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

**CR 127/128 of 2016**

**BETWEEN:** **REX**  
- **Prosecution**

**AND:** **TEVITA VAKA**  
- **First Accused**

**AND:** **RODNEY TOKI**  
- **Second Accused**

**Appearances:** **Mrs E. Langi for Prosecution**  
**Mr. Vaka and Mr. Toki in person**

**Date of Hearing:** **17 November 2017**

**Date of Ruling:** **17 November 2017**

**SENTENCING RULING**

- [1] The two accused appear for sentence today on counts of serious housebreaking contrary to sections 173(1) and (5) Criminal Offences Act and theft contrary to section 143(a) and 145(b) Criminal Offences Act. Serious housebreaking is punishable by a term of imprisonment not exceeding ten years. Theft is punishable by a term of imprisonment not exceeding seven years.
- [2] Both accused originally pleaded not guilty to the charges but changed their pleas to guilty a few days before the trial was due to commence.
- [3] Both accused are presently serving lengthy sentences of imprisonment for other offending.

- [4] Mr. Vaka is serving an overall sentence of 12 years imprisonment following the entry of convictions in CR85/16 and CR93/16 for offences committed in November 2015 and February 2016 of robbery, attempted robbery, serious housebreaking, serious bodily harm, common assault and serious damage to property. The offences involved three separate incidents. Full details of the offending are set out in the sentencing remarks of Cato. J. in those cases. I have had regard to his sentencing remarks but there is no need for me to repeat what he had to say here.
- [5] Mr. Toki is presently serving an overall sentence of 6 years imprisonment following convictions in CR88/16 for offences committed in November 2015 of robbery, serious housebreaking, common assault and serious damage to property. The final 18 months of his sentence was suspended subject to conditions. The offences were committed with Mr. Vaka and again the details are set out in the sentencing remarks of Cato. J.
- [6] A statement of agreed facts has been signed by Mr. Vaka and Mr. Toki in relation to their present offending. The agreed facts are as follows:
- a Rodney Toki is from Fangaloto. He is 21 years old.
  - b Tevita Vaka is also from Fangaloto. He is 29 years old.
  - c The Victim is Collin McCarthy of Samoa but residing at Fangaloto at a rented house owned by Feleti Sevele.
  - d On Saturday 15 May 2016, the Victim and his family were celebrating a birthday at their house. At approximately 11:30pm the celebrations had finished and the last of the guests left.
  - e The Victim and his wife and two children all went to sleep.

- f The following morning, the Victim woke to find that their house had been broken into and the goods listed on Count 2 of the Indictment (which were to a value of \$24,470) were missing.
- g They lodged a complaint at the Police Station on 15 May 2017. The Police carried out an investigation into the missing goods and received information that led to the arrest of both Accused persons.
- h The Accused Persons assisted the Police in locating most of the stolen items. Some items had been sold and consumed and others were retrieved from a bush area at Fangaloto.
- i The items that were retrieved were returned back to the Victim. These consisted of the following:
  - a. Toyota Car registration C-16234 (valued at \$15,000);
  - b. Dell Laptop (valued at \$3,000);
  - c. 1 Hard Drive (valued at \$800);
  - d. 2 School bags (valued at \$100);
- j Mr. Toki admitted to the offending when he was first interviewed by the Police.
- k Mr. Vaka remained silent and informed the Police he will only speak in Court.
- l Both Accused persons have previous convictions.

[7] Neither Mr. Vaka nor Mr. Toki considered that any purpose would be served by me obtaining a probation report and having regard to the length of the periods of imprisonment that they are presently serving and the information that is available to me from the Court

files I agree. The sentencing remarks of Cato. J., to which I have already referred, contained information about the personal backgrounds of Mr. Vaka and Mr. Toki and I have had regard to that information also.

**Mr. Vaka**

- [8] I take the offence of serious housebreaking as the lead offence in the circumstances of this case. Housebreaking is a very common but also very serious offence in Tonga and is often a precursor for violent offending. The Courts have an obligation to protect persons from being victims of crime in their own homes and deterrence and the protection of society are principal sentencing considerations in cases of this kind.
- [9] Mrs. Langi provided me with a number of rulings in comparable cases of serious housebreaking for sentencing purposes. I have considered them along with others. Based on the facts of this case which involved a planned break-in, during night time hours, while the occupants were asleep in the house and with the intention of taking property of considerable value I consider that the appropriate starting point for sentencing purposes is 3 years and 6 months imprisonment.
- [10] Little can be said in Mr. Vaka's favour by way of mitigation. The best that can be said is that he entered pleas of guilty prior to trial but against that it was at a late stage when the case was ready for trial. Mrs. Langi submitted that I should also give Mr. Vaka credit for the fact that this offending was not as serious as his previous offending in the sense I assume that it was not associated with crimes of serious violence. That is a matter I have already factored in to my assessment of the appropriate starting point. By way of aggravation Mr. Vaka is a recidivist offender, he has caused the

victim financial loss and he did not co-operate with the Police. On balance I give him a discount on the starting point of 6 months for his guilty plea.

- [11] Accordingly on the charge of serious housebreaking I sentence Mr. Vaka to 3 years imprisonment. On the charge of theft (and again based on the authorities) I sentence him to 1 year and 6 months imprisonment. In accordance with the principles in *Mo'unga v R* I can see no justification for suspending any part of the sentence.
- [12] I must now take into account the totality principle and decide whether the sentences I have imposed today should run concurrently or cumulatively with the sentences Mr. Vaka is presently serving. Mrs. Langi notes that whilst the present offences are distinct from those for which Mr. Vaka was previously convicted they were committed as part of what appears to have been the same crime spree. She contends that it would be wrong to make the sentences imposed today entirely cumulative as that would result in an overall sentence which in the circumstances would be unfair.
- [13] I agree with Mrs. Langi's submissions but recognise also that the combined sentence that I impose must result in some tangible punishment for the offending and reflect Mr. Vaka's recidivism whilst not imposing a sentence that is unfair or crushing in its length.
- [14] I therefore accept that some part but not all of the sentences I have imposed should be served concurrently with each other and the sentences previously imposed upon Mr. Vaka in CR 85/16 and CR 93/16.
- [15] I deal with the matter this way. Mr. Vaka is convicted on the offences of serious housebreaking and theft. The sentence I have

imposed in respect of the offence of theft shall be served concurrently with the sentences Mr. Vaka is presently serving. However the sentence on the offence of serious housebreaking shall be served concurrently with those sentences that Mr. Vaka is currently serving only in part. In addition to and cumulative upon the combined sentences in CR85/16 and CR 93/16 Mr Vaka is required to serve 10 months of the sentence imposed on the offence of serious housebreaking. That will mean that his overall sentence will now be 12 years and 10 months imprisonment.

**Mr Toki**

- [16] In the case of Mr. Toki I adopt the same approach. For reasons I have given I regard the offence of serious housebreaking to be the lead offence and adopt a starting point of 3 years and 6 months imprisonment.
- [17] More can be said in Mr. Toki's favour. In addition to the fact that he pleaded guilty to the offence he is younger than Mr. Vaka, his criminal history is not as bad and he was co-operative with the Police. Against that he too has previous convictions for similar offending (of an even more serious nature as it involved violence) and he caused the victim financial loss. I give a discount on the starting point of 12 months to reflect Mr. Toki's age, guilty plea and co-operation making a sentence of 2 years and 6 months imprisonment on the offence of serious housebreaking. I impose a sentence of 1 year and 6 months on the offence of theft.
- [18] When sentencing Mr. Toki on the previous occasion Cato J. was clearly doubtful that suspending any part of the sentence was justified but decided it appropriate in light of Mr. Toki's age and prospects of rehabilitation to suspend 18 months of his sentence subject to conditions. Because of the manner in which I propose to

give effect to the totality principle I do not consider it appropriate to suspend any part of the sentences I have imposed today. I think it most unlikely had these offences been dealt with at the same time as the other offences for which Mr. Toki was previously sentenced that a longer period of suspension would have been ordered.

- [19] Applying the totality principle I shall deal with the matter this way. Mr. Toki is convicted of the offences of serious housebreaking and theft. I accept that some part but not all of the sentences I have imposed should be served concurrently with each other and the sentences previously imposed upon Mr. Toki in CR 88/16. The sentence I have imposed in respect of the offence of theft shall be served concurrently with the sentences Mr. Toki is presently serving. However the sentence on the offence of serious housebreaking will be served concurrently with those sentences that he is currently serving only in part. In addition to and cumulative upon the sentences in CR88/16 Mr Toki is required to serve 7 months imprisonment on the offence of serious housebreaking. That will mean that his overall sentence will now be 6 years and 7 months imprisonment of which the final 18 months will be suspended on the conditions imposed by Cato J in CR88/2016.

**Result**

- [20] Both Mr. Vaka and Mr Toki are convicted on their guilty pleas of the offences of theft and serious house breaking.
- [21] Mr. Vaka is sentenced to 3 years imprisonment on the offence of serious housebreaking and 1 year and 6 months imprisonment on the offence of theft. The sentence I have imposed in respect of the offence of theft shall be served concurrently with the sentences Mr.

Vaka is presently serving in respect of CR85/16 and CR 93/16. The sentence on the offence of serious housebreaking shall be served concurrently with those sentences that Mr. Vaka is currently serving only in part. In addition to and cumulative upon the combined sentences in CR85/16 and CR 93/16 Mr Vaka is required to serve 10 months of the sentence imposed on the offence of housebreaking. That will mean that his overall sentence will now be 12 years and 10 months imprisonment. No part of the sentence is suspended.

- [22] Mr Toki is sentenced to 2 years and 6 months imprisonment on the offence of serious housebreaking and 1 year and 6 months imprisonment on the offence of theft. The sentence I have imposed in respect of the offence of theft shall be served concurrently with the sentences Mr. Toki is presently serving. However the sentence on the offence of serious housebreaking will be served concurrently with those sentences that he is currently serving only in part. In addition to and cumulative upon the sentences in CR88/16 Mr Toki is required to serve 7 months imprisonment on the offence of serious housebreaking. That will mean that his overall sentence will now be 6 years and 7 months imprisonment of which the final 18 months will be suspended on the conditions imposed by Cato J in CR88/2016.



O. G. Paulsen  
**LORD CHIEF JUSTICE**

**NUKU'ALOFA: 17 November 2017.**