

IN THE COURT OF APPEAL OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

APPEAL NO. AC 11 of 2010

BETWEEN : KONI KUSITAFU

Appellant

AND : REX

Respondent

Coram : Ford CJ
Salmon J
Moore J

Counsel : Mr. Tu'utafaiva for the Appellant
Mr. Kefu for the Respondent

Date of Hearing : 8 July 2010.

Date of Judgment: 14 July 2010.

JUDGMENT OF THE COURT

The appellant was tried before a Judge alone on two offences of housebreaking, two offences of theft and two offences of receiving stolen property and he was found guilty of one charge of housebreaking one of theft and 3 of receiving. He was sentenced to a total of four years imprisonment the last year to be suspended. He appeals against his sentence. His appeal was filed late. After hearing submissions and considering affidavits filed in support of an application for leave this court granted leave to file the appeal out of time.

Brief facts

There were six counts in the indictment. The appellant was discharged on count one .Count two was a charge of theft from a bonded warehouse of goods totalling \$45,490. He was acquitted on this charge of theft but convicted of receiving mats and alcohol of an unrecorded value. Count three was a charge of entering a school as a trespasser and with intent to commit an offence therein. He was found guilty of that charge. Count four was a charge of stealing a cash collection box containing \$20 from that school. He was found guilty of that charge too. Count five was a charge of receiving five waist mats. Again no value was disclosed. The final charge was one of receiving goods to a total value of \$1080. He was found guilty of these last two charges.

The judge sentenced the appellant to 4 years imprisonment on each of charges three and four and one years imprisonment on the other charges. As noted above he ordered that the last year be suspended but did not say for how long. The reason he gave for the four-year sentence on charges three and four was that the theft of money from the collection box was particularly reprehensible because it had been collected for the poor and needy. He said that the accused attended that college and knew of the moneys existence at that time of the year. The judge noted the appellant's previous conviction record produced by the prosecution. The appellant denied that the record was correct and no evidence was bought in relation to it. It must therefore be disregarded and he must be treated as a first offender. It is not clear whether the judge took this approach.

The submissions in this court

Counsel for the appellant submitted that the total penalty was excessive. Both counsel for the appellant and counsel for the Crown submitted that the four-year sentence for the charges relating to the school were excessive. Counsel for the appellant submitted that two years imprisonment was an appropriate penalty and that the whole of that term of imprisonment should be suspended. In support of that submission he referred to the judgement of this court in *Mounga v R*(1998) Tonga LR154. At page 156 the Court stated:

“this court has said before that imprisonment for a purely property offence is not appropriate unless there are unusual circumstances that render imprisonment necessary”

Counsel submitted that there were no unusual circumstances in this case. He also referred to the approach to be followed in considering a suspended sentence. The case of *Mo'unga* sets out criteria to be applied at page 157:

- (i) *Where the offender is young, has a previous good record, or has a long period free of criminal activity.*
- (ii) *Where the offender is likely to take the opportunity offered by the sentence to rehabilitate himself or herself.*
- (iii) *Where, despite the gravity of the offence, there is some diminution of culpability through lack of premeditation, the presence of provocation, or coercion by a co-offender.*
- (iv) *Where there has been co-operation with the authorities.*

Counsel for the Crown emphasised and we agree that breaking into a school is a serious offence as is breaking into a private home. He acknowledged that because they had not been proved, the previous convictions could not be taken into account, but he noted that even if they were, his last conviction was in 1998. He noted too that the appellant has six children although the care of them seems to be with his wife from whom he is separated. Counsel recorded in his written submission certain aggravating features including (wrongly) that he had been convicted of theft on count two and he noted the value of the goods referred to in the indictment. He acknowledged that this part of the submission was not correct. He submitted the starting point when considering all of the offending was 3 to 4 years. He agreed that suspension was appropriate but submitted that it should be only half of the term.

Discussion

Taking into account the nature and value of the offences of which he was found guilty, we consider that a term of imprisonment of four years is excessive. We note the only established value of goods stolen or received was \$20 on count four and \$1080 on count six. There is no doubt that the liquor referred to in count two would have a significant value. We agree with the judge that stealing the collection box from the school was a despicable act but we cannot accept that four years imprisonment was justified for that and the offence of breaking into the school. We have considered the dicta from Mo'unga. Even though these are property offences we consider that a term of imprisonment is appropriate. Reasons include the number of offences, the lack of remorse and the theft of the collection box. We consider that a term of two years imprisonment is appropriate. We consider, applying Mo'unga, that half that sentence should be suspended.

Result

The sentence imposed in the Supreme Court is set aside. The appellant is sentenced to the following terms of imprisonment:

Count two, receiving, one years imprisonment

Count three, breaking and entering the school, two years imprisonment

Count four, the theft of the collection box and the \$20 within it, four months imprisonment

Counts five and six, receiving charges, one years imprisonment on each

All penalties are to be served concurrently making a total of two years imprisonment. The second year of imprisonment is suspended for three years



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Ford CJ

Handwritten signature of Salmon J in black ink.

Salmon J

Handwritten signature of Moore J in black ink.

Moore J