

IN THE SUPREME COURT OF TONGA
APPELLANT JURISDICTION
NUKU'ALOFA REGISTRY

HENELI MANUOFETOA

-v-

POLICE

BEFORE THE HON. JUSTICE CATO

No appearance for the appellant who had been represented by Mr. Tu'utafaiva.

Mr Sisifa for the respondent

JUDGMENT

Appeal against Sentence

In this case, I gave my reasons for allowing the appeal orally but indicated I would set out my reasons in writing.

The appellant was unrepresented. Mr Tu'utafaiva had appeared for him at his trial and on his appeal but was unavailable for sentence due to his commitments in parliament.

The appeal proceeded. Mr Sisifa had frankly indicated his belief that there were merits in the appeal and I agreed so I heard the appeal without Mr Tu'utafaiva appearing.

The facts are that in the early hours of the 8th October 2011, a person by the name of Tevita Tau broke into a Chinese shop, and stole the takings and other items. He went and told the accused to take the bag and he in turn told others to fetch it. They did and gave it to the accused. Although the complainants said \$5000 was in the bag, it is unclear how much the

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accused actually received. The accused was aged 30, and a first time offender.

The Magistrate in a very short sentencing judgment said he formed the view the appellant was the mastermind although there was no real evidence of this aside from the age of the accused being older than it seems the others. He also took the view it was premeditated. He described the offence as very serious although the offender was a first offender. He sentenced the appellant to imprisonment for a year with the last six months suspended for two years.

The Crown indicated that Tau had been sentenced to 6 months imprisonment for housebreaking, 3 months for theft and the sentence were to be concurrently.

Tau had however I am informed previous convictions for housebreaking theft and found by night.

The Magistrate had only the barest of information concerning the background of the appellant before him. No probation report had been sought. There was some dispute about how much money the appellant did in fact take. Mr Tu'utafaiva advised the court the accused was married with 2 children and had pleaded guilty. There was some suggestion he had received a good education and had studied in Fiji but the information advanced was bare in the extreme.

Mr Sisifa said he accepted that the break in and theft were the acts of Tau who had previous convictions. He indicated that the appellant was in fact in good employment as a broker. He was a first offender and had pleaded guilty. He also questioned the mastermind tag when there was no real evidence of this, and I agree. Indeed the facts are very brief.

In my view the sentence was manifestly inappropriate. The appellant was a first offender aged 30 married with 2 children and in I was informed by Mr Sisifa employment. I considered that the involvement of the appellant on the limited evidence available suggested rather opportunistic involvement, and that not necessarily was he the mastermind. At the very least, the Magistrate should have considered

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the alternatives and a least restrictive alternative to imprisonment for a first offender. He did not appear to have done so. Plainly whilst in some cases, sentences of imprisonment will be imposed on first offenders there is also public interest in imposing sentences on first offenders which do not require a custodial sentence. Here the Magistrate gave little if any consideration to a non custodial sentence

I also think in circumstances of this kind a Magistrate should seek a probation report so that he is better informed about the personal circumstances of the offender than was the case here.

Here on the facts it is in any event quite uncertain how much the appellant actually received from the proceeds and how much others received. The appellant seems to have been held responsible for taking the lot when that might well not have been the case and it seems unlikely the principal offender did not take some of the money in the bag before leaving it for others. It was said by counsel for the appellant that the man who went and took the bag and gave it to the defendant took a reasonably substantial sum from it, in any event.

However, the appellant was a first offender and far greater weight should have been given to this fact than the Magistrate gave. The offending whilst serious was in my view not so serious that the accused should have been sent to gaol for his part as a first offender. Tau had previous convictions for the same offending. The appellant did not.

It is my view that the sentence imposed was manifestly inappropriate or excessive in all the circumstances. I accordingly order that the sentence of imprisonment be vacated.

In substitution, I order that the appellant undertake community work for 60 hours and to be under the supervision of the probation office. He is to report to probation no later than the 10th July, 2012 to receive appropriate directions on the work he is to carry out and the timing of that work;

And I also order him to pay compensation of \$500 (the maximum I can order in the jurisdiction of the magistrates Court) the first payment of

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\$100 to be made on the last Friday of July, with the further two payments of \$200.00 to be paid on the last Friday of August and September in default 3 months imprisonment. I observe he is a married man with two children so the terms of this order allow him a measure of flexibility for payment.

I record that I am grateful to Mr Sisifa for the Crown for his input on this appeal.



P. J.

DATED: 29th June 2012

JUDGE