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Crown Law

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

CR 283 of 2020

REX

-V-

'ANA KATOKAKALA SIALE

BEFORE HON. JUSTICE NIU

Counsel : **Mrs. S. 'Eliesa for the Crown.
Mrs. A. Siale, accused for herself.**

Submissions : **by Mrs. 'Eliesa on 9 December 2020.**

Hearing : **in Court on 28 January 2021.**

Sentencing : **12 February 2021.**

SENTENCING

Offences

- [1] 'Ana Siale, you have committed 2 offences, namely, serious housebreaking and theft. On 15 June 2020 you broke into the dwelling house of Milise Vaiangina in Nukunuku and stole Tongan mats and ta'ovala with a total value of \$14,100 belonging to her.
- [2] You have been charged with those 2 offences and you have pleaded guilty to them.

Your background and circumstances

- [3] You are 37 years old and you are married. Your husband is a staff sergeant in the Defence Force. He was in the force before you married him in 2003. You have 7 children and their ages are 16, 15, 13, 10, 7, 6 and 4 and they are all at school except the 4 year old.

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- [4] You are the third of 4 children of your parents. You attended Queen Salote College and only attained form 5. You stayed home and helped your parents. At age 20 you got married and you and your husband lived with your parents until they left and lived in New Zealand in 2005 (with one of their children your brother there). Your sisters got married and they left home. You and your husband and children are now the only ones living and looking after the home.
- [5] In 2004, you broke into a house and stole a ta'ovala and piece of tapa that belonged to your mother's sister and sold them to get money. You were later identified as the person selling them and you were charged and convicted of that theft. You were fined \$100 and ordered to pay compensation of \$500.
- [6] In 2012 you bought a ta'ovala (a fala vala) worth \$800 for \$200 knowing it had been stolen. You were ordered to be on probation for 2 years and you complied with it but after the probation ended, you went and broke into a house in Kolomotu'a in 2015 and stole mats and ta'ovala from there. You offered the properties as security for loans you took from loan businesses at Havelu and Mataika. You did not repay the loans and the properties were put up for sale on the net and the owner identified them as hers. You were arrested, charged and convicted and you were sentenced to 18 months imprisonment, 6 months of which you served and 12 months were suspended for 2 years.
- [7] It appears that you had complied with the condition of suspension of the 12 months imprisonment sentence and even afterwards because you committed no offence from 2015 to 2020. But then you committed the present offences in June 2020. You told me that you were in financial needs because of your big family and because there was not much left from your husband's fortnightly wages after deductions of outstanding loans. You then decided to commit the present offences.
- [8] You told me that in December last year, a relative of yours counselled you and gave you cooking facilities and started you off on

cooking food for sale to stop you from re-offending, and that you have been cooking take away meals for sale from then up to now.

[9] I asked you for your sales and expenses record of that business and you said that you did not have or keep any. So I directed that you did and to show them to me and to the Crown. You did that and you produced that record as starting from 9 January 2021 up to now. That record clearly shows that you have worked hard in your business to meet your family needs and to maintain the continuance of your business.

[10] I also directed that you provide me with copies of your children's school reports and I have now seen them. They are only the reports of Mailoni (form 4 at Tupou College), Sesika (form 3 at Queen Salote), Gerald (form 1 at Tupou College) and of Manu (final year at Longolongo Primary School). I have to say that all those reports are bad. They clearly show that your children could have done better but they did not and it is clear that you and your husband have not taken as much interest or effort in their studies as you should have done.

[11] You told me that your older children were greatly hurt, and were ashamed, when you went to prison in 2015. That would not have helped them concentrate on or care about their studies either.

[12] You told me that you are very sorry for what you have done and that you apologise most sincerely to the lady whose house you broke into and have stolen her properties. And you have told me that you would from now on be law abiding and be working hard to raise your children properly.

Crown submissions

[13] Ms. 'Eliesa for the Crown has referred to the Cases of **Malafu** (CR 133/16), **Liku** (CR47/19), **Maile** (CR133/19) and **Lolohea** (CR38/20) and submits that a starting for your sentence is 3 years imprisonment for the housebreaking offence, and in view of your guilty plea that sentence be reduced to 2 years 6 months. In respect of the theft charge, she submits that the sentence be 2 years imprisonment, but that the two sentences be concurrent.

[14] She submits that in light of the principles set out in *Mo'unga v R* [1998] Tonga LR 154, you are not entitled to be granted any suspension of that 2 years 6 months imprisonment sentence.

Consideration

Period of imprisonment sentence

[15] I consider that the period of imprisonment for the housebreaking should reflect the period which Parliament has enacted to be the maximum period of imprisonment. That maximum is 10 years. The period suggested of 3 years imprisonment does not reflect that, especially when the offender has committed similar offences in the past. That was the case of the offender, Mo'unga, to which the Crown has referred. He was sentenced to 7 years imprisonment for a series of housebreaking offences in 1969.

[16] That was appropriate. As the Court of Appeal stated in its decision in 1998 in that case referred to by Mrs. 'Eliesa,

“Also relevant is the appellant’s criminal history. He has been punished for each of those offences. He is not to be punished for them again. The relevance of the history is twofold. First, it demonstrates that the penalties that have been imposed in the past have not acted as a deterrent. This can be a reason for imposing a longer prison sentence than would otherwise be considered appropriate. Secondly, where a person has been a habitual offender, the protection of the public can require a lengthy prison sentence, if only because he cannot offend again while he is in prison. This may have been the reason for the very lengthy sentence of seven years imprisonment for a series of housebreaking offences imposed on 7 January 1969.”

[17] Because of your history of offences of housebreaking, I consider that an appropriate imprisonment sentence for you is 5 years, that is, half the maximum enacted by the Parliament for housebreaking.

Suspension

[18] As to suspending that, or part of that, sentence, I consider that you may be eligible to qualify for suspension under the criteria set by the Court of Appeal in that case of Mo'unga:

- (i) **Where the offender is young, has a previous good record or has had a long period free of criminal activity.**

You have had no criminal activity for 5 years, namely from 2015 to 2020 and I am willing to give you the benefit of that abstention from criminal activity and say that that is a long period.

- (ii) **Where the offender is likely to take the opportunity offered by the sentence to rehabilitate himself or herself.**

I am satisfied by the evidence that you have provided that you have taken positive and responsible steps to work and earn an honest living for yourself and for your children, which is the first time in your life that you have done so. I am willing to accept that you are likely to take the opportunity offered by a suspended sentence to rehabilitate yourself and be law abiding for the rest of your life.

- (iii) **Where, despite the gravity of the offence, there is some diminution of culpability through lack of premeditation, the presence of provocation, or coercion by a co-offender.**

I am willing to accept that you had had no intention to commit this offence when you went to Nukunuku that day. You said you had gone there to borrow money from a loan business there but that there was no one there and that as you were leaving, you saw this unattended house and you just decided there and then to see if there was any property there to sell because of your dire need for money for your family that day.

I accept that you had not planned this offence in advance, like Mo'unga did in the case before the Court of Appeal, where

Mo'unga and a co-offender planned and executed the housebreaking and theft of 12 cartons of Winfield cigarettes and 2 cartons of 3 lb cans of Palm corned beef from the Tonga Co-Operative Federation Limited. Even in that case, the Court of Appeal was willing to and it did suspend the last year of the 4 years imprisonment sentence imposed by the Supreme Court.

(iv) **Where there has been cooperation with the authorities.**

The Court of Appeal in that case was willing to accept that there "has been some cooperation with the authorities, if only to the extent that he pleaded guilty to the charges."

In your case, you have pleaded guilty to the charges. To me, that shows remorse and admission of your guilt and wrong doing, and I accept that you had apologised to the complainant, Milise Vaiangina, when you saw her at the police station when she came there to identify her properties. That is consistent with your apology to me in Court at the hearing.

[19] Parliament has enacted that the Court may suspend the whole or part of a sentence of imprisonment for a period of up to 3 years upon the condition of the offender not being convicted of an offence punishable by imprisonment committed during the period of suspension.

[20] In considering whether to suspend the whole or only part of your imprisonment, I have to consider the harm that will be caused by ordering either one. If the whole of your sentence is suspended, you will be able to continue with your life with your family and to continue with the livelihood business you have started and upon which you now rely. You may then provide the proper care and attention for your children, and in particular, their education, in order that they do not become delinquents and a menace to the community. You would also have money for you and your family's needs and you may not be tempted to reoffend ever again in future.

[21] Against that, if only part of your sentence is suspended, then you have to start right away to serve the unsuspended part of your

sentence. That means your present food business is stopped and there will be no more money for the family needs other than your husband's wages, which is already insufficient for them. Your family will suffer and the children's education will suffer and sooner than later, they will be in trouble and the community will suffer.

[22] I also consider that the aim of Parliament in enacting that the whole of the sentence be suspended would be achieved, namely, that the offender is allowed to continue with his/her life in the community because it would be in the best interests of the community that the offender so continue, **but** that if he/she re-offends, he/she is then ordered to serve out the suspended sentence. That is the deterrent Parliament has intended. It serves the community better.

Conclusion

[23] Accordingly, I sentence you, 'Ana Siale, as follows:

- (a) For the housebreaking offence, you are sentenced to 5 years imprisonment.
- (b) For theft offence, you are sentenced to 2 years imprisonment.
- (c) Both sentences in (a) and (b) are to be concurrent and are suspended for a period of 3 years from today upon the condition that you do not commit an offence punishable by imprisonment within the period of 3 years of your suspension.



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NUKU'ALOFA: 12 February 2021.