



15 June 2020. Niu J sentenced Mrs Siale on 12 February 2021 to five years imprisonment on the first charge and two years on the second, both terms to be served concurrently. The Judge suspended the sentence for the maximum period of three years from the date of sentencing.

### **Circumstances of the offending**

[3] According to the summary of facts, Mrs Siale broke into the complainant's home at Nukunuku while the complainant was absent from the property. The gate and house doors were locked. Mrs Siale sold some of the handicrafts to a loan business and an unspecified number of the articles were recovered from the owner of that business.

### **Mrs Siale's personal circumstances**

[4] Mrs Siale is 37 years old. Her husband has employment and they have seven children ranging from 16 to four years of age. Mrs Siale has recently started a small business cooking food for sale to help support the family. She told the sentencing Judge she was remorseful and had offered an apology to the complainant.

[5] Mrs Siale has a prior history of offending of a similar nature. In 2004, she broke into a house and stole a ta'ovala and a piece of tapa and sold them for money. She was convicted of theft, fined \$100 and ordered to pay compensation of \$500. In 2012 she bought a ta'ovala worth \$800 for \$200, knowing it had been stolen. She was placed on probation for two years and complied with the sentence. However, at the conclusion of the probation period, she broke into a house in 2015 and stole mats and ta'ovala. She used the stolen property as security for loans which were not repaid. On that occasion, she was sentenced to 18 months imprisonment, six months of which was served and the remaining 12 months was suspended for two years.

[6] Mrs Siale complied with this last sentence and the Judge noted she had not reoffended for a five year period from 2015 until the instant offending in June 2020. Financial hardship appears to have been the underlying cause for her offending in each case.

[7] Niu J became aware at sentencing that there were 3 summary offences pending in the Magistrates Court for similar offending.. The transcript of a discussion between the Judge and Mrs Siale reveals that the alleged offending had occurred in November 2020 after Mrs Siale had been granted bail for the instant offending. Mrs Siale told the Judge she had pleaded guilty to one of the 3 charges but denied the others. There was a discussion about whether the sentencing of the instant offending should be delayed until all could be dealt with together in the Supreme Court but this did not happen, apparently because sentencing would likely be delayed for some months in consequence. We were told at the hearing of this appeal that Mrs Siale had since been sentenced to one period of four months imprisonment on one or more of the other charges together with a further term of imprisonment of four months as a result of an earlier sentence being activated.

[8] We do not consider it would be just to accord weight to the existence of these other charges in dealing with this appeal since they may not been dealt with at the time of the

sentencing and, if they had, the Crown did not have available any details of the outcome at that time. We expect that Mrs Saile will have now served any sentences for that offending.

### **The approach to sentencing**

[9] At sentencing, the Crown submitted by reference to comparable cases,<sup>2</sup> that a starting point of three years imprisonment was appropriate for the house breaking offence, reduced in view of the guilty plea to two years six months. The Crown further submitted at sentencing that there should be a concurrent sentence of two years imprisonment on the theft charge. As to suspension of the sentence, the Crown submitted in the light of the principles in *Mo'unga*<sup>3</sup> that there should be no suspension of the sentence.

[10] The Judge noted that the maximum term of imprisonment for house breaking was 10 years and declined to accept the Crown's submission that a three year starting point was appropriate. Taking into account Mrs Siale's history of house breaking offences, the Judge considered a sentence of five years imprisonment for the house breaking was appropriate, noting this was half the maximum period available.

[11] Dealing with the issue of suspension of the sentence under s 24 (3) (a) of the Criminal Offences Act, the Judge took into account the five year period with no offending prior to the index charges; he accepted Mrs Siale was likely to take the opportunity offered by a suspended sentence to rehabilitate herself and that she had not planned the offence in advance; he considered her small business would help support the family; he said the guilty plea indicated remorse and was an admission of guilt; and he noted her apology to the complainant. Niu J then stated:

[20] In considering whether to suspend the whole or only part of your imprisonment, I have to consider the harm that will be caused by ordering either one. If the whole of your sentence is suspended, you will be able to continue with your life with your family and to continue with the livelihood business you have started and upon which you now rely. You may then provide the proper care and attention for your children, and in particular, their education, in order that they do not become delinquents and a menace to the community. You would also have money for you and your family's needs and you may not be tempted to reoffend ever again in future.

[21] Against that, if only part of your sentence is suspended, then you have to start right away to serve the unsuspended part of your sentence. That means your present food business is stopped and there will be no more money for the family needs other than your husband's wages, which is already insufficient for them. Your family will suffer and the children's education will suffer and sooner than later, they will be in trouble and the community will suffer.

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<sup>2</sup> *Malafu* (CR 133/16), *Liku* (CR47/19), *Maile* (CR133/19) and *Lolohea* (CR 38/20).

<sup>3</sup> *Mo'unga v R* [1998] Tonga LR 154.

[22] I also consider that the aim of Parliament in enacting that the whole of the sentence be suspended would be achieved, namely, that the offender is allowed to continue with his/her life in the community because it would be in the best interests of the community that the offender so continue, **but** that if he/she re-offends, he/she is then ordered to serve out the suspended sentence. That is the deterrent Parliament has intended. It serves the community better.

[12] The final sentence imposed was:

- (a) Five years imprisonment for the house breaking offence;
- (b) A concurrent sentence of two years imprisonment for the theft offence;
- (c) Both sentences suspended for three years from the date of sentencing upon condition that Mrs Siale did not commit an offence punishable by imprisonment within the period of the suspension.

### Submissions on appeal

[13] Mr Lutui submitted for the Crown that the final sentence of five years imprisonment, fully suspended for three years on conditions, was manifestly inadequate or wrong in principle. He referred us to the decision of this Court in *R v Misinale*<sup>4</sup> in which the sentencing Judge had imposed a term of imprisonment for embezzlement of three years with the first eight months of the sentence to be served in prison and the balance of two years four months suspended from the date of release. This Court found that the sentence was clearly in error because the period of the suspension (two years) was less than the unserved balance of the sentence (two years and four months). The result was that the prisoner would be required to return to prison at the end of the period of suspension for the balance of four months. This Court held that the suspension of the sentence for a period less than the balance of the sentence was an error and stated that:

“When a sentence is suspended, it must always be for not less than the unserved portion of the sentence.”

[14] The result in *Misinale* was that the overall sentence of three years imprisonment was upheld; the suspension imposed by the Judge was quashed; and, in lieu, the last 12 months of the three year sentence was suspended for two years from the date of his release.

[15] Mr Lutui also submitted that the sentencing Judge had erred by limiting his consideration of the suspension issue to the non-exhaustive specific considerations identified by this Court in *Mo'unga* and had overlooked the broader considerations which must be reconciled as elaborated in the following passage from this Court's decision:

Two considerations need to be reconciled. First, the serious nature of the offending, coupled with the long criminal history, require a lengthy sentence that

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<sup>4</sup> *R v Misinale* [1999] TOCA 12; CA 13/1999.

will be a deterrent to this appellant and to others, and will mark the community's condemnation of criminal conduct of this kind and degree. Secondly, it is in the community's interests for the sentence to be one which will encourage the appellant in his rehabilitation, and will help him to break the cycle of offending.

We have reached the conclusion that these considerations can best be reconciled by affirming the sentence of imprisonment of four years, and by suspending the last year of that sentence. The three years he will spend in prison should itself be an effective deterrent, and the year with the sentence hanging over him should be an added encouragement to put a life of crime behind him.

[16] Understandably, Mrs Siale made only brief submissions pointing out that she had pleaded guilty and submitting that the sentence was appropriate.

### **Discussion**

[17] The principles applied by an appellate court on a Crown appeal against sentence are well known. It is not sufficient to show merely that a more severe sentence might have been available. The appellate court must be satisfied that the sentence is so inadequate or inappropriate that the sentencing Judge erred in that he or she must have acted upon a wrong principle, wrongly assessed a relevant circumstance, took into account irrelevant factors, failed to take into account relevant factors, or has imposed a sentence that is inconsistent with sentences the Court has imposed for like offending. If the Court is so satisfied, the sentence should be increased only to the lower end of the appropriate sentencing range.<sup>5</sup>

[18] We are satisfied in the present case that the sentence imposed was wrong in principle. The sentence was an unusual combination in that it involved a lengthy term of imprisonment to reflect what the Judge considered to be the seriousness of the offending and then suspending the first three years of the sentence. While the suspension for the first three years could assist in rehabilitation, it would have the unfortunate result of then requiring Mrs Siale to serve the last two years of the sentence in prison, a consequence this Court held was wrong in principle in *Misinale*.

[19] We conclude that the appeal must be allowed and an alternative sentence substituted. Mr Lutui submitted that the 5 year sentence should remain with the last three years suspended but was unable to direct our attention to any comparable case where a sentence of that length had been imposed. We consider that a proper reconciliation of the objectives of deterrence and rehabilitation would be met by reducing the overall length of the sentence but substituting an alternative suspension regime requiring Mrs Siale to serve an initial period of imprisonment followed by suspension of the balance of the sentence after her release into the community.

[20] We accept that Mrs Siale's history of offending of a similar nature is serious and requires a deterrent response which includes a period of time spent in prison. But we consider the period

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<sup>5</sup> *R v Misinale* [1999] TOCA 12; CA 13/1999.

of five years imprisonment imposed by the Judge was significantly too long. By reference to the authorities already cited, a starting point of three years for the house breaking charge as proposed by the Crown at sentencing is appropriate, reduced by six months for the guilty plea to two and a half years. The concurrent sentence of two years on the theft charge was appropriate.

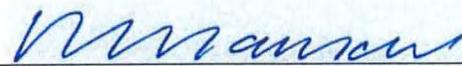
[21] We have concluded that the correct approach to suspension is to require the respondent to serve the first six months of her sentence, with the remaining two years suspended from the date of her release for a period of two years. As recognised by this Court in *Mo'unga*, the substituted sentence will mark the community's condemnation of the respondent's conduct while encouraging her rehabilitation with the aim of breaking the cycle of offending.

### Result

- (a) The appeal is allowed.
- (b) The sentence imposed in the Supreme Court is quashed.
- (c) In substitution, the respondent is sentenced to a term of two and a half years imprisonment on the house breaking charge and a concurrent term of two years imprisonment on the theft charge.
- (d) The respondent is to serve the first six months of her sentence with the remaining two years suspended from the date of her release for a period of two years on condition that she does not commit an offence punishable by imprisonment within the two year period of her suspension.



Whitten P



Hansen J



Randerson J



White J

