Solicitor General

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IN THE SUPREME COURT OF TONGA **AM 16 of 2015**
APPELLANT JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN: **THE POLICE** - ***Appellant***

AND: **MISIMA TUPOU** - ***Respondent***

BEFORE THE HON. JUSTICE CATO

APPEAL AGAINST SENTENCE

[1] The Crown appealed against a sentence of Senior Magistrate Mafi, who in his enhanced jurisdiction, sentenced the respondent on one serious count of housebreaking contrary to section 173(1) (a) and 173(5) of the Criminal Offences Act, and one count of theft contrary to section 143 an 145(b) of the Criminal Offences Act to ;

1. 2 years probation;
2. attend an alcohol and drugs course run by the Salvation Army;
3. fine $200.00 to be paid to the Magistrates Court by the 4th July in lieu of one month imprisonment;
4. to reside at home.

[2] The Magistrate did not impose it seems discrete sentences on the two offences but imposed one overall sentence. Sentences should be imposed on each charge even if those sentences are made concurrent with the head sentence imposed.

Rec'd 13/08/15

[3] The Crown' appeal and complaint was that the respondent had been sentenced differently from a co- accused, who had been sentenced to the same conditions also in a global way, rather than with discrete sentences on separate counts. The Crown complained that, whereas the co-accused had been sentenced to 80 hours community work in an earlier sentence by Senior Magistrate Mafi, the respondent had, as a further condition, been sentenced to a fine of $200 to be paid to the Magistrates Court by the 4th July 2015, in lieu one month imprisonment. The Crown submitted that the sentence imposed on the respondent lacked parity with the co-accused, and he should have been sentenced to between 30 and 50 hours community work.

[4] Both offenders were in a similar position in that they were young men and, to the knowledge of the Magistrate, first offenders. Both had pleaded guilty at an early stage. The Learned Magistrate had drawn a distinction between the two accused in terms of his sentence on the basis that the co-accused, Siasosi 'Ulukivaiola CR 164/14, did not have a job but took classes at the University of the South Pacific. The respondent had a wife and two children to maintain and was currently working, the record showing that he earned about a $100.00 per week.

[5] The Crown referred to a number of comparable sentences for young housebreakers with no previous convictions in some of which quite a sizable amount of property was stolen where suspended sentences of imprisonment or bonds together with probation had been imposed, some with conditions such as alcohol and drug course or other requirements together with community work (generally in cases of this kind imposed discretely on the theft charges). Mr Aho, who appeared for the

Crown and presented a detailed memorandum, contended that the sentence lacked parity and the respondent received an inordinately low sentence. He submitted the sentence imposed here was inconsistent with the general pattern of sentences for offending of this kind and it was a proper case for intervention under Misinale AC13/99 (Court of Appeal).

[6] During the housebreaking about $18,000.00 of property was stolen but the Magistrate was informed that half of this had been recovered. Mr Aho submitted Senior Magistrate Mafi had placed too much emphasis on the fact that the respondent was employed and had a family and was wrong not to have also ordered him to perform community work. He submitted that the Magistrate had in effect misdirected himself in reasoning that having a young family and being employed justified not imposing community work.

[7] I agree with Mr Aho that the general principle is that sentences on co-offenders should bear parity with one another. Lowe v The Queen (1994) 181 CLR 295, at 299. Fifita v R [2000] TLR 289 Had the Magistrate declined altogether to impose a fine on the offender, I would have intervened because plainly the sentences would have lacked parity and for no good reason. But that was not what occurred. My reading of the Magistrates' assessment of the respondent's circumstances was that, because he was working and had responsibilities to maintain his family, he was not in the same position as the co-accused to perform community work. As is common in the Magistrate's court, reasons are ordinarily very brief and often rather inadequate but it this, I infer was the reason for the distinction.

[8] The law on sentencing is clear. A sentencing judge is entitled to take into account the personal circumstances of an offender in differentiating between sentences based on co-offenders but there must be a good reason for this. R v Church 7 Cr App R (S) 370 CA. Archbold 2001, at para 5-171. Here, the Magistrate imposed a fine of $200.00 to be paid within a month and in default, one month imprisonment. This was plainly to enable the appellant to continue working and supporting his young family, unaffected by the constraints on his time of community work, whilst acknowledging that the respondent should be punished for his offending beyond the other conditions imposed about which there is no complaint. The fine represents two weeks of the respondent's wages and accordingly, if he works 40 hours a week, amounts to 80 hours of labour. On this basis, I am not prepared to find that the sentence imposed on the respondent was so lacking in disparity or principle that I should correct it. The law is clear that a Crown appeal against sentence should be upheld only where it is clearly wrong in principle and I am not able to say that this was the case here.

[8] Accordingly, I dismiss the appeal.

NUKU'ALOFA: 10 AUGUST 2015 **J U D G E**