

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

CR 162 of 2018

BETWEEN: REX

Prosecution

AND: MAIKOLO 'EALELEI

Accused

BEFORE LORD CHIEF JUSTICE PAULSEN

**Counsel: Mr. Fifita for the prosecution
 The Accused in person.**

Date of Hearing: 15 February 2019

Date of sentencing: 15 February 2019

SENTENCING REMARKS

- [1] Mr. 'Ealelei pleaded guilty on arraignment to one count of serious housebreaking contrary to s. 173(1)(b) and 5(a) of the Criminal Offences Act and one count of theft contrary to s. 143 and 145(b) of the Criminal Offences Act.
- [2] The maximum penalty for serious housebreaking is a term of imprisonment for any period not exceeding 10 years. The maximum penalty for theft of things to a value exceeding \$10,000 is a term of imprisonment for a period not exceeding 7 years.

The facts

- [3] Mr. 'Ealelei is 20 years old and at the material time he resided at Tofoa. On 15 March 2018, he broke into the home of Mrs. Briest and Mr. Jurgen at Tofoa and stole items to a value of around \$34,000. The property stolen consisted mainly of Tongan mats but also electrical equipment and personal items.
- [4] The Tongan mats were sold or used as security for loans by Mr. 'Ealelei and another person. There is no information before me about what happened to other property stolen. Items to a value of approximately \$12,800 were recovered.
- [5] When arrested Mr. 'Ealelei admitted his offending and co-operated with the Police and when he appeared before the Court he advised that he did not want legal representation and pleaded guilty to the offences on arraignment.
- [6] Mr. 'Ealelei has previous convictions for theft and housebreaking offences going back to 2014. He is presently serving a sentence imposed in the Magistrate's Court on 25 May 2018 of 2 years and 11 months imprisonment for theft and housebreaking.

The material before me

- [7] I have been provided with:
- (a) A pre-sentence report; and
 - (b) Submissions from the Prosecution along with relevant authorities.
- [8] I also heard from Mr. 'Ealelei.

Pre-sentence report

- [9] The pre-sentence report does not make positive reading. Mr. 'Ealelei is the seventh of ten children of his family. His parents are alive and provide for themselves and the children still living with them by subsistence farming.

Mr. 'Ealelei left school early due to low academic achievement and helped on the family plantation. His family relationships are not strong due to his criminal behaviour. The report says he has not had paid employment but he tells me that he worked in a local supermarket and lost that job when he went to prison. He commits offences on his own rather than in a group or gang (and is not therefore subject to pressure from his peers to commit offences) and does so to satisfy his own needs. The report says that he is comfortable in Hu'atolitoli and is not remorseful for his crimes. When I asked Mr. 'Ealelei about this he said he is not comfortable in Hu'atolitoli and is making efforts to improve himself.

The Prosecution's submissions

- [10] The Prosecution submits that the aggravating features of this offending are that Mr. 'Ealelei is not a first time offender, that he has criminal convictions for the same offences in 2014 and 2016 and that the value of the property stolen was substantial.
- [11] The Prosecution acknowledges that Mr. 'Ealelei is entitled to credit for his co-operation with the Police, his comparative youth and his early guilty pleas but argues that given his prior offending no part of his sentence should be suspended.
- [12] I was referred to a number of comparable cases which I have considered. I have undertaken my own research and had regard also to recent sentencing decisions in addition to those to which I was referred.
- [13] The Prosecution submits that an appropriate sentence in this case is 3 to 4 years imprisonment.

Discussion

- [14] The lead offence for sentencing purposes is serious housebreaking. It is a distressingly common offence committed in the main by young men. It is a very serious problem in Tonga to which there must be strong response.

Based on the authorities and having regard particularly to the value of the property stolen in this case I am adopting a starting point for sentencing purposes of four years imprisonment.

- [15] In terms of aggravating factors relevant to Mr. 'Ealelei I note that he is a repeat offender. It appears that he is a loner who steals as an occupation to support his own needs and feels little remorse for his criminality. In addition, these offences occurred at around the same time as other offences for which he is serving a term of imprisonment. I consider these matters justify an uplift on his sentence of 6 months imprisonment.
- [16] In terms of mitigating factors I do not think that Mr. 'Ealelei can be given much credit for his youth. His offending is now habitual. He is entitled to credit for his co-operation and guilty plea and I give him a discount on his sentence of 6 months for these factors. This is a smaller discount than is commonly given in other cases reflecting the fact that given the evidence against Mr. 'Ealelei his conviction on these offences was inevitable.
- [17] The result of this is that on the charge of serious housebreaking (count one) the sentence that I impose is 4 years imprisonment. On the charge of theft (count two), and again based on the authorities, I impose a sentence of two years and six months imprisonment which shall be served concurrently with count one.
- [18] As noted above, Mr. 'Ealelei is presently serving a period of imprisonment for other offences. They were committed within a short period of time of the offences for which he is being sentenced today. I must consider from what date the sentences I impose should take effect having regard to the principle of totality.
- [19] There is authority that the correct approach is for the Court to impose a sentence reflecting what would likely have been the effective head sentence imposed if the accused had been sentenced for all offences at the same time. On the information before me the head sentence, in such circumstances,

would have been at least (and possibly greater than) the sentence I intend to impose today (that is 4 years imprisonment).

[20] Accordingly, I consider that the just and appropriate approach is that the sentences that I impose today are to run from the date Mr. Ealelei was sentenced on those other offences (25 May 2018) and, in addition, shall run concurrently with each other and the sentences imposed in the Magistrates' Court under CR 155, 156, 168, 176, 177 of 2018.

[21] The final issue is whether any part of the sentences should be suspended. The Prosecution opposes any suspension based on the principles in *R v Mo'unga* [1998] Tonga LR 154. A contrary view is taken in the pre-sentence report where the recommendation is that suspension is warranted to improve the prospects of Mr. 'Ealelei's rehabilitation. Mr. 'Ealelei has received suspended sentences on prior occasions and has continued to offend. I am sceptical that he will change his ways but he tells me that he is not comfortable in Hu'atolitoli and he is making an effort to change himself and become a better person. He says he does not intend to reoffend upon his release. I have decided that given his youth it is too early to give up on Mr. 'Ealelei completely and accordingly I have decided to suspend a portion of the sentence.

Result

[22] The sentences I imposes are as follows:

- (a) On count one of the indictment (serious housebreaking) Mr. 'Ealelei is sentenced to 4 years imprisonment;
- (b) On count two of the indictment (theft) Mr. 'Ealelei is sentenced to 2 years and 6 months imprisonment;
- (c) These sentences shall be backdated to commence from 25 May 2018 and shall be served concurrently with each other and with the

sentences imposed in the Magistrate's Court under CR 155, 156, 168, 176, 177 of 2018.

(d) The last six months of Mr. 'Ealelei's sentence shall be suspended on conditions that:

(i) He is not to commit any offences punishable by imprisonment for the period of his suspension;

(ii) He is to report within 48 hours of his release to the offices of the Probation Service at Fasi for registration;

(iii) He is placed on probation for the period of his suspension to live where directed by his Probation Officer; and

(iv) He is to undertake and successfully complete a life skills course as directed by his probation officer during the period of his suspension

[23] Mr. 'Ealelei has been warned that should he fail to comply with any of these conditions during his suspension he may be required to serve out the balance of his sentence.

NUKU'ALOFA: 15 February 2019.


O.G. Paulsen
LORD CHIEF JUSTICE

