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**IN THE SUPREME COURT OF TONGA
CRIMINAL APPEALS JURISDICTION
NUKU'ALOFA RGISTRY**

CR/APP. 515/98

BETWEEN : PAULA TAI SIALE : Appellant
AND : POLICE : Respondent

BEFORE THE HON. MR JUSTICE LEWIS

Luki Veikoso for the Appellant
Linda Simiki for the Respondent

Hearing : 2 April, 1998
Judgment : 8 May, 1998

JUDGMENT

This Appeal is against 2 separate sentences. The Appellant stole some pigs – 7 piglets on 4 July 1997 and a sow and 2 piglets on 5 July. All the animals belonged to Panuve Niupalau. The Defendant pleaded guilty to both charges. At the hearing and sentencing before the Magistrate he was not invited to seek legal advice and he was not asked to admit a number of prior and relevant offences against property which the Prosecution alleged against him.

It is essential that a Defendant be aware of the facts relied upon by the prosecution when pleading guilty to charges. Here the Defendant knew what was alleged against him and was invited to make submissions about those facts. He appears to have accepted the allegations, taken responsibility for his action apologised and asked for the mercy of the Court.

It is equally essential that where the prosecution allege a prior record of offending by a person before the Court that the person be asked whether he admits or denies the Record. In this case he was not invited to make the admission or denial. In those circumstances the sentencing process miscarried to that extent.

All magistrates must be alert to ensure that before any notice is taken of any prior record of offending that the Defendant is prepared to admit the allegation otherwise the Prosecution will be required to strictly prove the alleged prior Record.

In any Appeal against sentence this Court must ensure that Magistrates have not made any error of law when considering the appealed sentence. Was there an error of law in this case? I have concluded that there was. There were 2 charges relating to different days. The value of the goods taken will determine the maximum penalty, which may be imposed.

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The Criminal Offences Act Cap 11 section 145 (a) provides that where the goods are of the value of \$500.00 or less then the maximum penalty for theft shall be imprisonment for not more than 2 years but if the goods exceed the value of \$500.00 then the maximum penalty for theft is not more than 7 years imprisonment.

In these two charges the values of the goods were \$300.00 and \$450.00 respectively. In respect of each count the Magistrate appears to have imposed the maximum for goods of the value of \$500.00 or less. I say 'appears' because it is unclear whether he was imposing 2 years imprisonment on each count or whether he was imposing one year on each count cumulative on each other.

The Magistrate's words (as translated) are:

"I'll give you punishments for both cases for the possessions belong to only one person. Your punishment is to a 2 years imprisonment and this will be counting from the last day of your imprisonment which is now going"

Clarity in sentencing is essential. The Defendant must know what has been imposed by way of sentence upon him. Ambiguity and Appeals are avoided.

For the purpose of the present case the serious ambiguity in the sentence on each count needs to be put right. The only way to achieve that is by remitting the Appeal to the same Magistrate so that he can express his sentence clearly.

I would add that if he has imposed the maximum of 2 years imprisonment in each separate Charge then the sentence must miscarry since no prisoner as a matter of sentencing principle can be given a maximum sentence. There must always be some worse conduct, which will attract a higher sentence than the conduct before the Court.

Pursuant to the Magistrates' Act Cap 11 section 80 (1) I remit these Charges to the magistrate in order that he may:

- Invite the Defendant to admit or deny the Allegation of prior Record and,
- Make clear precisely what the duration of the sentences is in respect of each charge.

IT IS ORDERED THAT:

1. This Appeal be allowed.
2. The cases be remitted to the Magistrate for further hearing and determination.

NUKU'ALOFA 8 May, 1998

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[Handwritten Signature]
 CHIEF JUSTICE