IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)

NO:

BETWEEN TRAVEL TANGATOPOTO
APPELLANT

AND POLICE
RESPONDENT

Mr MacAnally for Appellant

Sergeant Howard for Respondent

Mr Browne for Probation Service

Hearing: 2 March 2001

Delivered 8 March 2001

Judgment of Chief Justice

This is an appeal granted by leave against three sentences of imprisonment imposed on the appellant on 28 October 1999, 17 March 2000 and 21 July 2000 by the Court sitting in Atiu.

The first conviction was on a charge of burglary of the Atiu Development Corporation store at Arcora on the night of 20 September 1999. The appellant and another broke into the store and stole a number of items of the value of $392.00. The appellant was soon apprehended by the police and readily admitted his part in the burglary. Some items were recovered but there remained items of the value of $279.00 unrecovered.

On 28 October the appellant pleaded guilty and was sentenced to two years imprisonment and ordered to pay restitution of $139.50. He was immediately released from custody on condition that he labour for the term of the sentence on public works. Conditions imposed on the appellant were that he not buy or drink intoxicating liquor, not leave Atiu and not associate with the other accused.

On 15 March 2000 with the same associate the appellant broke into a store at Teenui and stole a number of items of the value of $327.00. Again the appellant was soon apprehended by the police and readily admitted his part in the burglary. On the charge of burglary the appellant leaded guilty and on 17 March 2000 he was sentenced to three years imprisonment and ordered to pay $74.85 restitution.

Again he was immediately released from custody on condition of labouring on public works for the term of the imprisonment.

On 21 July 2000 the appellant on his own entered a house at Tengatengi. He was charged with being found by night without lawful excuse but in circumstances that did not disclose an intention to commit any other offence in a dwelling house. He pleaded guilty and was sentenced to two months in prison to commence when the previous sentence of three years expired. His release from custody followed on the same terms but on the additional terms that he was not to be seen on the property in question, was to be subject to a curfew from 6pm to 6 am and not to consume alcoholic drink. It is said that the appellant had gone to the house to see his girlfriend. Unlike the other two cases there is no summary of facts or other information about the offence.

The appellant was born on 21 July 1983. He was 16 years at the time of the first offence. That was the first time he had appeared on any charge.

There was no representation by a solicitor or any other person on the three occasions he was sentenced. No probation report was sought or made available to the Court.

On each occasion the appellant readily admitted his culpability and pleaded guilty at the earliest opportunity. The appellant has complied with conditions of labour on public works. He has now carried that out for more than twelve months.

I have had the advantage of submissions from Counsel and have received a full probation report. The appellant comes from a broken marriage. He was raised by his grandparents who died in 1998 and 1999. His natural mother married for a second time in Rarotonga on 14 December 2000. The appellant was given leave to come to Rarotonga to attend that wedding. Following that he was permitted to remain in Rarotonga on bail under the protection and care of his mother and step-father. He has responded well to this care. He is in employment and is reported to be a satisfactory employee. He has complied with the terms of his bail.

In the Cook Islands there is no statutory provision, as there is in New Zealand, about the requirement of a probation report before sentencing, the requirement of legal representation before sentencing to imprisonment, the guidelines for sentencing for property offences (which militate against imprisonment) and the direction against imprisonment for young offenders. There are special reasons for the absence of some of these provisions arising out of the remoteness of the outer islands and the unavailability of probation and legal services in these places.

Without these statutory provisions there are underlying principles which embody the same policies and ideals in sentencing. It is clearly preferable to avoid imprisoning young offenders especially if they have not offended before. Before sentencing the Court will seek as much information about the offence and the offender as it can. If a probation report is a practical source of that information it is desirable that one should be obtained. Likewise a representative of the offender, whether a solicitor or a layperson, can give information and bring to the attention of the court mitigating circumstances helpful to the decision. This is particularly the case when the offender is young and unlikely to be able to articulate with confidence before a Court such matters as may mitigate the offence. The first offender is entitled to a specially careful consideration before a sentence of imprisonment is imposed even when the custodial effect may be avoided by release to work on the public works. When the first offender is a youth of 16 years there is even more need to give careful consideration to the question of imprisonment.

The final point is that although burglary is a serious offence and carries a substantial maximum penalty it is not as serious as an offence which have involved violence to the person. In this case the two offences of burglary were not serious in themselves. There was no threat or danger to any person. A relatively small number of items of little value were taken and some of these were recovered.

The problem facing the Court in this case was the repeated offending, particularly the second offence which occurred shortly after the first and was of the same nature and quality. That was a very deliberate and contemptuous act which indicated to the Court that the appellant had not accepted the warning that the first sentence and appearance before the Court entailed. He was deliberately ignoring the lesson he had received from the Court.

The third offence was of a different kind which did not involve any criminal intent other than the entering of the house. The maximum penalty is only three months imprisonment. But it may be said to be another instance of the offender's disregard of the law in spite of the penalties which he was under.

In imposing sentence an important aspect is deterrence. The punishment is to deter the offender from repeating the offence or any offence. It is also to deter others from doing similar offending. This is where the Court in a locality may wish to make it clear by a severe punishment that some offending such as burglary is not to be condoned. This is particularly the case when there has been a number of offences of the same kind carried out on the locality. I should record that there is no suggestion in this case that this was a consideration in the sentencing of the appellant. That principle or aspect of punishment has to be balanced with the aspects of rehabilitation, and prevention in respect of the particular offender. It is better to turn the young or first offender away from offending and the life style, which has, led him or her into offending. Imprisonment is less likely to do that. It seems rather that imprisonment may confirm an offender in his path by bringing him or her into contact with other criminals. That is not to say that the young offender is to escape the final sanction of imprisonment but it ought to be regarded as the final sanction.

On this appeal I have concluded that in light of the appellant's age, his plea of guilty, the circumstances of the offence the application of the appropriate principles on the occasion of his first appearance in the Courts the sentence imposed was inappropriate and more than was warranted. Having imposed a sentence of imprisonment the first time the Court had limited itself and the sanctions available on the second occasion. There was then no alternative to a sentence of imprisonment. If a lesser sentence had been imposed the first time than the need for a sentence of imprisonment the second time would not have been mandated. It was not in my opinion appropriate on that occasion even though this was a second offence committed in a short time after the first.

The third offence was relatively minor. It did not call for imprisonment let alone a cumulative sentence. Again however the Court had little choice because of the approach it had taken before.

The appeal must be allowed and the sentences of imprisonment quashed. The difficulty in a case like this is what is the appropriate sentence at this time when a long time has passed since the original sentencing and the offender has served, in some form, a substantial part of the sentence.

The appropriate sentence on the first offence would have been probation. That might have avoided the second offence. Assuming that it did not, the appropriate sentence for the second offence would have been community service or possibly a short sentence of imprisonment as a warning. The third offence did not warrant more than a fine or possibly some additional probation or community service. But the appellant has now spent more than a year in work on public service as a punishment. That is probably a greater punishment than he would have suffered if he had been undergoing probation or community service. The probation report recommends that he now undertake a period of 18 months probationary supervision. That is in all probability the term that would have been properly imposed in October 1999 which would have expired in May 2001. The benefits of probationary supervision have not been available to the appellant. I am sure he would have benefited from it. Indeed he would still benefit from it even though he has apparently settled down and benefited from the care and support of his family in Rarotonga.

The minimum sentence of probation is 1 year. Anything more will amount to more punishment than is appropriate in this particular case. I believe that supervision is important and will be beneficial to the appellant.

The result is that the appeal is allowed and the sentences of imprisonment imposed on the informations 4/99, 3/2000 and 11/2000 are quashed. In lieu the appellant is sentenced to one year's supervision on the following special conditions:

1. Not to purchase or consume alcohol
2. Not to be abroad during the hours of 7.30 pm to 6.00 am
3. Not to enter any licensed premises other than in the course of his employment with the Manuia Beach Resort Hotel or any other employment approved by the Probation Officer.
4. To live and work as directed by the Probation Officer.
5. To pay the restitution money a directed by the Probation Officer.

That sentence is applied to informations 4/1999 and 3/2000. No further or replacing sentence is imposed on information 11/2000 but the order for the payment of Court fee stands.
The orders for restitution already made in the Court on the informations and the orders for payment of Court fees stand and are confirmed.

I record that I have received no information about the sentencing of the appellant's associate in the two earlier charges. I have dealt with this appeal on the information about the appellant alone.

L M Greig CJ