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03/10/14

IN THE SUPREME COURT OF TONGA **AM 17 of 2014**
APPELLATE JURISDICTION **[MC CR 291 of 2014]**
NUKU'ALOFA REGISTRY

BETWEEN: **MANILI TU'I'ONETOA** - **Appellant**

AND : **POLICE** - **Respondent**

'O. Pouono for the Appellant

'A. Kefu SC (Acting Attorney General) for the Respondent

JUDGMENT

[1] The Appellant was charged with common assault contrary to Section 112 of the Criminal Offences Act. The prosecution alleged that the Appellant become annoyed when a 12 year old primary school student stoned some young pigs. He seized the student by the shirt and slapped her face. No bodily harm was inflicted.

[2] Section 112 has seven subsections (a) to (g). In the present case both subsections (a) and (b) were included in the single charge. This was a mistake. If the prosecution wished to allege that the Appellant had breached both subsections (a) and subsection (b) then he should have faced two charges, each containing one offence. It is a mistake to charge more than one offence in a single charge. Where, of course, the two charges are all part of one transaction then the penalty imposed for the two offences will usually be concurrent. Magistrates should be watchful that not more than one offence is included in each charge.

[3] The Appellant pleaded guilty. He was a first offender. The Magistrate imposed a sentence of 3 months imprisonment suspended for 2 years. He also awarded compensation of $200 to the Complainant to be paid within one month, in default 3 months imprisonment. The Appellant appeals against the sentence on the ground that it is manifestly excessive. Mr Kefu conceded that the sentence could not stand. In my opinion the appeal raises a number of fundamental sentencing principles which can conveniently be dealt with together.

[4] The maximum penalty which may be imposed for a breach of Section 112 is a fine of $5000 or 12 months imprisonment or both. This is the *maximum* penalty and should of course be reserved for the most serious breaches of the Section.

[5] Although the Section makes provision for a sentence of imprisonment such a penalty is not appropriate for this offence save in exceptional circumstances. As a general rule a Court should not impose a sentence of imprisonment unless satisfied that no other sentence is adequate. In the case of a first offender imprisonment is only justified if the offence is serious, not, as in this case at the lower end of the scale. When an offender has pleaded guilty he is entitled to have that fact taken into account (and stated) when sentence is passed. If the court concludes that it has no reasonable option but to impose a sentence of imprisonment then that sentence should be no longer than the minimum necessary to reflect the seriousness of the offence (*Bibi* [1980] 1 WLR 1193).

[6] In this case the offender acted impulsively under a degree of provocation. No lasting harm was done. He pleaded guilty. He had no previous convictions. The sentence of imprisonment imposed upon him was, in my

view, wholly inappropriate and manifestly excessive. This is not to say that imprisonment may not, in suitable cases, be imposed for common assault. *Vea v Police* [2001] To. L.R. 281 is an example. In that case the offender had 2 previous convictions for the same type of offence and had, on each occasion been fined. He had however, not learned his lesson.

[7] It might be thought that a suspended sentence of imprisonment is not "imprisonment" as generally understood. This, however, is not correct. In *O'Keefe* [1969] 2 QB 29, 32 the Court explained:

> "before one gets to a suspended sentence at all, the Court must go through the process of eliminating the other possible courses such as absolute discharge, conditional discharge, probation order, fines, and then say to itself : this is a case for imprisonment. And the final question, it being a case for imprisonment, should be, is immediate imprisonment required or can a suspended sentence be given?"

In other words, a suspended sentence should not be imposed if a sentence of imprisonment is not warranted.

[8] In addition to imposing the suspended sentence of imprisonment, the Magistrate awarded compensation of $200. There is nothing in the record to show that before doing so he made any enquiry as to the Appellant's ability to pay. In fact, the Appellant is unemployed and has a family to support. It is plain that he would have much difficulty in paying the compensation within the 1 month allowed.

[9] After awarding $200 compensation with 1 month to pay the Magistrate specified that if the $200 was not paid within the month then the Appellant

as to serve 3 months imprisonment in default. In imposing this default period the Magistrate overlooked that the maximum default period available for this amount of compensation was 1 month (Section 28, Magistrates Court Act, as amended in 2012).

[10] The appeal is allowed. The sentence is quashed. The Appellant will pay a fine of $100. He is given 6 weeks to pay. In default 14 days imprisonment.

NUKU'ALOFA: 3 October 2014. **CHIEF JUSTICE**

N.Tu'uholoaki
3/10/2014.