

IN THE COURT OF APPEAL OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

APPEAL NO. AC 34 of 2009

BETWEEN : TIMOTE FANGUPO
Appellant

AND : REX
Respondent

APPEAL NO. AC 36 of 2009

BETWEEN : PENISIMANI FA'AOA
Appellant

AND : REX
Respondent

**Coram : Ford CJ
Salmon J
Moore J**

**Counsel : Mr Piukala for the Appellants
Mr Sisifa and Ms Puloka for
the Respondent.**

Date of Hearing : 9 July 2010

Date of Judgment: 14 July 2010.

JUDGMENT OF THE COURT

[1] These appeals have two unusual features. The first is that according to what we were told from the Bar by both counsel, this is the first time in almost 30 years that a judge in Tonga has ordered prisoners (the appellants) to be whipped. The second unusual feature is that due to an oversight in the court or prosecution procedures the appellants were sentenced in the Supreme Court on two charges of escaping from lawful custody in respect of which they had already been sentenced in the Magistrates Court. The appellant Fangupo pleaded guilty in the Supreme Court to 3 charges of escape from lawful custody, three charges of housebreaking and three charges of theft. The appellant Fa'aoa pleaded guilty to 3 charges of escape from lawful custody four charges of housebreaking and four charges of theft. Each appellant was sentenced to a total of 13 years imprisonment from the date of release on current sentences they were serving, together with six lashes of either the cat or rod to be supervised by a Doctor and magistrates. The appeals are against these sentences.

Brief facts

[2] The two appellants each have previous convictions. In the case of Fangupo he has two convictions for housebreaking and two for theft over the years 2008 and 2009. In the case of Fa'aoa he has three convictions for housebreaking, three for theft and one for assault with intent to rob, also over the years 2008 and 2009. According to the records before the court both appellants are now just 17 years of age. In May 2009 both appellants broke out of prison three times. On the first occasion they stole goods from a shopping centre to a total value of \$3229. On the second escape they were apparently arrested before committing any further crimes. On the third escape they broke into a house and stole goods to the value of \$28 and into another house where they stole goods to the value of \$7417. Additionally the appellant Fa'aoa broke into a third house where he stole items to the value of \$215.50. The appellants appeared before the Magistrates Court in June 2009 where they were charged with and pleaded guilty to the first and third escapes. They were each sentenced to 18 months imprisonment to be served cumulatively upon current sentences at the time. As already recorded they were charged with the same escapes in the Supreme Court and sentenced again there.

The submissions in this court

[3] Counsel for the Crown acknowledged that the duplicate convictions in the Supreme Court would have to be set aside. He also submitted that the whipping penalty should be set aside on the grounds that it is now recognised as a cruel and unusual punishment. He submitted that the prison terms imposed by the judge were excessive. He referred to authority relating to escape offences and to breaking and entering and theft and submitted on the basis of those cases that the appropriate sentence for the remaining escape charge should be in the range of six months to 18 months imprisonment and asked the court to consider whether that should be served concurrently with the 18 months imprisonment imposed by the magistrates court. In respect of the housebreaking charges he suggested a range of 2 to 3 years imprisonment for each charge and in respect of the theft charges a range of nine months to 1 year for each charge. Again he invited the court to consider whether the housebreaking and theft charges should be concurrent. He also submitted that it would be appropriate to consider suspending part of the sentence. He acknowledged however that the offences were premeditated and that the previous sentences imposed on the appellants had failed to rehabilitate and deter them from further offending. Counsel for the appellants supported the submissions made on behalf of the Crown.

Discussion

[4] There is no doubt that the two duplicate sentences for escaping from lawful custody should be set aside. The whipping sentence was imposed on the third escape from custody so that for that reason alone that part of the sentence would need to be reconsidered. In his sentencing remarks the judge appears to have taken into account in fixing sentence the fact that there had been assaults on prison staff in 'Eua and the burning of the prison in Tongatapu. There is no suggestion that either of the appellants had anything at all to do with either of these incidents indeed their offending and their imprisonment is on the island of Vava'u. The judge was obviously wrong to take those matters into account. Additionally we have concluded that the prison sentences imposed by the judge and the sentence of whipping were excessive. For all the above reasons we are able to ignore the exercise of sentencing discretion by the judge and exercise our own.

[5] In relation to the sentence for escaping from custody counsel relied upon the decision of this Court in *Malafu v R* [2002] Tonga LR 244. That was a case where the appellant was sentenced to 6 months imprisonment for escaping from lawful detention but he also was sentenced to a total of nine years imprisonment for other offences. He appealed against his sentence and the appeal was dismissed. In concluding whether the sentence was excessive the court was concerned with the longer sentences rather than the short one imposed on escaping. We do not think that that case assists us in determining the appropriate sentence for the one remaining escape charge. In relation to the breaking and entering and theft charges counsel referred us to the sentencing remarks of Ford J in *Kafalava* made in May 2006. That case is helpful. The prisoners were charged with varying numbers of housebreaking and theft charges and were sentenced to terms of imprisonment ranging from 2 years to 6 years. All pleaded guilty. They ranged in age from 21 to 29. The maximum sentence for theft is two years imprisonment if the goods stolen have a value less than \$500 and seven years imprisonment if the goods stolen are over that value. Housebreaking carries a maximum sentence of 10 years imprisonment.

[6] In the present case we take into account the age of the appellants and the fact that they pleaded guilty at the earliest opportunity. We also take into account that they have previous convictions and have not learnt from the previous sentences imposed on them. We consider that the appropriate sentence for the third escape is two years imprisonment to be served concurrently with the sentences imposed for the other two escapes. That effectively means an additional six months in relation to those sentences. This recognises the repetitive nature of that offending and the fact that it occurred over the same period of time as the other two escapes. So far as the housebreaking charges are concerned we have considered the sentences imposed in *Malafu*. We consider that four years imprisonment on each of these charges is appropriate. On the charges where the value of the items stolen was less than \$500, we impose a term of one year's imprisonment on each charge. On the charges of theft where the value is in excess of \$500 we impose sentences of three years imprisonment. The housebreaking and theft sentences are all to be concurrent but will be cumulative on the escape sentence. That means that for the total offending including the escape charges heard in the Magistrates Court the sentences imposed total six years. Had it not been for the pleas of guilty the appropriate sentence would have been in the order of eight years total. We have considered whether a portion of the sentence should be suspended. For the most part, judging by the sentences imposed, the previous offending appears

to have been relatively minor. Nevertheless it is a concern that neither of the appellants has learnt from their previous sentences despite the fact that in some cases a part or the whole of the sentence was suspended. The only justification for suspension is the youth of the appellants. Bearing that in mind we have decided that the final two years of the sentence should be suspended for a period of three years.

The whipping sentence

[7] We think it appropriate to make some observations regarding this sentence. The attitude of the courts in many countries has, over the last 20 years, changed in relation to sentences involving corporal punishment. A number of countries have adopted or amended constitutions to prohibit cruel and unusual punishment. Tonga has not amended its constitution. Interpreted in the light of international conventions and decisions of this Court such as *Tu'itavake v Porter* [1989] Tonga LR 14 it might be argued that the whipping provision is now unconstitutional. The decision of this court referred to above, sets the following principles for the interpretation of the Constitution:

1. *Pay proper attention to the words actually used in context;*
2. *Avoid doing so literally or rigidly;*
3. *Look also at the whole constitution;*
4. *Consider further the background circumstances when the Constitution was granted in 1875;*
5. *Bear in mind established principles of international law;*
6. *Finally, be flexible to allow for changing circumstances;*

[8] Without going into great detail we make reference to the International Convention against Torture and other Cruel Inhumane or Degrading Treatment or Punishment as being particularly apposite. In this connection we note the judgment of the Chief Justice in *Tavake v Kingdom of Tonga* [2008] TOSC 14 at para 52 to the effect that most international jurists now accept that the prohibition against torture is part of customary international law and is a jus cogens rule from which states cannot derogate whether or not they are a party to the various treaties which prohibit it. Additionally a purposive interpretation of clauses 1 and 14 of the Constitution may lead to the conclusion that the whipping provision is unconstitutional.

[9] There are other matters of concern. Section 31 (6) of the Criminal Offences Act provides that a sentence of whipping must not be carried

out unless the offender has been examined by a doctor or a government medical assistant and certified by him that there is no mental or physical impairment of the offender such as to render him unfit to undergo such punishment. It is arguable that for a doctor to provide such certification would be contrary to various Medical Association declarations and codes and principles of medical ethics which taken together would appear to prevent a doctor from participating in the infliction of a whipping sentence. We note too that various human rights bodies such as the Human Rights Committee appointed by the UN, the Inter-American Court of Human Rights and the European Court of Human Rights have all described whipping or flogging as cruel inhumane and degrading. This view is increasingly becoming accepted by countries around the world and has led to the constitutional changes earlier referred to. Because it was not necessary for these issues to be argued before us we do not express any decided view on these matters.

Conclusion

[10] For the reasons set out earlier in this judgement we set aside the sentences imposed by the Judge in the Supreme Court and in their place impose the sentences of imprisonment set out above.



Ford CJ



Salmon J



Moore J