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

AM 9 of 2017

BETWEEN: 'IOANE TAMA SENO TAVO

- Appellant

AND: R E X

- Respondent

BEFORE THE HON. JUSTICE CATO

Mr Corbett for the Appellant

Mr Aho for the Respondent.

J U D G M E N T

[1] This is an appeal against an order by a Magistrate that the Appellant be recalled to serve a sentence of imprisonment which was the following terms for being on enclosed premises at night contrary to section 175 of the Criminal Offences Act;

"6 months imprisonment suspended for two years on the following conditions;

- i. That he perform 60 hours community work
- ii. Commit no further criminal offence and
- iii. After sentencing, to go to the Court office and obtain the total hours of community service and from there go to the Probation office."

[2] The maximum sentence for this offending is two years imprisonment.

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- [3] The Appellant failed to perform any of the community service and as a consequence the Magistrate ordered that the suspension order be rescinded under section 24(3(d) of the Criminal Offences Act and he was recalled to prison to serve the 6 months term of imprisonment. The Appellant appealed against this order.
- [4] Under section 24(a) of the Criminal Offences Act, it is provided that a Court when imposing a sentence of imprisonment has the power to suspend the whole or part of such sentence for any period up to three years. On its face, this might suggest that a Court may fashion a sentence which, as here, allows the period of suspension to exceed the period of imprisonment; however, I consider that the better view is that the sentence in this case can only be suspended for the period of the term of imprisonment imposed that is, in this case, 6 months. The sentence on this interpretation of the provision was accordingly unlawful in that it exceeded the term of imprisonment by 18 months.
- [5] The appellant is aged 62. He has no previous convictions I was informed by his counsel Mr Corbett and the Crown did not contradict this. He is married with 9 children. Although the appeal was not expressly based on this ground, (but on any appeal, I am directed to consider the merits of the case under section 81 of the Magistrate's Court Act), I consider that sentencing a first offender aged 62 with nine children to a term of imprisonment, whether suspended or not, where the offence carries a maximum sentence of only 2 years imprisonment is manifestly excessive.
- [6] As part of the suspension, the Appellant had been ordered to undergo 60 hours community work under the direction of probation. This raised the issue of whether under section 24(3) (d) of the Criminal Offences Act a community work order can be imposed as a condition of suspension. That approach had been

taken prior to the Criminal Offences Amendment Act, 2012, but it was considered that to remove doubt about community work being imposed in addition to other sentence or punishment, the legislation should be amended to sanction this. Accordingly, section 9 was inserted into the Act by section 4(d) of the 2012 Amendment and provided;

"A community service order may be made either in addition to or in substitution for any other punishment and, without prejudice to subsection 6, it shall be lawful to order that in default of compliance with a community service order the offender shall be imprisoned for such period as may be specified in the order."

- [7] Since then, community work has often been ordered as a condition of the suspension of a term of imprisonment, sometimes with other rehabilitative courses such as anger management, and counselling for sexual offending and drug or alcohol abuse. Being able to combine a community service requirement as a condition of suspension is a valuable option because it allows the Court to impose a measure of retribution in cases where a sentence is fully suspended. A sentence of this kind came before the Court of Appeal in *R v Guttenbeil* (a Crown Appeal) [2015] Tonga LR 88 where a large number of hours of community work(160 hours) was ordered as a condition of the Respondent's sentence of imprisonment for manslaughter being fully suspended, and was not subject to adverse comment. By making community work a condition of the suspension of a term of imprisonment, not only does it provide a measure of retribution for the offending, in addition to any rehabilitative measures provided by other conditions, but the failure to perform the work condition means, as the Magistrate recognised, that the offender can be ordered to serve at least a part of the sentence of imprisonment. Breach of the order does not, however, necessarily mean that the offender should be recalled

to serve the whole of a period of imprisonment. He may have performed some of the work and attended courses which should be taken into account in fixing the length of period of his recall to avoid any unfairness that will accrue should the offender have to serve the full prison term.

[8] Where a discrete community service order is made under section 25 as amended by section 4(d) of the Criminal Offences Act, 2012, the offender may be ordered in default of performance to serve a term of imprisonment. In my view, a similar consequence can be achieved where community work is made a condition of suspension.

[9] Before a Magistrate can revoke suspension or order a default period to be activated where community work has been not been performed, he or she must be satisfied that there is no reasonable excuse for non-performance. I asked Mr Aho, who appeared for the Respondent whether that was the case here. He was not able to confirm that this had been the case and the record did not assist. An order be it one revoking suspension or activating a period in default of service should not be made peremptorily that is without an inquiry as to whether the offender had any reasonable excuse for non-compliance. If the Magistrate were to find that he had, then the offender should be given a further opportunity to comply with the condition or order as to community work.

[10] I consider that the sentence imposed was manifestly excessive, for the reasons I have mentioned and merited a community based sentence such as community work. I consider that the suspension was for reasons given above also unlawful. I, accordingly, resentence the Appellant to community service of 60 hours. I order in default that he serve 6 weeks imprisonment. Because Mr Corbett informed me that he has spent 3 and a half months in custody, I ordered his immediate release, yesterday,

and advised counsel that I would confirm my reasons for doing so in writing, as soon as I was able.



A handwritten signature in black ink, appearing to read "Cato", written over the seal.

C. B. Cato

JUDGE

DATED: 29 JUNE 2017