

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

JP APPEAL: 2/09

IN THE MATTER

of Section 26(2) of the
Judicature Act 1980-1981

BETWEEN

JONATHAN MOKOHA
of Rarotonga,
Unemployed
(Appellant)

AND

THE CROWN
(Respondent)

Date: 19 April 2010
Court: Weston J
Appearances: Mr Charles Petero for Appellant
Solicitor General for the Respondent

DECISION OF WESTON J

- [1] This is an appeal against a sentence imposed on Mr Mokoha by 3 JPs. The decision of the 3 JPs records the outcome of their decision but not their reasoning. It is in the following terms and I quote "Jonathan Mokoha convicted and sentenced to 12 months imprisonment on each charge of burglary and 6 months on the charge of escaping from lawful custody, to be served accumulating a total of 2 years and 6 months imprisonment. The Court also takes into consideration the 1 month served on remand to be deducted from the total imprisonment term of 2 years and 6 months. Therefore you are to serve a total of 2 years and 5 months imprisonment as of today 26 August 2009".

- [2] Mr Petero raises two issues in support of his appeal. First he says, there were no reasons given in support of the JPs' decision. Secondly, he says, the overall sentence was manifestly excessive.
- [3] I now set out some background details. On the 15th of June 2009 Mr Mokoha escaped from custody in prison where he was already serving a sentence. He was able to do so, he says, and the Police summary accepts, because a Prison Officer allowed him to leave the prison. While he was out of the prison he entered PTS Plumbing and checked the till. There was nothing in there but his fingerprints were subsequently found. He was charged with burglary in relation to that incident. A short while later, he entered the Spaghetti House and he took a bottle of gin from there. Having done so, he returned to the prison where he and a cell mate consumed the gin.
- [4] Shortly after his first appearance the defendant pleaded guilty to all three charges. The probation report is dated 5 August 2009. It sets out the defendant's long history of offending. The Crown submissions which were filed the day before the hearing sought a total imprisonment term of 3 years. Sentencing occurred the next day on 26 October. I'm advised from the bar that the hearing occupied some two or three hours and that the JP's adjourned on a number of occasions during the hearing to confer. Nevertheless, the only record of the sentencing is that set out already above.
- [5] I have had the benefit of written submissions from both Mr Petero and Mr Solicitor on behalf of the Crown and I also had the benefit of being able to discuss issues with them. Mr Petero emphasizes the five aims and objectives of sentencing and put at the forefront of his submissions the question of rehabilitation. As I read his submissions, he suggested the appropriate outcome was an overall sentence of 1½ years.
- [6] The Crown submissions in reply set out the background to the offending but essentially sought to uphold the decision of the Justices. A copy of the


recent New Zealand Court of Appeal decision in Hessel was attached and this deals with the question of discounts available for an early guilty plea. While the New Zealand sentencing regime is conducted by reference to specific legislation in New Zealand, the Courts in the Cook Islands traditionally look to New Zealand for assistance in sentencing matters. In this case it seems to me a reasonable outcome that the defendant should receive a one third reduction resulting from a guilty plea at the first reasonable opportunity. Mr Solicitor agrees that that is correct.

- [7] It seems to me the real issue in this case is whether the sentences on the three charges should have been treated concurrently or cumulatively. Mr Solicitor candidly admitted this was the first time he was aware that cumulative sentences had been imposed. Mr Petero was not aware of any other incident.
- [8] There are no particular reasons given in the Crown submissions before the Justices supporting such an outcome other than a reference to the defendant's extensive criminal history. Certainly there is nothing in the decision of the JPs that explains why they took this approach. I do observe, however, that the Crown asked for 3 years before the Justices and that is ultimately what they gave subject to a discount for the early guilty plea.
- [9] I do not think this is an appropriate case where the sentences should be approached cumulatively. Rather, I think the usual practice of looking at the individual offences and then imposing them concurrently should apply here.
- [10] The most serious offending relates to the burglary. Mr Petero accepted the two charges should be treated effectively on the same basis notwithstanding a slightly different outcome to the defendant's efforts. I believe an appropriate starting point for offending of this character is 12 months. Mr Solicitor accepted that this offending was at the lower end of the scale.

- [11] What then are the aggravating features? It seems the main features are the significant history of offending over the last 5 years. While the defendant is a young man, he nevertheless has racked up a depressingly long list of convictions, many of which are burglary but not all of them.
- [12] It seems to me that, taking those into account, a further 6 months would be added to the 12 months period making a total of 18 months. From this total there will then be a discount of one third taking the overall sentence back to 12 months for each of the 2 burglary charges.
- [13] As it happens, that is what the Justices did as well. The defendant was sentenced to 12 months imprisonment on each charge of burglary. It seems therefore we agree on the essential sentence that should be imposed. As I have already said, however, I am not satisfied that it was appropriate to order the three sentences to be served cumulatively and in that, and with respect, I believe the Justices were quite wrong.
- [14] That sentence therefore should be set aside on the basis that the defendant is sentenced to 12 months on each of the 2 burglary charges and 6 months on the charge of escaping from lawful custody. These sentences are to be served concurrently.
- [15] Having heard further submissions I order that there be a term of 12 months probationary supervision to follow the term of imprisonment.
- [16] In dealing with the sentence above I have not specifically addressed the very unusual circumstances in which the defendant came to leave prison. I have been advised that the Prison Officer concerned was dismissed and is now facing criminal charges. It is difficult in those circumstances to think how those circumstances might impact on the current sentence.
- [17] While the Prison Officer provided the opportunity for the offending to occur, it was the defendant who undertook the offending and must be held responsible for it. Having said that, and if I was facing a serious argument

that this offending should be approached cumulatively, it seems to me that those unusual circumstances are another reason why these three sentences should be approached concurrently rather than cumulatively.

- [18] I have raised the question of costs but am advised that no orders as to costs need to be made. If however I am wrong as to that, I reserve leave the question of cost to be addressed subsequently.



Weston J