

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

ATTORNEY GENERAL'S OFFICE	
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FAKA'ANAUA 'AKAU

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mr T. 'Aho for the Prosecution
The Defendant in person
Date: 14 September 2021

The charges

1. The Defendant appears for sentencing on the following counts:
 - (a) escaping from lawful custody (contrary to s 69(1) of the *Prisons Act*);
 - (b) serious housebreaking (contrary to s 173(1)(b) and (5) of the *Criminal Offences Act*); and
 - (c) theft (contrary to s 143(a) of the same Act).

The offending

2. The Defendant is 22 years of age. On 14 September 2018, in proceeding CR 77 of 2018, Cato J sentenced the Defendant to 5 ½ years imprisonment for armed robbery, 3 years imprisonment for serious housebreaking and 2 years imprisonment for simple bodily harm. The offending occurred in February 2018 when the Defendant was 19 years of age. The sentences were ordered to be served concurrently with the final 12 months of the head sentence being suspended on conditions. The sentences were backdated to the date of his remand in custody on that offending.
3. Until the instant offending, the Defendant was serving his sentences at Sainai Prison on 'Eua.
4. On or about 31 May 2020, around 2 a.m., Police were conducting normal patrols when they noticed that the complainant's store was open. When they informed the complainant, he reported that cash and goods were missing from his store. The Police went to check Sainai Prison for any escaped prisoners. On their way, they noticed empty bongo, biscuit and lolly packets by the side of the road. When Police arrived at the prison, the Defendant and two other inmates, Viliami Kupu and Siaosi Langi, were missing from their cells. A short time later, prisoners informed the police that the Defendant and Langi were in their cells. They were

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taken to the police station. Kupu was later arrested as he re-entered the prison through a hole behind the toilet walls.

5. On the way to the police station, the officers could smell alcohol on the Defendant. He told them about a vehicle. The complainant confirmed that his vehicle was also missing. It was found some 600 metres from the prison. A search was conducted around that area and inside the prison. The total value of the goods and cash stolen was \$21,044. Most of the goods were recovered but not the cash. The quantum of that cash has not been specified.
6. When questioned, the Defendant chose to remain silent.
7. On 11 June 2020, the Defendant was returned to Tongatapu and placed in maximum security at Hu'atolitoi Prison. He was removed from there on 4 February 2021. However, that same day, he was found in possession of cannabis and returned to maximum security, where he has reportedly been kept since.
8. Upon his arraignment on 16 March 2021, the accused pleaded not guilty to all charges. He and his co-accused were then remanded to stand trial commencing 26 July 2021. On that day, the Defendant was re-arraigned and pleaded guilty to all three counts.

Crown's submissions

9. The Crown submits the following as aggravating features of the offending:
 - (a) the Defendant committed the offending whilst in lawful custody;
 - (b) the Defendant has previous convictions including for serious housebreaking; and
 - (c) the cash was not recovered.
10. The Crown submits the following as mitigating features:
 - (a) the Defendant contacted the Crown to change his plea, which indicates he has accepted some responsibility for his actions; and
 - (b) he pleaded guilty to all the charges.
11. The Crown referred to the following comparable sentences:
 - (a) *Tevita Fifita* (CR 74/2018) – the Defendant broke into a store and stole \$21,664.12 in cash which he spent on alcohol and distributed to people on the roadside. He pleaded guilty to serious housebreaking and theft. For the serious housebreaking, a starting point of 3 ½ years was set, reduced by 1 year for mitigation, resulting in a sentence of 2 ½ years imprisonment. For the theft, he was sentenced to 2 years' imprisonment, concurrent. The final 12 months of the head sentence was suspended on conditions.
 - (b) *Penisiliti Malafu* (unreported, CR 133/2016, 29 March 2018, Cato J) - the Defendant broke into a home and stole Tongan goods valued at \$15,000. He was convicted after trial of serious housebreaking and theft. For the serious housebreaking, a starting point of 3 ½ years imprisonment was set.

There were no mitigating factors. For the theft, the Defendant was sentenced to 2 years' imprisonment to be served concurrently. The final 6 months of the head sentence was suspended on conditions.

- (c) *Maikolo 'Ealelei* (CR 162/2018) – the Defendant, who was a young repeat offender, pleaded guilty to serious housebreaking and theft of Tongan goods valued at \$34,269. He was sentenced to 4 years imprisonment for the serious housebreaking and 2 ½ years for the theft.
- (d) *Kelikupa Maile* (unreported, CR 133/2019) – the Defendant was convicted following trial for serious housebreaking and theft of Tongan mats and other goods valued at \$14,900. For the serious housebreaking, a starting point of 3 years and 9 months imprisonment was set. Following discounts for his lack of previous convictions and important information provided to police in retrieving some of the stolen items, the Defendant was sentenced on the serious housebreaking to 3 years and 3 months imprisonment with the last 12 months suspended. For the theft, he was sentenced to 2 ½ years imprisonment to be served concurrently.

12. Here, the Crown submits the following sentence formulation:

- (a) a starting point of 5 years' imprisonment for the serious housebreaking;
- (b) that head sentence be reduced by 17.5% or 10 months for mitigation;
- (c) a further reduction of 17 ½ months for the Defendant's time in maximum security, making a total reduction of 28 months, resulting in a sentence of 2 years and 8 months' imprisonment;
- (d) 2 years' imprisonment for the theft count, concurrent with count 2;
- (e) 3 months' imprisonment for escaping from custody, also concurrent with count 2;
- (f) the sentence of 2 years and 8 months to commence following the completion of the Defendant's current sentence; and
- (g) no suspension.

Presentence report

13. The Defendant was raised by his maternal family in Fahefa. His mother married when he was 3 years old and left him in the care of his maternal grandmother. When his grandmother passed away in 2010, he went to live with his mother and stepfather and his four children. His mother described the Defendant as being spoiled by his grandmother such that he refused to be disciplined by his stepfather. The Defendant described his mistreatment at the hands of his stepfather for not conforming to the latter's strict discipline. As a result, at the age of 16, the Defendant left school during a repeat of form 4. He also left home. He went on to live in various places with various 'friends' until committing the crimes for which he is serving his current sentence.

14. The Defendant admitted the offending to the probation officer and explained that

he did it because he needed money and tobacco for his own personal use. He alleged that one of the prison officers was complicit in his escape. Investigation has indicated that assertion to be presently unfounded.

15. The probation officer described the Defendant as not only unremorseful but in fact "cheerful" when he spoke of this offending and other offences committed whilst in prison. The probation officer concluded that the Defendant appeared to be enjoying his time in prison and showed no signs of wanting to be released sooner.

Starting points

16. The statutory maximum penalty for serious housebreaking is 10 years imprisonment; for theft, 7 years; and, for escaping from prison, 2 years.
17. I agree with the Prosecution that count 2, serious housebreaking, ought be treated as the head offence.
18. Having regard to the seriousness of the offending; that it was committed when the Defendant was serving a significant sentence for previous offences including serious housebreaking, for which he was sentenced to 3 years imprisonment; the value of the property stolen; that the unspecified cash component has not been recovered; and the comparable sentences referred to above, I set the following starting points of imprisonment:
 - (a) count 1, escaping from custody – 12 months;
 - (b) count 2, serious housebreaking - 4 ½ years (or 54 months); and
 - (c) count 3, theft – 3 years.

Mitigation

19. For the only primary mitigating factor being the Defendant's indication of wanting to change his plea shortly before trial, I reduce those starting points by 1/6th or 16.67%, resulting in the following sentences:
 - (a) count 1 – 10 months;
 - (b) count 2 – 45 months; and
 - (c) count 3 – 30 months.

Concurrent vs cumulative

20. The sentences for counts 2 and 3 are to be served concurrently.
21. However, ss 69(3) of the *Prison Act* requires the sentence for count 1 to be served cumulatively upon the term of imprisonment the Defendant is currently serving. Although the back date for commencement of the current term was not specified in the sentence in CR 77/18, and I am not aware of whether, and if so, how many marks for remission the Defendant may have earned pursuant to the formulae in Part III, Division 7 of the Act, or whether he has lost any as a result of this offending and/or for the possession of cannabis in prison, I will proceed on an estimate that he may be currently due for release around September 2022, with

the final year of that sentence then suspended (presumably for a year).

22. That means that the 10 month sentence on count 1 in this proceeding must commence on the date the Defendant would otherwise be eligible for release (per s 50 of the Act).
23. Further, having regard to the totality principle and the Defendant's brazen disregard for the law and demonstrated lack of remorse or desire for reform by the instant offending, I consider it appropriate to order that 28 months of the sentence for count 2 also be served cumulatively to the sentence the Defendant is currently serving.
24. That makes a total additional period of imprisonment of 38 months, commencing from the date the Defendant would otherwise be eligible for release in respect of his sentence for CR 77/18.

Time spent in maximum security

25. I have considered the Prosecution's submissions and authorities referred to in relation to the time the Defendant has spent to date in maximum security at Hu'atolitoi Prison, of which, some 8 months are a consequence of the instant offending.
26. Section 37 of the *Prisons Act* provides:

37 Maximum security orders

- (1) The Commissioner may make a maximum security order that a prisoner be placed in a maximum security facility within a prison.
- (2) The Commissioner may only make the order if the Commissioner reasonably believes, that any or all of the following apply —
 - (a) there is a risk the prisoner will escape, or attempt to escape;
 - (b) there is a risk the prisoner will kill or cause serious injury to prison officers, other prisoners or another person that the prisoner may come into contact with; or
 - (c) the prisoner is a threat to the security or good order of the prison.
- (3) The term of the order shall not be longer than 7 days, unless the Commissioner otherwise directs.

27. In this case, there is no evidence before the Court:
 - (a) of the existence, or terms of, any maximum security order made by the Commissioner of Prisons in respect of the Defendant;
 - (b) that the Defendant continues to pose any of the risks specified in ss (2);
 - (c) that the Commissioner has directed that the term of the Defendant's order be longer than 7 days; or
 - (d) of any monthly review of the order by the official visitor as required by s 38.
28. This is a matter of concern. As stated recently in *Tu'itavake v Police* [2021] TOSC 98:

“29. I have no difficulty in accepting that any prisoner who procures or is given drugs, which are then taken within the prison, does pose a threat to the good order and security of the prison by the potential for distributing those drugs to other inmates or by consuming them, resulting in disruptive or even violent behaviour. But in this case, there was no evidence to support the continuing retention of the appellant in the maximum security facility. One would have thought that once the methamphetamine was detected and seized, the appellant could no longer pose a threat to the security of the prison, especially if he was unable to come into future contact with anybody outside the prison, as he did here, who could have given him any further illicit drugs. There is no evidence, nor even a suggestion, that it was necessary to place him in maximum security to achieve that. The only other indirect explanation proffered by the Deputy Commissioner was that the Hu’atolitoli prison is overcrowded, it has limited resources, and that whilst the Act prescribes three classes of prisoners, and how they are to be accommodated, the harsh reality is that most of the inmates have to be housed in mixed accommodation. That, however, still does not explain why the appellant was kept in maximum security for approximately three months. In the absence of any such explanation, it is impossible to dismiss entirely, and, at a minimum, I am left with reservations, as to the appellant’s contention that he was punished by the prison authorities.

30. Although the making of the submission was perhaps understandable, I regard the fact of Mr Fili’s characterisation of the appellant’s time in maximum security as “torture” as somewhat of an exaggeration. That may be contrasted with whipping which presently remains, within Tonga, as a form of punishment available within the Criminal Offences Act. Nonetheless, having personally inspected the prison shortly after arriving in the Kingdom, including the maximum security facility, I do accept that any time in that place would be far more arduous and uncomfortable, to say the least, than even the ordinary cramped conditions the general population of prisoners are required to endure.

31. For those reasons, I consider it appropriate to order that credit be given for the three months served in maximum security towards the balance of the substituted sentence referred to above.”

29. In the circumstances, I consider it appropriate on this sentence to allow the Defendant credit for the 8 months in maximum security he has served as a consequence of this offending. I do not consider it appropriate to allow any further credit for the unrelated time spent in maximum security as an apparent result of him coming into possession of cannabis while in that facility.
30. I also recommend that the Commissioner of Prisons promptly review this case and any other for compliance with the legal requirements of Part III, Division 4 of the Act.
31. As a result, the additional 38 months for this proceeding will be reduced by those 8 months resulting in a net sentence of 30 months to commence on the date the Defendant would otherwise be eligible for release on his sentence for CR 77/18.

Suspension

32. Of the considerations for suspension discussed in *Mo’unga* [1998] Tonga LR 154

at 157:

- (a) the Defendant is young;
 - (b) but he now has a significant criminal history;
 - (c) the offending was clearly premeditated;
 - (d) he did not co-operate with the authorities; and
 - (e) his lack of remorse and assessment by the probation officer of the Defendant appearing to enjoy committing crime, including while inside prison, are strong indicators that he is unlikely, at present, to take the opportunity afforded by another partially suspended sentence to rehabilitate.
33. For those reasons, I agree with the Prosecution that no part of this sentence should be suspended.
34. I am prepared, however, not to interfere with the partial suspension granted by Cato J in CR 77/18. Therefore, the final year of that sentence will be suspended in accordance with his Honour's order, although that period will commence at the end of the additional term of imprisonment imposed in this proceeding.

Result

35. The Defendant is convicted and sentenced on:
- (a) count 1, to 10 months' imprisonment;
 - (b) count 2, to 45 months' imprisonment; and
 - (c) count 3, to 30 months' imprisonment, to be served concurrently with the sentence on count 2.
36. The sentence on count 1 and 28 months of the sentence on count 2 are to be served cumulatively upon the sentence the Defendant is currently serving in respect of proceeding CR 77/18.
37. The Defendant is to be given credit of 8 months for part of the time he has served in maximum security to date.
38. Accordingly, the net sentence on this proceeding is an additional 30 months' imprisonment to commence on the date the Defendant would otherwise be eligible for release on his sentence in CR 77/18.

NUKU'ALOFA
14 September 2021



M. H. Whitten QC
LORD CHIEF JUSTICE