

Sean & Hle

Mr Lutini
DPP
Crown Law Office

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

CR 42/2020 & 182/2020

BETWEEN: R E X
-Prosecution

AND: LAFITANI MAHE
-Accused

SENTENCE

BEFORE : JUSTICE LANGI

Counsel : Mrs. Halaevalu Aleamotu'a for the Crown Prosecution
The Accused in Person

Date of Sentence: 26 February, 2021

A. THE CHARGE

1. The Accused is charged in CR 42/2020 with one count of Serious Housebreaking contrary to section 173 (1) (b) and (5) of the Criminal Offences Act and one count of Theft contrary to section 143 (a) and 145 (b) of the Criminal Offences Act;
2. The Accused is charged in CR 182/2020 with one count of possession of illicit drugs contrary to section 4 (a) (iii) of the Illicit Drugs Control Act;
3. In CR 42/2020, the Accused pleaded not guilty when he was arraigned in front of Justice Niu. He was subsequently found guilty and his matter has now been transferred to this court to be sentenced together with his matter in CR 182/2020;
4. In CR 182/2020, the Accused pleaded not guilty on arraignment. He was subsequently convicted after defended hearing.

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5. He now appears before me for sentencing for both matters in CR 42/2020 and CR 182/2020;

B. THE OFFENDING

CR 42/2020

6. On or about 19 February 2019, at 8am, the Complainant 'Ana Kama left her residence to go to work. At approximately 2pm, she returned home for lunch and discovered that some louvers from ma window at her house had been removed.
7. Upon inspection of her house, she discovered the following items missing from her home:
 - a. 1 x 40 ft Fihu loua valued at TOP \$4000;
 - b. 4 x 15 ft Paongo mat valued at TOP\$4000;
 - c. 5x 8'5ft , 1x6'4 & 3x4'3, 2x Ngafingafi mats valued at TOP\$20,000;
 - d. 1x20ft Tapa valued at \$2000
 - e. 2xBluetooth speakers valued at TOP\$500;
 - f. 1 Iphone valued at TOP\$500;
 - g. 1 Ipad valued at TOP\$500
 - h. Cash of \$500;
8. The Complainant notified the police who were able to successfully lift a fingerprint from the louvers that were removed.
9. On our about 20 February 2019, the Complainant's son logged onto Facebook to see whether any of the stolen items were being advertised for sale. He was able to identify one of the stolen Bluetooth speakers advertised for sale by one Viliami Ongosia.
10. The Police apprehended Mr. Ongosia who told the police that the Accused had approached him that day and asked him to advertise the speakers online for sale.
11. The Accused was then arrested and charged with housebreaking and theft.
12. The police fingerprint expert analysed the prints left from the louvers and confirmed that the prints belonged to the Accused.
13. Apart from the speakers, none of the items that were stolen were ever recovered.
14. The Accused did not cooperate with the police and he has previous convictions.

CR 182/2020

15. On or about 8 July 2019, the Police received reliable information of potential drug dealing at the residence of Talia'uli Fatongiatau at Pili. At approximately 5pm, the police went to the resident and saw the Accused sitting inside a car with Talia'uli Fatongiatau and Ue'ikaetau Tapa'atoutai.
16. When the Accused saw the police he ran and Officer Vaka chased after him and called out to the Accused to stop. The Accused stopped running and returned back to where the Police were standing.
17. Officer Vaka walked to the area where the Accused had stopped running and found a plastic packet containing 4 small packets of methamphetamine. He admitted to the Police that the drugs were his.
18. The drugs weighed 1.4 grams.
19. The Accused has previous convictions.

C. CROWN'S SENTENCING SUBMISSIONS

CR 42/2020

20. The Crown submits the following as aggravating factors in this case:
 - a. The Accused did not cooperate with the police;
 - b. The Accused has previous convictions for similar offences;
 - c. The Accused is a repeat offender;
 - d. The goods stolen were not able found causing a huge loss to the Complainant;
 - e. The Accused committed this offence while he was under a suspended sentence for another matter;
 - f. The Accused is not remorseful and maintains that he is innocent;
21. The Crown submits the following as mitigating factors in this case:
 - a. The Accused has a young family;

22. The Crown also submit a few comparable sentences delivered in this court to assist me in determining the appropriate sentence:

a. *Rex v Penisiliti Malafu* CR 133/2016 – The Accused was convicted after a defended hearing of serious housebreaking and theft. He had broken into the Complainant’s home and stole Tongan goods valued at a total of \$15000. The court set a starting point of 3 years and 6 months imprisonment. There were no mitigating factors in that case. The aggravating factors included:

- i. Extensive previous convictions;
- ii. The Tongan goods stolen were of considerable value and could not be replaced and valued at \$15000;

On the housebreaking charge the Accused was sentenced to 3 years and 6 months imprisonment. He was to serve the 3 years and the last six months was suspended. On the theft charge he was sentenced to 2 years imprisonment to be served concurrent with the housebreaking charge.

b. *Rex v Maikolo Ealelei* CR 162/2018 – The Accused pleaded guilty to serious housebreaking and theft. He had broken into the Complainant’s house and stolen Tongan goods valued at \$34,269.00. His Honour Lord Chief Justice Paulsen (as he was then) stated that this offence was common among the youth and is a major problem in Tonga and requires the courts to make a strong opposition to such offences. His Honour therefore raised the starting point to 4 years imprisonment for housebreaking. The mitigating factors in this case were:

- i. Early guilty plea;
- ii. Accused cooperated with the Police;
- iii. Accused was a young offender;

The aggravating factors were:

- i. Accused was a repeat offender;
- ii. He has convictions for similar offences;
- iii. The value of the goods stolen exceeded \$30,000;
- iv. None of the goods were recovered;

For the house-breaking charge the Accused was sentenced to 4 years imprisonment. For the theft charged the Accused was sentenced to 2 years and 6 months imprisonment to be served concurrent to count 1. The last 6 months was suspended on conditions.

b. *Rex v Kelikupa Mahe* CR 133/2019 – The Accused was convicted after a defended hearing of housebreaking and theft. The total value of goods he stole was \$14,900.

The goods consisted of Tongan mats and electrical appliances. The starting point for the housebreaking charge was 3 years and 9 months imprisonment. For the mitigating factors of having no previous convictions and assisting the police in finding part of the goods, the starting point was reduced to 3 years and 3 months. The last 12 months suspended and Accused had to serve 2 years and 3 months. For the charge of theft, he was sentenced to 2 years and 6 months imprisonment to be served concurrent to Count 1.

23. In this case the Crown submits a starting point of 3 years imprisonment for the housebreaking charge and 1 year imprisonment for the theft charge to be served concurrent with Count 1.
24. The Crown further submits that the circumstances of the Accused does not warrant any suspension of his sentence.

CR 182/20

25. The Crown submits the aggravating factors in this case as follows:
 - a. The Accused did not cooperate with the Police;
 - b. Drug offending is a serious offence, and it is an issue what the country is trying very hard to battle;
 - c. The Accused committed the offence in this matter on 8 July 2019 whilst he was on a 2 year suspended sentence for CRS 359-359/2018, 366-378/2018 which was imposed on 5 December 2018;
 - d. The Accused criminal record illustrates that he is a habitual property offender. He has now escalated to drug offending which can only result in an increase in his property offending to feed his drug-related needs.
26. The only mitigating factor in this case is that this is the Accused's first drug offending;

D. PRE-SENTENCE REPORT

27. According to the probation report, the Accused is 32 years old and lives at Houmakelikao with his de facto partner and their young daughter.
28. In terms of education, the Accused went to Liahona High School from Form 1 to Form 3 and then to Tupou College from Form 4 to Form 5. He is now employed as a builder in the government project for building houses damaged by the cyclone.

29. The probation officer reports that it was difficult to collect any information about the Accused because he does not attend church and is not involved in any church work or or community activities. It is believed that this may be because the Accused moves around a lot and there is no stable home for him to reside.
30. The Accused has an extensive list of previous convictions and the probation officer recommends a term of imprisonment.

E. PREVIOUS CONVICTIONS

31. The Accused has the following previous convictions:
- a. 2009 – CR 21 – 23/ 09 - convicted for disturbance, trespass and theft;
 - b. 2018 – CR 358-359,366-378/18 - convicted for 2 counts of housebreaking, 2 counts of theft, unlawful entry by night.
 - c. Head sentence of 6 months was fully suspended for 2 years on condition not to re-offend;
 - d. 2019 – convicted for housebreaking and theft
32. I consider the fact that the accused has previous convictions for property offences a serious aggravating feature in this case. However, whilst previous convictions are relevant to establish the character of an accused for sentencing purposes and whether he has a predilection to commit a particular type of crime, a sentencing Judge should be on guard against sentencing the accused twice for the same offences on which he had previously been convicted and sentenced. In *R v Casey* [1931] NZLR 594 Sir Michael Meyers CJ stated at 597
- “The Court should always be careful to see that a sentence of a prisoner who has been previously convicted is not increased merely because of those previous convictions. If a sentence were increased merely on that ground it would result in the prisoner being, in effect, sentenced again for an offence which he has already expiated. We agree that the sentence passed ought to bear some relation to the intrinsic nature of the offence and gravity of the crime. But it by no means follows that he previous convictions must be ignored. It is necessary to take them into consideration, because the character of the offender frequently affects the question of the nature and gravity of the crime, and the prisoner’s previous convictions are involved in the question of his character. Further the previous convictions of a prisoner may indicate a predilection to commit the particular type of offence of which he is convicted, in which case it is the duty of the Court, for the protection of the public, to take them into consideration and lengthen the period of confinement accordingly”.*

33. This view was re-affirmed in *R v Ward* [1976] 1 NZLR 588 where it stated that views of the court in *Casey* quoted above was an authoritative statement of the policy which the court should adopt where it thinks it necessary to protect the public from the depredations of persistent offenders. The Court of Appeal in *Ward* further stated that “*regard may be had to an offender’s record when imposing sentence. This matter is not without its difficulties as the Court has to reconcile two principles: on the one hand the acceptance of the preventive purpose of punishment, and, on the other, the rejection of punishing an offender again for earlier offences*”.
34. I am mindful that any additions made to the sentence in this case does not punish the accused twice for offences which he has been convicted and sentenced, but his previous convictions for property offences do indicate a predilection to commit the particular type of offences of which he is convicted, in which case it is the duty of the Court, for the protection of the public, to take them into consideration and lengthen the period of confinement accordingly.

F. DISCUSSION

CR 42/2020

35. It is clear from the extensive list of previous convictions that the Accused is a habitual property offender. As highlighted by the Crown, he has been given many opportunities to rehabilitate and it is clear that the Accused refuses to change. The classical theory of crime is that people commit crime because they view the benefits far outweigh the cost. This theory tells us that if we increase the punishment, then crime will decrease.
36. In this case, I believe that the Accused is of the view that he gets more from stealing than the cost of having to do time. To protect the community from such people, there is a need to increase the punishment as a deterrence.
37. I believe a starting point in line with ‘*Ealelei*’ above is appropriate, where Lord Chief Justice Paulsen (as he was then) lifted the starting point to 4 years imprisonment for theft of goods valued at \$34269. In this case the total value of goods stolen was \$34000. The starting point is therefore 4 years imprisonment on Count 1;
38. I add on another 12 months to the starting point for his previous convictions for which I take as a serious aggravating factor in this case. The total sentence therefore comes to 5 years imprisonment for Count 1;

39. For the charge of theft, I sentence the Accused to 2 years' imprisonment to be served concurrent to Count 1;
40. I have considered the principles outlined in *Mo'unga v Rex* in relation to suspension and I am of the view that there is nothing in favour of any suspension in this case.

CR 182/2020

41. The Crown submits a starting point of 18 months imprisonment based on the comparable cases discussed above. In previous sentences for possession of methamphetamine under 1 gram I have set the starting point at 12 months imprisonment even for very minimal amounts (*R v Tafuna* CR 198/20, *R v Angilau* CR 103/20, *R v Suasau* CR 120/20, *R v Lave* CR 185/20). This is to reflect the views of the courts towards this destructive and dangerous drug and to emphasize the views stated by the Court of Appeal in *Maile* and *Cato J in Ngaue*. This starting point will then be increased and decreased depending on the aggravating and mitigating factors.
42. In this case, the Accused is charged with possession of 1.4grams of methamphetamine. In the case of *Rex v Harris Satini* CR 227/2019, I had set a starting point of 18 months' imprisonment for methamphetamine between 1 – 2 grams.
43. I therefore set a starting point of 18 months' imprisonment in this case.
44. For the mitigating factors of this being his first drug offending, I deduct 6 months. The Accused is sentenced to 12 months imprisonment. I suspend six months of the sentence for a period of 1 year on conditions. The rest of the 6 months is cumulative to his sentence in CR 42/2020.
45. As submitted by the Crown, the Accused breached his suspended sentence imposed on 5 December 2018. I activate the 6 months suspended sentence to be served together with the sentences in this case.

G. SENTENCE

46. On the charge of Serious Housebreaking, the Accused is convicted and sentenced to 5 years' imprisonment;
47. On the charge of Theft, the Accused is convicted and sentenced to 2 years' imprisonment to be served concurrent to Count 1 of CR 42/2020;

48. On the charge of possession of a Class A drug in CR 182/2020, the Accused is convicted and sentenced to 12 months' imprisonment. The sentence is fully suspended on the following conditions.

- a. Not to commit any further offences punishable by imprisonment for a period of 1 year upon his release;
- b. The Accused is to be placed on probation during the period of his suspension;
- c. I activate the suspended sentence of 6 months' imprisonment imposed on 5 December 2018 to be served cumulative to his sentence in CR 42/2020;
- d. If my calculation is correct, the Accused will therefore serve a total of 5 years and 6 months' imprisonment;

49. As requested by the Crown, I order that the drugs seized are destroyed and all items associated with drugs such as the weighing apparatus and plastic packs and cash are forfeited to the Crown.

NUKU'ALOFA: 26 February 2021

