

ATTORNEY GENERAL'S OFFICE	
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IN THE COURT OF APPEAL  
CRIMINAL JURISDICTION  
NUKU'ALOFA REGISTRY

AC 19 of 2022  
96/2021 & 49,56/2022]

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BETWEEN:

ATTORNEY GENERAL

Appellant

AND

RODNEY TOKI

Respondent

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### JUDGMENT OF THE COURT

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Court: Whitten LCJ  
Randerson J  
Harrison J

Appearances: Mrs T. Vainikolo for the Appellant ✓  
Respondent in person

Hearing: 27 March 2023  
Judgment: 6 April 2023

#### Introduction

[1] This appeal by the Attorney-General from a sentence imposed by Cooper J in the Supreme Court raises a very short point: did the Judge err in imposing terms of imprisonment on the respondent, Rodney Toki, to be served concurrently with rather than cumulatively, in whole or in part, upon a term of imprisonment which had been earlier imposed?

#### Facts

[2] Mr Toki pleaded guilty to one count of theft and three counts of housebreaking with three associated thefts in what the Judge aptly described as a crime spree committed between July and August 2021. On the first occasion he stole a flatscreen television set, a video machine, iPad , five ta'ovalas and car tyres to a value of \$14,000; on the second he stole jewellery worth \$25,000, less than half of which was recovered; on the third he stole

electronic equipment to a value of \$500; and on the fourth he stole Tongan traditional mats and electronic equipment including a laptop to value of \$4,600. The Judge noted that aggravating factors of the offending included targeting high value homemade items and high value jewellery; the ongoing emotional stress and fear suffered by some of the victims; in one case, the loss of irreplaceable stored data relating to work as a teacher and as a student; arming himself with a machete; and committing the offences while on bail for robbery offending.

[3] Mr Toki was aged 27 years of age when he appeared for sentencing on 28 June 2022. He had a history of serious dishonesty offending dating back to 2014. The presentence report writer noted his continual association with habitual criminals; his substance abuse and family dysfunction; his community disassociation and related lack of a sense of social responsibility; and his previous reluctance to complete a rehabilitation program. The report writer was satisfied that he continued to be a threat to society, particularly foreign residents.

[4] Mr Toki had been sentenced to a term of six years imprisonment in 2016, the final 18 months of which was suspended. Also, of direct significance to this appeal, Cooper J had on 29 November 2021 sentenced him to a total term of 12 years and three months imprisonment for a series of armed robberies committed on Chinese supermarkets over a five-day period in January 2021.

[5] On 28 June 2022 Cooper J imposed a series of sentences for the subject offences, concurrently and cumulatively amounting to an aggregate term of five years and four months imprisonment with no suspension. There is no challenge to the length of that end sentence. However, the Judge expressly ordered that the sentence was to run concurrently with and not cumulatively upon Mr Toki's first or existing term of 12 years and three months imprisonment. He justified his decision on the grounds that, first, despite all the aggravating features of the offending, he had already declined to suspend any part of the sentence; and second, the existing sentence was so substantial that it would be unjust to add to it.

## **Analysis**

[6] The Attorney-General's appeal is limited to the Judge's decision not to order that a part of the second sentence should be cumulative upon the first or existing sentence. The

Attorney General submits that Cooper J erred in principle by failing to take into account and give sufficient weight to relevant factors when considering the totality principle.

[7] The Judge was required in the circumstances to take a two-step approach<sup>1</sup>. First, he had to determine whether the two series of offending, on January 2021 and again in July and August 2021, were so closely connected that they should be regarded as part of the one course of criminal conduct. He failed to undertake this exercise. If he had, the result was plain that the offending was distinctly disconnected by time, place and circumstances. Thus, on its face, cumulative sentences were appropriate.

[8] Second, the Judge was required to consider whether the aggregate of the two end sentences was not excessive for the totality of the criminality; or, to express the same concept slightly differently, whether the totality principle required the two sentences to be made concurrent, wholly or in part. We accept that the Judge expressly asked himself this question and concluded that cumulative sentences would be wrong because the first or existing sentence was so substantial. However, we are satisfied that he erred in two respects in this inquiry. First, he considered that his refusal to suspend part of the second sentence was a penalty of itself. But this consideration was illusory or academic because the second sentence was rendered of no effect by his imposition of concurrent sentences. Second, the Judge asked himself the wrong question. It was not whether the first or existing sentence was so substantial that it would be unjust to add to it. The correct question was whether aggregated sentences would be excessive for the total offending, or whether concurrent sentences would not properly reflect its totality.

[9] We agree with the Judge that an aggregation of the two end sentences would have been excessive. However, he did not consider the alternative of ordering part of the second sentence to be served cumulatively upon the first. We agree with the Attorney-General that a partial cumulative term of two years would be appropriate. In fixing this period, we acknowledge that the minimum addition possible should be allowed when granting an appeal by the Crown, and that Mr Toki is unrepresented.

[10] There are compelling factors justifying that result. It would be repugnant to justice not to recognise Mr Toki's serious bout of criminal offending by a discrete term of

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<sup>1</sup> *Kolo v R* [2006] TOCA 5

imprisonment. He must be held separately accountable for those crimes. While we agree with Cooper J that the existing term of 12 years and three months imprisonment is substantial, it cannot be just when considering the wider societal interests to subsume all the aggravating features of the second offending within it. We emphasise particularly Mr Toki's offending while on bail and his use of a weapon.

[11] We accept that the end result is indeed substantial. But Mr Toki's personal circumstances carry little weight. This is one of those rare cases where there is little if any hope of his rehabilitation. The protection of society requires that he remain imprisoned for a lengthy period which properly reflects the total seriousness of his two distinct bouts of criminal offending.

### Decision

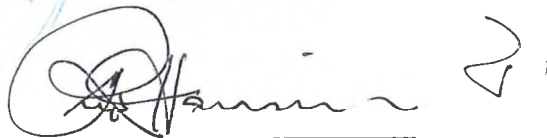
[12] The appeal is allowed. We vary the sentence imposed in the Supreme Court on 28 June 2022 by ordering that two years of Mr Toki's sentence of five years and four months imprisonment is to be served cumulatively upon his first sentence of 12 years and three months imprisonment imposed on 29 November 2021.



Whitten LCJ



Randerson J



Harrison J