

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

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BETWEEN: MAKA LATU - Appellant

AND: POLICE - Respondent

BEFORE THE HON. JUSTICE CATO

Mr Niu for the Appellant

Mr Aho for the Respondent

J U D G E M E N T

[1] This is an appeal against a sentence imposed by Magistrate Kaufusi delivered on the 7th April 2017. The Appellant had broken into a house and stolen a significant amount of Tonga kava worth about \$500.00. The Magistrate, in a very short sentencing decision given without reasons, sentenced him to housebreaking, 2 years imprisonment; theft, 2 years imprisonment, and wilful damage, 1 month imprisonment. The accused was sentenced to 3 years imprisonment, with one year and one month to be suspended for two years.

[2] First, this is another example of a practice which I have criticised in several judgements of a Magistrate sentencing without giving any or adequate reasons. Reasons must be given when sentences are imposed. Not only do they focus the sentencer on the issues but they provide a reasoned basis for an appellate

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Court to consider the matter should an aggrieved defendant appeal.

- [3] No doubt, in suspending the final year and one month of the sentence, the Magistrate considered that he was imposing a sentence which met the statutory three year maximum that a Magistrate is entitled to impose by law under section 11 (4)(2) of the Magistrates Court (Amendment Act) 2012. Section 11 (4) (2) provides;

“Subject to subsections three and four, the Magistrate’s Court has jurisdiction to hear and determine criminal cases in which the maximum punishment provided by law does not exceed three years imprisonment or a fine of \$10,000.”

- [4] Although the section gives a Magistrate the power to consider all cases where the maximum sentence is three years, I do not consider that a Magistrate has the power to effectively impose a cumulative sentence so that the overall sentence is above three years imprisonment. In certain cases falling within section 11 4(4) of the Amendment, a Magistrate has an enhanced jurisdiction to sentence to a maximum of seven years imprisonment or a fine of \$50,000 but those provisions did not apply here.

- [5] In this case, the housebreaking must have been a simple housebreaking which carries a maximum sentence of 3 years (serious housebreaking carries 10) and the theft, one of no greater than \$500.00 value of the property which carries a maximum sentence under section 145(a) of the Criminal Offences Act of 2 years imprisonment. It was, accordingly, plainly within the jurisdiction of the Magistrate to hear these charges, but he was not able to impose an overall cumulative sentence which exceeded three years. The sentence he imposed

was effectively a cumulative sentence of 2 years for housebreaking, two years for theft together with one month for willful damage. The combined sentence of four years and one month imprisonment was beyond his jurisdiction to impose. That he suspended a year and one month did not bring the sentence within the three year statutory maximum. Suspending a sentence reduces the length of actual imprisonment that an offender is required to serve before being released on licence but it does not reduce or alter the length of the sentence of imprisonment imposed. The suspended portion is a part only of the sentence of imprisonment. Thus, an offender who violates his suspension by violating the terms of his suspension may be recalled under section 24(3)(c) of the Criminal Offences Act to serve the balance of his term of imprisonment.

[6] The Magistrate erred also, in any event, in accumulating the sentences in these circumstances for theft and house breaking. The theft arose out of property taken during the housebreaking and it is usual in those circumstances for the sentence to be concurrent. The one month sentence imposed for wilful damage, however, arose out of separate offending committed on a different date and justified a cumulative sentence. In these circumstances, I propose to uphold the appeal and vary the sentences after taking into account his guilty pleas and record which did include a previous housebreaking and a robbery in 2006 for which he served a substantial sentence.

[7] The sentences I impose are;

1. on the housebreaking, which I view as the more significant of the charges, two years imprisonment;
2. on the theft of the kava 6 months imprisonment to be served concurrently with the housebreaking;

3. and for wilful damage, one month imprisonment cumulative on the sentence of housebreaking.

[8] My sentence, however, is affected by the fact that, after the Magistrate gave his decision, I had to sentence the Appellant on manslaughter (in CR 20 of 2017) to three years imprisonment with the final year suspended on conditions;

a. That he was not to commit any offences punishable by imprisonment for the period of suspension;

b. He was placed on probation for a period of suspension to live where directed;

c. He was to undergo a course of alcohol and drug addiction and an anger management course;

d. He was not to consume alcohol or take drugs during the period of suspension.

[9] These rehabilitative conditions were imposed because I was aware that Mr Latu had encountered problems with drugs over the years and this was his final opportunity to address that issue.

[10] I have now to consider the totality of the sentence I impose on Mr Latu to take into the account the sentences I imposed on the housebreaking and other offending Magistrate Kaufusi had to deal with and my sentence on the manslaughter. I indicated to counsel at the hearing that I proposed to combine or impose one year of the accumulated sentence for the offending arising out of the housebreaking and wilful damage to be served cumulatively upon the three year sentence for manslaughter(CR 20 of 2017) .

[11] I have also taken into account that the sentence of imprisonment imposed by Magistrate Kaufusi probably took

effect from the date of his sentencing of the Appellant being the 7th April 2017, the sentence on manslaughter which took place on the 19th May 2017, being backdated to his date of remand in custody for that offending. In my view, the 12 month totality period I have imposed adequately addresses any period of time in prison that the Appellant may have served either on remand or after sentence for the housebreaking and other offending. Accordingly, the combined sentence arising out of this appeal is;

He is sentenced to;

- i. 2 years imprisonment for simple housebreaking;
- ii. 6 months for theft to be served concurrently with (i);
- iii. He is sentenced to one month imprisonment cumulative upon the sentence imposed in (i) for simple housebreaking.

I order that 12 months of his combined sentence on (i) and (iii) be served cumulatively upon his sentence of 3 years imprisonment for manslaughter (CR 20 of 2017);

I order that the final 12 months of this combined sentence of 4 years imprisonment be suspended on the following conditions;

- i. That he is not to commit any offences punishable by imprisonment for the period of suspension;

- ii. He is placed on probation for a period of suspension to live where directed;
- iii. He is to undergo a course of alcohol and drug addiction and an anger management course;
- iv. Is not to consume alcohol or take drugs during the period of suspension.

This sentence is to be backdated to the date of Mr Latu's remand in custody on the manslaughter charge.

[12] I have noted the submissions in the Appellant's Notice of Appeal in which Mr Niu SC submits that the sentences that should be imposed for the housebreaking charges should be reduced to good behaviour. I do not share his view because the Appellant is not a first offender; indeed, he has a significant criminal record. I add also that the sentences I have imposed in this judgement varies in one respect from my oral indication this morning of the revised sentence on appeal which I indicated was to be recorded in a later written judgement. I was unaware at the time of the hearing that the wilful damage arose in a separate incident from the other offending and hence the sentence should be cumulatively imposed as I understand the Magistrate correctly approached the matter. However, the end result is the same because I have required only 12 months of this combined sentence to be served cumulatively upon the manslaughter sentence.

DATED: 28 AUGUST 2017



A handwritten signature in black ink, appearing to read "C. B. Cato".

C. B. Cato

JUDGE