *Police Act*. Nonetheless, the final suspended two years of the head sentence expired on 29 April 2018. The instant offences were committed in May and June 2019, that is, just over a year after the actual end of the Appellant's full sentence for serious sexual offences.

38. We do not consider such a short overall period free of crime to be a factor in mitigation sufficient to warrant reducing the starting points. Similarly, the seriousness of the Appellant's first Supreme Court conviction for which he received a substantial term of imprisonment, partly suspended, eclipses any mitigatory effect there might have been in the fact that these are the Appellant's

first detected property-related offences.

39. The next question is whether, subject to the totality principle, the two sentences should be served concurrently or cumulatively (in whole or in part). Ordinarily, cumulative sentences should only be imposed for offences that are unrelated: *Hokafonu v Rex* [2003] TOCA 3 at [51]. Even though the two offences here were committed about a month apart, and involved different complainants and property, we tend to the view that they were sufficiently connected (as a sort of 'mini theft spree') that they should be regarded as part of the one course of criminal activity. Further, as this issue was not considered below, nor was it raised on this appeal, we are content that the two sentences be served concurrently.

40. Finally, none of the considerations discussed by this Court in Mo'unga favour suspension. The Appellant is not young. Prior to the commission of these offences, he served a significant term of imprisonment for serious sexual offences. In less than three years following his release, two of which represented the balance of his partly suspended sentence, he has committed the subject offences. The offending here was premeditated and planned. The Appellant did not co-operate with the authorities. He has shown no remorse. There are no other factors which might diminish his culpability. The Appellant has shown little to no propensity for genuine or lasting rehabilitation. The Appellant's medical conditions are of a kind which may be managed within prison and are not, of themselves, a basis for suspension.

41. For those reasons, we, too, decline to suspend any part of the substitute sentences to be imposed.

42. In his submissions on this appeal, Mr Fili regarded a three-year term as a "fair level" for the Appellant's sentence.

43. On 19 March 2021, in response to the Court's invitation prior to hearing, Mr Lutui informed the Court of an agreement between counsel, in the event the appeal is allowed, on substitute sentences of two years for the receiving and three years for the abetment to theft, to be served concurrently, and without suspension. No explanation was given for the difference. As noted above in paragraph 33, the Appellant's conduct relating directly to both primary thefts leads us to conclude

that there is no identifiable basis for imposing different sentences. In the final result, there is also no practical difference in the time to be served.

44. During oral submissions, Mr Fili sought to resile from the apparent agreement in relation to suspension by relying upon the Appellant's age and his medical condition. In this case, neither warrant suspension.

Result

45. Leave to appeal against sentence is granted and the appeal is allowed.

46. The sentences below are set aside and in substitution therefore:

    (a) the Appellant is sentenced to three years imprisonment on the receiving count and three years on the abetment count;

    (b) the sentences are to be concurrently; and

    (c) the commencement of the sentence is to be backdated to the date the Appellant was remanded in custody for the offences the subject of this appeal.

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Whitten P

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Moore J

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Randerson J

COURT OF APPEAL TONGA