'Eukaliti v Police

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Supreme Court, Nuku'alofa
Ward CJ
Criminal appeal No.510/94

12, 15 August 1994

Criminal laws - housebreaking & theft - sentence
Sentencing imprisonment appropriate - first property offence - suspension

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On an appeal against a sentence of six months imprisonment imposed on a first offender for housebreaking and theft, it was,

Held:

1. When sentencing a first offender who has committed on offence solely against property the Court should consider a sentence that would not immediately result in imprisonment.
2. In particular when a young offender is convicted of any offence the Court should strive to avoid imprisonment.
3. However, there are many exceptions to the general propositions eg. certain aggravating circumstances, overall harm to victim, attitude of defendant, the property broken into or stolen.
4. Matters of contrition, apology and recompense may be powerful matters of mitigation but much may depend on when such matters were expressed.
5. Sentence varied and period of imprisonment suspended for 2 years.

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Cases referred to : Fainga'a v R Ct of Appeal 20/1990
Mafi & Latu v R Ct of Appeal 6/1991
Sailosi v R Ct of Appeal 4/1991

Counsel for Appellant : Mr Niu
Counsel for Respondent : Mrs Taumoepeau

Judgment

On 12th May 1994 the appellant pleaded guilty in the Magistrates' Court to one charge each of housebreaking and theft committed on 19 April 1994. He was sentenced to six months imprisonment and now appeals against that sentence. Lengthy and detailed grounds have been filed which need not be set out in this judgment. They are, in effect, an amplification of the mitigation put to the court below.

The appellant, having helped unload a container, was given a bottle of spirits which he drank. This led to a heavy drinking session, largely of vodka, that lasted some hours. 50 Eventually on his way home, he went to a house to ask for food. Adjacent to the house is a store owned by a village Association and, as he left, the appellant pulled off part of the weather boarding at the back and stole items to a total value of $145. It was raining that night and the damage to the back wall resulted in some of remaining stock being damaged as well. The appellant had been seen and was chased by the people from whom he had requested food and, in the chase, abandoned the stolen items. He was arrested shortly afterwards and, following an initial denial, admitted the offence.

The magistrate was told that the appellant had paid for the items taken and he and his parents had apologised to each of the eight members of the Association and his apology 60 had been accepted. A letter was produced to the court confirming this and one member had indicated they did not wish the prosecution to continue. This Court has been informed that the appellant helped repair the shop and has given up drinking since the offence.

Mr. Niu, for the appellant, in a careful and helpful submission asks this Court to suspend the sentence or substitute a non-custodial sentence.

He cites three Court of Appeal decisions; Fainga'a v R, No.20 of 1990, Mafi and Latu v R, No.6 of 1991 and Sailosi v R, No.4 of 1991. All were delivered on 7 June 1991 and all were appeals against sentence. Mr. Niu asks this Court to take them as authority for the proposition that a first conviction for property offence should not result in a sentence 70 of imprisonment. In all these cases, the Court of Appeal commented on the lack of available alternatives to imprisonment and based its decision on that point. I consider each was decided on its own facts and I cannot accept they are authority for the proposition suggested by Mr Niu. However, having said that, there is certainly plenty of authority that such cases should generally not result in immediate imprisonment.

In broad terms, when sentencing a first offender who has committed an offence solely against property, the court should consider a sentence that would not immediately result in imprisonment. In particular, when a young offender is convicted of any offence the court should strive to avoid prison. At least one of the cases cited (Sailosi v R) started with a sentence of imprisonment on a 16 year old that so effectively disrupted his life that he was left with little incentive to lead an honest life.

However, there are many exceptions to the proposition. The nature of the offence itself and any aggravating circumstances in the manner in which it was committed, the overall harm to the victim and the attitude of the defendant subsequently should all be reflected in the sentence. Some property offences are almost certain to result in imprisonment if committed by an adult offender. Breaking into a dwelling house is an offence where the possible effect on the owner can be the same as an offence of violence and should result in an immediate custodial sentence. Similarly theft of property left unprotected on a farm or in a boat is an offence that may call for a more condign penalty

because of the vulnerability of such property.

In Fainga'a's case, the Court of Appeal appears to be suggesting that the fact the offence was caused by the appellant's over indulgence in alcohol is a matter of mitigation. I am sure that is not the case. Any man who knowingly drinks until he is drunk and, in that state, commits an offence cannot then pray in his aid the fact the drunkeness took away his self control. In the present case, the appellant consumed a great deal of alcohol over a number of hours. The fact that was the cause of the offence aggravates rather than mitigates the case. It certainly cannot assist this appellant.

100 Although, as Mr. Niu correctly points out, this is the appellant's first conviction for such an offence, he has six previous conviction for antisocial conduct stemming from drunkeness. It is clear he has a disregard for the standards of behaviour of normal people. That is confirmed by the information given to this Court that, at the time of the offence, the appellant's wife had gone to Vava'u because of the appellant's drinking.

The Court of Appeal in Fainga'a's case stated that they have frequently heard that the "principal effect of imprisonment in this country is to harden criminal attitudes and merely to complete the education of criminals". Such a suggestion is not unique to Tonga. It is a charge frequently levelled against imprisonment. Taken to its logical conclusion
110 it would mean that all imprisonment is counter productive and should never be ordered. No court likes sending a man to prison. It is a heavy responsibility to bear but, in this case, the magistrate was sentencing a man with clear antisocial tendencies whose criminal activities had just escalated into a much more serious category.

When dealing with any criminal case the court must decide whether or not imprisonment is the appropriate and proper penalty. If it is, the court should then, and only then, consider whether to suspend it. The magistrate, with respect, was correct to consider this was a case for imprisonment. The only question left is whether it should be suspended in this particular case.

120 I have already described this appellant's history of offences. He is 29 years of age, married with 2 children and is an experienced carpenter. Imprisonment will fall hard on the family he should be supporting but this Court has commented more than once that such a factor is not the responsibility of the Court.

It has been urged he has clearly shown contrition and I accept that can be a powerful matter of mitigation. However repentance can cover a very wide spectrum. A man who commits an offence and, before discovery, admits it and tries to put it right deserves a more lenient sentence than the man who, having done nothing to correct the matter, speaks of apology and recompense only after discovery and whilst he is awaiting trial.

130 This appellant was seen and ran away. When he was arrested, he attempted to avoid responsibility by denial at first. His apologies only came after he was charged and when he knew the matter would be coming to Court. The value to him now is limited. It is true the members of the Association have accepted his apology and forgiven him. That reflects well on them but the fact remains the appellant has committed a serious offence and the court has a duty to sentence in the public interest as well as to protect individuals.

Only one matter adds to the case as it was when it was heard by the magistrate. When sentencing, the magistrates' court was told the appellant had stopped drinking. Any magistrate hears that said so often by penitent criminals that he is wise to place little
140 weight on it when, as here, less than a month had passed since the offence. Mr. Niu tells

the Court that he is still not drinking some four months later; his wife has returned to him in consequence and the family is reunited.

That is, of course, easily said and hard to disprove. Whether it is true or not, I am willing to say that it just tips the balance in the appellant's favour. I shall suspend the sentence for 2 years. I have no doubt that, if it is not true or if the appellant loses his resolve to stop drinking, he will offend again and that will mean he must serve his sentence in addition to any other. I hope it is true and that he will realise that his family need him to stay off drink and to behave like a normal responsible member of society but he must realise the consequence of a further offence is inevitable prison. He has effectively been given a chance but the nature of the penalty is that is must be his last chance.

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He is lucky enough to be earning good money as a carpenter. I see no reason why he should not also pay a fine on the housebreaking charge of $200 or one months imprisonment in default.

Appeal dismissed; sentence varied to six months imprisonment suspended 2 years on each count concurrent and fined $200 or 1 months imprisonment in default of payment on count one. He has two weeks in which to pay the fine.