

IN THE SUPREME COURT OF TONGA CR 150-154 &156 of 2014
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN:

R E X

- Prosecution

AND:

1. SISI PALE
2. PENI TOMASI MO'UNGA
3. SIOSAIA TU'UHOKO
4. 'AMANAKI TUPOU'ATA
5. PETELO MO'UNGA
6. 'ATUNAISA TUPOU'ATA

- Defendants

BEFORE THE HON. JUSTICE CATO

Mr Niu SC for Pale

Mr Corbett for 'Amanaki and 'Atunaisa Tupou'ata

Mr Tu'utafaiva for Tu'uhoko

Peni and Petelo Mo'unga unrepresented.

SENTENCE

[1] The accused come before me on a serious case of a home invasion at night followed by theft and robbery. A large amount

of property was taken valued at about \$11,000, about half of which was recovered. The agreed facts are as follows.

SUMMARY OF FACTS

1. *On or about the night of 10th June 2014, Sisi Pale, Petelo Mo'unga, 'Amanaki Tupouata, Peni Tomasi Mo'unga and Siosaia Tu'uhoko were on a white 3 tonne truck belonging to Sisi Pale. They were en route to Nuku'alofa from Lapaha.*
2. *On or about 11:00pm, Pale and Petelo Mo'unga dropped off 'Amanaki Tupou'ata, Peni Tomasi Mo'unga and Tu'uhoko at Vuna Road at Sopu. Pale and Petelo Mo'unga then went to the residence of 'Anitoni Hurrell to pick up 'Atunaisa Tupou'ata.*
3. *After picking up 'Atunaisa Tupou'ata, they came back and picked up the rest of the boys ('Amanaki Tupou'ata, Peni Tomasi Mo'unga and Tu'uhoko) on Vuna road and drove west to the end of Sopu.*
4. *'Atunaisa Tupou'ata showed Pale, Petelo Mo'unga, 'Amanaki Tupou'ata, Peni Tomasi Mo'unga and Tu'uhoko where the house of the complainant (Vika Carafa) is located. 'Atunaisa Tupou'ata told them that he is sure there should be goods in the house and that the residence owners are elderly.*
5. *They then dropped off 'Atunaisa Tupou'ata at around 1:00am and returned to Sopu on Vuna road. They stopped in front of an abandoned house at Sopu and proceeded to plot on how the crime would be committed.*
6. *At about 3:00am, they drove to the end of Sopu where they parked the white 3 tonne truck. They all got off and walked to the residence of the complainant (Vika Carafa). The accused persons entered the residential area and tried to break into the house occupied by the victim.*

7. *Pale climbed up a pipe and broke into the house through a window on the first floor. He entered the house and went downstairs opened the entrance letting the other accused inside.*
8. *Pale, Petelo Mo'unga and 'Amanaki Tupou'ata then went upstairs. At this time the victim was still asleep in her room. There were no one else in the house except the accused. The accused persons entered with shirts tied on their faces.*
9. *Two of the accused persons held her head and her feet, and a third tied her up. Pale threatened the victim that if she screamed, they would kill her. They left her tied up on the bed while they proceeded to rob the house.*
10. *While the accused persons were robbing the house, 'Amanaki Tupouata, went to get the white 3 tonne truck they had parked at the end of Sopa in order to transport the stolen goods.*
11. *After leaving the complainant's residence, the accused persons aside from 'Atunaisa Tupou'ata all returned to Lapaha to Sisi Pale's residence and unloaded the goods. The goods were divided between and pawned by the accused persons.*
12. *Some of the goods were later pawned on or about 11 June 2014.*

1. SISI PALE (CR150/2014)

- [2] Mr Pale pleaded guilty to charges of conspiracy to serious housebreaking, conspiracy to theft, serious housebreaking and robbery. He was aged 34, the leader of the offenders who were all much younger, and the instigator of this offending. His probation report indicates he is a first offender, and a husband and father of a large number of children. He is their sole means

of support. He was in gainful employment, at the time of this offending.

- [3] I adopt the robbery as the head sentence. The complainant and occupier of the residence was threatened and bound in her residence in an upstairs bedroom where she had been sleeping by three of the offenders including Mr Pale who had adopted disguises. Objectively, the offending is very serious. It involved, an entry into a residence in the early hours of the morning, serious threats made to the complainant and her being tied up, and subsequently a large amount of property was taken from the premises.
- [4] Mr Niu SC submitted that the offending was not in the upper range of robbery. He submitted that the offending was more spur of the moment rather than premeditated. The offenders led by his client drove around and sourced a target, his client scaled a drain pipe and opened the door to allow the others inside, and those that entered disguised themselves. It may be that the robbery was conceived when the offenders discovered the occupier was present and not before, however, the Agreed Facts evidence that the offenders had been told that people were in the house and in such circumstances they chose to enter the house. There is a real risk in cases of housebreaking that resistance will be encountered. They must have anticipated having to confront an occupier otherwise they would not have adopted disguises. The threat to the occupant by Pale, and tying her up in her own bedroom was callous. It must have been an extremely frightening experience for this woman who was, it seems, on her own in the house at the time and asleep before the group entered. Mr Pale seems likely to have

committed these acts after consuming a large amount of whiskey earlier that evening. Mr Niu informed me that his wife had grown concerned about his drinking about that time.

- [5] Mr Lutui amongst other cases cited to me CR 226-229/2005 Kafalava, Masima and Taufu'ou where the sentencing Judge had to deal with a number of offenders who had entered a residence of the owner of a popular cafe in Nukualofa to await the return after he had locked up the café for the night. A violent attack was carried out on him with a rock knocking him unconscious. I am informed the head sentence, in this case, was the robbery, although there were other charges such as housebreaking and causing grievous bodily harm, as well. Two of the offenders were first offenders and one had previous convictions for house breaking and theft. The Judge sentenced all the offenders on robbery to seven years imprisonment. Given that the offenders pleaded guilty a starting point would likely to have been 8 years or higher. That case may be distinguished, however, from this case in that there was a measure of more serious violence and greater planning.
- [6] The starting point in my view is less than Kalava, but nonetheless the offending is very serious. Deterrence and the protection of society, aside from retributive considerations, are very important sentencing rationales in cases like these involving home invasions, at night, by several offenders, followed by violence. Robbery carries a maximum sentence of 10 years in Tonga. The starting point taking into account also that the offender was the instigator and the leader that night and much older than the others, I consider to be seven and a half years.

[7] Mr Niu rightly referred to his early guilty plea, his co-operation, the fact he expressed remorse and the fact he is a first offender as being relevant factors for mitigation. I accept this and the starting point is reduced by 18 months making the sentence for robbery for which he is convicted, six years imprisonment.

[8] I consider, bearing in mind his early guilty plea and co-operation, remorse and the fact he is a first offender in particular, who has a large family that he should be allowed some suspension of his sentence. Taking into account the very serious nature of the offending, I order that the final 18 months of his sentence be suspended on the following conditions;

- a. He is not to commit any offences punishable by imprisonment for a period of two years;
- b. He is placed on probation for 12 months to live where directed;
- c. He is to undergo a course under the direction of probation on alcohol and drug addiction.

[9] On the charge of conspiracy to housebreak, I convict him and sentence him to 2 years imprisonment to be served concurrently with the robbery sentence.

[10] On the charge of serious housebreaking, which carries a maximum sentence also of 10 years, I convict and sentence him to 3 and a half years imprisonment concurrent with the robbery sentence.

- [11] On the charge of conspiracy to theft, I convict and sentence him also to two years imprisonment to be served concurrently with the robbery sentence.
- [12] All sentences are to be backdated to the period he was remanded in custody on this offending.

2. PENI TOMASI MO'UNGA (CR151/2014)

- [13] This prisoner also pleaded guilty also to conspiracy to serious housebreaking, conspiracy to theft, serious housebreaking and robbery. He is aged 18. He has one previous offence for theft for which he received 3 months imprisonment suspended for three years on the 25th January 2010. He came from a dysfunctional family and, as with his brother, left home for periods. His father is serving a sentence of imprisonment for drugs. He is married with a child but the relationship is unstable. He was on the night in question with a co-offender Mr Tu'uhoko when he was given a lift by Mr Pale, in his motor vehicle. He was not told about Mr Pale's intention to commit housebreaking until later. He entered the residence but he did not go upstairs. However, knowing the occupant had been disabled, he proceeded to assist others to steal a significant amount of property. His involvement in the robbery was less serious but he also took advantage of the complainant being disabled and proceeded to assist in the stealing of a significant amount of property from the residence. I commence with a starting point of five years for his involvement. He is allowed 18 months

reduction for his early guilty plea, his youth, remorse, and with also a background of limited offending.

[14] He is convicted and sentenced to three and a half years imprisonment. Despite his earlier conviction, I consider he falls within Mo'unga and I suspend the final 18 months of his sentence on the following conditions;

- a. He is not to commit any offence punishable by imprisonment for a period of 2 years;
- b. He is placed on probation to reside where directed by his probation officer for a period of 12 months;
- c. He is to undergo a Life skills program at the direction of his probation officer.

[15] On the charge of conspiracy to effect serious housebreaking, he is convicted and sentenced to 18 months imprisonment concurrent with the robbery offending.

[16] On the offence of conspiracy to theft he is convicted and sentenced to 18 months imprisonment concurrent with the robbery sentence.

[17] On the serious housebreaking, he is convicted and sentenced to two years imprisonment concurrent with the robbery sentence.

[18] All sentences are to be backdated to the period he was remanded in custody on this offending.

3. SIOSAIA TU'UHOKO (CR152/2014)

- [19] This prisoner falls into a different category. He was with Peni Mo'unga when they were picked up and given a lift in his vehicle by chance by Mr Pale. It was only later that he learned about Mr Pale's intention to housebreak. His counsel Mr Tu'utafaiva informed me he was too afraid to enter the house. He was given very little of the proceeds. He pleaded guilty to conspiracy to serious housebreaking and conspiracy to theft.
- [20] I am informed by his counsel that he is aged 21. He has recently married and his wife was in Court. He has a labouring job with his father in law's construction company. I was informed he has previous convictions. He was sentenced in the Magistrates Court to 12 months' probation on the 18th February 2014. On the 12th December 2014, I sentenced him to housebreaking and indecent assault to 15 months imprisonment (6 months for the assault) and fully suspended this on conditions that he commit no offences punishable by imprisonment for a period for two years, that he be placed on probation for a period of 12 months, and that he was not to drink alcohol whilst on probation, that he attend a Salvation Army Alcohol and drug awareness course, and that he carry out 40 hours community work with the recommendation he clean the Vuna Road.
- [21] The present offending occurred prior to the offending for which he was sentenced. As such he is not in breach of my orders. Had he faced sentence today on the earlier charges, I may not have fully suspended his sentence. However, I am instructed

that he has not committed any further offending since this offending, that he has attended and completed a course on alcohol abuse and has not consumed alcohol for a very long time now (confirmed by his wife now in court). He also completed his community work. At the time of this offending, I am informed he was residing with Peni Mo'unga. He is now in a stable relationship. I bear this in mind when it comes to sentence. I view him as a person who appears since this offending to be well on the way to rehabilitating himself.

[22] On the charges of conspiracy to serious housebreaking and conspiracy to theft, he is convicted. On each charge, he is sentenced to 12 months imprisonment both fully suspended on the following conditions;

- a. He is placed on probation for a further 12 months to live where directed;
- b. He is further to undergo a Life skills course;
- c. He is also to undergo a further 40 hours community work as directed by his probation officer.

4. 'AMANAKI TUPOU'ATA (CR153/2014)

[23] He is aged 18 years. He was represented at this hearing by Mr Corbett. He pleaded guilty to conspiracy to serious housebreaking, conspiracy to theft, serious housebreaking, and robbery. He was unrepresented at the arraignment but prior to arraignment, he had been warned as had his brother, 'Atunaisa, that he should attempt to secure legal representation, the

procedure on arraignment and the principles relating to discount on sentence. He pleaded guilty to charges as did his brother to conspiracy to serious housebreaking. I have no doubt they both understood what they were doing and the particulars were understood by them and confirmed by them at arraignment. They appeared at the first sentencing hearing of this matter again unrepresented, and both confirmed the summary of facts, and expressed remorse for their actions. After this hearing had been adjourned to enable further inquiries to be made, by the Crown, and the prisoners remanded in custody, the defendants engaged Mr Corbett who is acting for another defendant who is not before the Court today. Mr Corbett sought to have their pleas set aside. His case was that the brothers had entered pleas without the assistance of counsel who had been engaged by them. He also said in the case of this defendant that he had been subject to duress.

- [24] I adjourned the application to have the Crown obtain an affidavit from the counsel who they said should have appeared to represent them. An affidavit was obtained from counsel, and I am satisfied there is no substance in the complaints at all. Rather than their counsel abandoning them, I am satisfied that they abandoned the services of counsel who had appeared for them in the early stages after arrest, but not at the committal, or since. Further I am satisfied they well knew the nature of their pleas, and the particulars of their offending. I was informed when I requested of Mr Lutui whether Amanaki had, in his record of interview, suggested duress he confirmed he had not. I declined the applications. Further, I indicated to counsel Mr Corbett, prior to sentencing resuming in the afternoon, he might take instructions as to whether the defendants still expressed

remorse because that might affect my approach to their sentence. He informed me in the afternoon that they both expressed remorse for their actions.

[25] In relation to Amanaki, although he has one previous conviction, there is some doubt about this. In any event, it was not of great moment so I regard him as a first offender. Objectively his role included disabling the complainant in her bedroom. He was not the instigator and compared with Mr Pale he was very young. The prisoner was only about 18 at the time of the offending. I am prepared to accept there was some pressure placed on him by Mr Pale although I observe he is not a very big man in stature. I consider objectively his involvement, though less than Mr Pale, in assisting to disable the complainant who had been asleep in her bedroom was very serious and I commence with a starting point of six years in his case for his role in the robbery. I reduce this sentence by 18 months for his guilty pleas, apparent co-operation, remorse, being a first offender, and his youth. The sentence I impose upon him for robbery is 4 years and a half years imprisonment.

[26] I suspend the final 18 months of this sentence on the basis, he satisfies Mo'unga principles. I do this on the following conditions.

- a. He is not to commit any further offences punishable by imprisonment for two years;
- b. He is placed on probation for 12 months to live where directed;

c. He is to attend a Life skills course under the direction of his probation officer.

[27] On the charge of conspiracy to theft, he is sentenced to 18 months imprisonment to be served concurrently with the sentence on the robbery count.

[28] On the charge of conspiracy to serious housebreaking he is sentenced to 2 years imprisonment to be served concurrently with the sentence on the robbery count.

[29] On the charge of serious housebreaking, he is convicted and sentenced to three years imprisonment concurrent with the sentence on the count of robbery.

[30] His sentences are also backdated to the period he was placed on remand in custody.

5. PETELO MO'UNGA (CR154/2014)

[31] Petelo was the youngest of the offenders. He was 15 at the time of the offending. He had an unstable family upbringing and little education. He worked occasionally in the bush and for Mr Pale, and some of his friends. The probation report revealed that he was very influenced by Mr Pale to carry out the offending and under his influence during the offending. He has previous offences for housebreaking and theft. His role in the offending included being involved in disabling the occupant by tying her up in her bedroom. I fix the same starting point as Amanaki Toupu'ata, namely six years. I allow him 2 years for his guilty

plea, co-operation, remorse, and additionally, the fact he was only 15 at the time of the offending.

[32] I convict and sentence him on robbery, to four years imprisonment. Because of his age at the time of the offending, I allow a greater period of suspension in his case. I suspend the final two years of his sentence on the following conditions;

- a. he commit no further offences punishable by imprisonment during the period of suspension;
- b. He is placed on probation for a period of 12 months;
- c. He is to live where directed by his probation officer;
- d. He is to undergo a Life skills course under the direction of probation.

[33] On the charge of conspiracy to theft, he is sentenced to 18 months imprisonment to be served concurrently with the sentence on the robbery count.

[34] On the charge of conspiracy to serious housebreaking he is sentenced to 18 months imprisonment to be served concurrently with the sentence on the robbery count.

[35] On the charge of serious housebreaking, he is convicted and sentenced to 18 months imprisonment concurrent with the sentence on the count of robbery.

- [36] His sentences are also backdated to the period he was placed in remand in custody.

6. 'ATUNAI SA TUPOU'ATA (CR156/2014)

- [37] He did not proceed beyond giving Mr Pale information and directions on which house the group should break into as the Summary of fact records. At the time, he was living in the area, and he was visited by Mr Pale that night first in connection with some musical equipment, and after being dropped back at his house by Mr Pale before the housebreaking took place, he took no further part in the offending. He pleaded guilty to conspiracy to serious housebreaking, conspiracy to theft, and abetment to serious housebreaking.
- [38] He is aged 22. He comes from a large family. He attended a panel beating course some years ago. He is married and has a family. He works as a labourer and does some mechanical work when able. He will get credit for his early plea, his reported expression of his remorse, his co-operation. I also sentence him as a first offender.
- [39] Even though he did not go into the house or take any further part in the activity, or it seems profit from the nights events, he supplied material information knowing Mr Pale's intention and that it would be used for the purpose of housebreaking, and that the house was likely occupied by people who would not provide much resistance. A starting point for his involvement in the house breaking by providing material information I assess as 18 months imprisonment, which I mitigate for his guilty plea, his co-operation, remorse and his absence of any other convictions by

6 months. I accordingly, convict him of abetting a serious housebreaking and sentence him to 12 months imprisonment. However, I fully suspend his sentence on the following conditions;

- a. He is not to commit any offences punishable by imprisonment for a period of two years;
- b. He is to be placed on probation for 12 months;
- c. He is to live where directed by his probation officer.
- d. He is to attend a Life skill's course.

[40] Because he has been remanded in custody for sentence since the 6th March, 2015, I will not impose any additional requirement of community work. He is eligible for immediate release from custody under the conditions of this sentence.

[41] On the charges of conspiracy to serious housebreaking and the conspiracy to theft charges, he is convicted and sentenced to six months imprisonment concurrent with the charge of abetting a serious housebreaking.

DATED: 28 APRIL 2015



JUDGE