

REGINA -v- ALULU, TO'OTA, KISIOMEA, TONAFALEA, BAKELOA

CRIMINAL CASE CRC 147/91MMC

Date of Review: 13th April 1992

REVIEW JUDGEMENT

MURIA ACJ: The learned Chief Magistrate has sent this case to me for review of the sentences he imposed on the four defendants, Jasper To'ota, Darling Tonofalea, Rex Kisiomea and Faeline Bakeloa, each of whom he sentenced to 4 years imprisonment.

Previously in December 1991 the learned Chief Magistrate first dealt with Kelly Alulu, the fifth defendant in this case. Alulu pleaded guilty and he was sentenced to 4 months imprisonment of which 3 months was suspended. When the other four defendants came before the learned Magistrate on 18 February this year, they all pleaded guilty as well and each was sentenced to 4 years imprisonment.

There is clearly a disparity in the sentences passed on Alulu and those passed on the other four defendants. However, for the disparity to be objectionable it must show that one of the two or more defendants receives a more severe sentence than the other and that the difference is not justified by any relevant distinction in their culpability or personal circumstances. That principle of sentencing had been applied in R -v- Church 1985 7 Cr. App: R (s) 370.

There was nothing in this case that could properly be said to distinguish between the criminality of the four defendants and Alulu. Alulu was extremely fortunate to be sentenced to 4 months imprisonment and even more lucky to have 3 months of that sentence suspended for 1 year. This case is clearly one in which the principle set out above applies and in reviewing the sentences passed on the four defendants, I am able to extend to the four defendants the same good fortune given to Alulu.

But before I do that let me say something again about the offence under section 293(a) of the Penal Code. The offence under that provision is committed when a person "breaks and enters .... and commits a felony ..." There is no requirement that the "breaking and entering" must be accompanied with "intent to commit" a felony. Thus the charge brought under section 293(a) will be bad for duplicity if the count alleges

that a person "broke and entered .....with intent to steal therein and did steal therein...." See my comments in my Review Judgements in Crim. Case No. 1245/91/CMC given on 10 January 1992, Crim. Case No. 1167/91/CMC given on 13 January 1992 and Crim. Case No. 1293/91/CMC. The count alleging that each of the four defendants "broke and entered .....with intent to steal and did steal therein ....." in this case is therefore bad for duplicity.

By my powers under section 50(1) of the Magistrates Court Act (Cap.3) I set aside the conviction of each of the four defendants in respect of the "breaking and entering .... with intent to steal therein and did steal therein ....."count and I convict each of them with the offence of "breaking and entering .... and stealing therein ...." which is the offence under s.293(a) of the Penal Code.

Having done so, I now extend the good fortune given to the Alulu to these four defendants and I reduce each of the sentences imposed on Jasper To'ota, Rex Kisiomea and Faeline Bakeloa to one of 4 months imprisonment each in respect of the offence under section 293(a) of the Penal Code and 2 months imprisonment each in respect of the offence under section 78 of the Penal Code. Those sentences are to run concurrent to each other. In so far as Darling Tonofalea is concerned, I reduce his sentence on the storebreaking count to one of 4 months imprisonment.

The total period of sentence imposed on each of the four defendants is therefore 4 months imprisonment of which 2 months is suspended for 1 year. This will enable each of the four defendants to be released as soon as possible.

(G.J.B. Muria)  
ACTING CHIEF JUSTICE