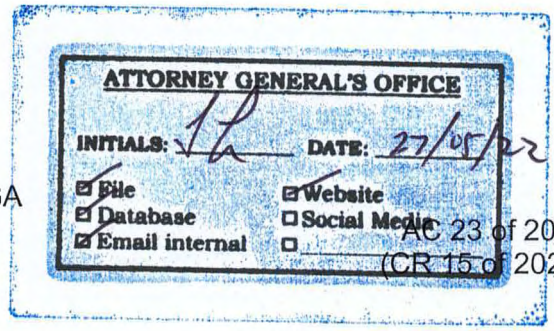

IN THE COURT OF APPEAL OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AC 23 of 2021
(CR 15 of 2020)

BETWEEN:

ATTORNEY GENERAL Appellant

-v-

KISIONE TAUVAKA Respondent

JUDGMENT

Court: Whitten P
Blanchard J
Randerson J

Appearances: Mrs L. Aonima for the Appellant
The Respondent in person

Hearing: 16 May 2022
Judgment: 24 May 2022

Appeal

1. On 1 April 2021, Niu J sentenced the Respondent to three years and six months' imprisonment on each of three counts of serious housebreaking and two years' imprisonment on each of three counts of theft. The sentences were ordered to be served concurrently and were fully suspended for a period of three years, on conditions.

2. On 21 September 2021, the Attorney General was granted leave to appeal, pursuant to s. 17B of the *Court of Appeal Act* against the sentence, which she contends was contrary to law and manifestly inadequate.

Background

3. On three occasions in May and June 2020, the Respondent, who was 19 years of age at the time, took the keys to one of his employer's warehouses, broke into it, and stole various goods, the value of which totalled $22,934. He cooperated

with police and pleaded guilty at the earliest opportunity. Most of the goods were recovered.

4. The Crown submitted below that an appropriate sentence for each of the counts of serious housebreaking was 2½ years imprisonment and 2 years imprisonment for each of the theft counts, with the final 18 months of the head sentence suspended for 2 years. It did not specify any conditions on the suspension.

5. Counsel for the Respondent below submitted a starting point for the serious housebreaking of 3 years imprisonment and that the resulting sentence should be fully suspended.

Sentence below

6. In his sentencing remarks dated 1 April 2021,[1] Niu J took into consideration the statutory maximum penalty for the serious housebreaking of 10 years imprisonment; the seriousness of the offending marked by the repeated breaking into the employer's warehouse on three occasions in one month and breaches of trust; and the substantial value of the property stolen.

7. The judge referred to the decisions of this Court in *Sailosi v R* [1991] Tonga LR 51 and *Mafi & Latu v R* [1991] Tonga LR 53 as authority for the proposition that:

> *"[24] The Courts have shown leniency to young first offenders in respect of property offences which they commit because of that, and the reason for that is because if such young first offenders are sent to prison, they would have no fear any more of going to prison. There would be no deterrent for them not to commit another offence and they would commit them again and again, and again and so on for the rest of their lives."*

8. His Honour also referred to the statement in *Lausi'i & Tauki'uvea v R* [1991] Tonga LR 55 at 56, that:

> *"... it is inappropriate for first offenders in regard to property offences to be sentenced to imprisonment unless the offences are of a particularly serious nature...."*

9. The judge then set a starting point for the head offences of 5 years imprisonment. That was reduced by 18 months on account of the Respondent being a first-time

---

[1] *R v Tauvaka* [2021] TOSC 41

offender, his guilty plea, a substantial amount of the stolen property having been recovered, demonstrated remorse and cooperation with police.

10. On the issue of suspension, the judge considered that the majority of the factors described in *Mo'unga v R* [1998] Tonga LR 154 at 157 favoured suspension. He then concluded:

> *"[40] I therefore find that you are eligible for a suspended sentence under 3 of the 4 situations listed by the Court of Appeal and I must therefore find that your imprisonment be suspended. I however consider that the suspension be for the longest period which the law has provided, namely 3 years,*[2] *in view of the seriousness of the housebreaking and thefts you have committed. And more importantly, it would keep you trouble free for much longer. You would be 23 years of age by then and be more mature and all the more responsible."*

Grounds of appeal

11. In this proceeding, the Attorney General contends that:

    (a) the judge erred in law by fully suspending the sentence of three years and six months imprisonment for three years, which effectively means that at the expiration of the suspension period, the Respondent will be required to serve the balance of six months of the sentence; and

    (b) the sentence was manifestly inadequate and wrong in principle because the judge failed to impose community service as a condition of the full suspension.

Consideration

12. In relation to the first ground, the Appellant relied on the oft-cited principle stated by this Court in *Rex v Misinale* [1999] TOCA 12 that:[3]

> *"The suspension of the sentence for a period less than the balance of the sentence was an error. When a sentence is suspended, it must always be for not less than the unserved portion of the sentence."*

13. The suspension here of a 3 ½ year sentence for 3 years, that is, for less than the unserved portion of the sentence, was a clear error of that principle, and must be corrected.

---

[2] *Criminal Offences Act*, s 24(3)(a).

[3] Recently referred to in *Attorney General v Siale* [2021] TOCA 16.

14. The Appellant does not challenge the full suspension of the sentence. We agree that, in the circumstances of the case as presented below, it was open to the sentencing judge to fully suspend the head sentence.

15. In light of the Crown's submission below, based on comparable sentences,[4] of a head sentence of 2½ years imprisonment, we consider it appropriate to reduce the head sentence to 3 years' imprisonment, fully suspended for 3 years.

16. In relation to the second ground of appeal, the Appellant correctly identified the test on s.17B appeals, again from *Misinale*, as:

> *"First, for such an appeal to succeed, clear and compelling grounds for increasing the sentence need to be established. It is not sufficient for the appellate court to consider that a more severe sentence could properly be imposed, or that the sentence imposed is inadequate or inappropriate. For a sentence to be increased on a Crown appeal, 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. In such a situation, the appellate court is left with no alternative but to impose a more severe or a different sentence. If the court is so satisfied, the sentence should be increased only to the lower end of the appropriate sentencing range. Indeed, the appellate court, in fixing the proper range for this case, should take into account that it is an added penalty to have to face sentence a second time, and to have hope deferred, and perhaps dashed, in the result."*

17. However, in *Misinale*, a second consideration was also identified, namely, that:

> *"... the right of the Crown to appeal affects the course the Crown should take when the sentence is before the sentencing judge. As was said by the Full Court of the Federal Court in R v Tait (1979) 24 ALR 473, 476, after pointing out that a Crown appeal puts the defendant in double jeopardy:*
>
> > *'It would be unjust to a defendant to expose him to double jeopardy because of an error affecting his sentence, if the Crown's presentation of the case either contributed to the error or led the defendant to refrain from dealing with some aspect of the case which might have rebutted the suggested error. The Crown has been said not to be concerned with sentence .... but when a statutory right of appeal has been conferred on the Crown, that proposition must be more precisely defined. It remains true that the Crown is required to make its submissions fairly and in an even handed manner, and that the Crown does not, as an adversary, press the sentencing court for a heavy sentence. The Crown has a duty*

[4] *'Ealelei* (CR 162/18) and *Maile* (CR 133/19).

> *to the court to assist it in the task of passing sentence by an adequate presentation of the facts, by an appropriate reference to any special principles of sentencing which might reasonably be thought to be relevant to the case in hand, and by a fair testing of the defendant's case so far as it appears to require it.'"*

18. In the proceeding below, the presentence report was filed on 18 March 2021. In it, the probation officer recommended full suspension. The Crown's submissions were filed on 26 March 2021. They did not address the possibility of a full suspension, or in that event, the conditions which ought to be imposed, including, as the Appellant now contends, community service.

19. Notwithstanding, the Appellant submits that by failing to add community service as a condition of the suspended sentence, the sentencing judge failed to place sufficient weight on the sentencing objectives of punishment, effective deterrence and rehabilitation: *Mo'unga*, ibid; *Fifita v R* [2000] Tonga LR 289. Elsewhere,[5] it was submitted that the judge "*placed too much emphasis on the rehabilitation of the Respondent*" and "*failed to consider the need for the offender to be punished for the crime he committed as well as the protection of the community*".

20. We consider that the judge's assessment gave effect to the objectives of specific deterrence and rehabilitation of the Respondent. However, we agree that a fully suspended sentence, without a requirement to perform community service, failed to give sufficient effect to the objectives of punishment, general deterrence and the community's condemnation of criminal conduct of this kind and degree.

21. During her oral submissions, Ms Aonima proposed that the fully suspended sentence be subject to the usual conditions plus 40 hours community service, which is the lowest number of hours permitted by s. 25A(2) of the *Criminal Offences Act*. Having regard to the test for Crown appeals against sentence referred to above, that the original sentence was passed over a year ago, the comparable sentences referred to, the Respondent's age and lack of previous convictions and the fact that a substantial portion of the goods stolen were recovered, we agree.

---

[5] [22]

Result

22. The appeal is allowed.

23. The sentence of the Supreme Court is quashed.

24. In substitution:

    (a) The Respondent is sentenced to:

        (i) three years' imprisonment on each of the three counts of serious housebreaking; and

        (ii) two years' imprisonment on each of the three counts of theft.

    (b) All the sentences are to be served concurrently.

    (c) The sentences are to be suspended, from 1 April 2021, for a period of three years.

    (d) The suspension of the sentence is subject to the following conditions, namely, that during the period of suspension, the Respondent is to:

        (i) not commit an offence punishable by imprisonment;

        (ii) be placed on probation;

        (iii) report to the probation office as directed by his probation officer;

        (iv) complete courses in life skills and drug and alcohol awareness as directed by his probation office; and

        (v) complete 40 hours community service as directed by his probation officer.

.....

Whitten P

.....

Blanchard J

.....

Randerson J

COURT OF APPEAL TONGA