IN THE COURT OF APPEAL OF NIUE

Application No. CR35/2012

IN THE MATTER OF An appeal pursuant to section 75 of the Niue Amendment Act (No. 2) 1969

LIONEL TAHEGA

Appellant

NIUE POLICE

Respondent

Coram: Justice W W Isaac, presiding
Justice N Smith
Justice C T Coxhead

Hearing: 15 May 2012 at Wellington

Appearances: Mr K McCoy and Mr M Starling for the Appellant
Mr G J Burston for the Respondent

Judgment: 25 June 2012

JUDGMENT OF THE COURT

A The appeal is upheld in part

Introduction

[1] This is an appeal against the sentence of Chief Justice Savage dated 22 March 2012 at Alofi.

[2] In sentencing Lionel Tahega, the above named appellant, Savage CJ concluded:

(a) Mr Tahega be sentenced to two years and five months in prison; and

(b) Restitution be ordered in the sum of $3,344.00.

Case for the appellant

[3] Counsel for the appellant submits that the sentence imposed by Chief Justice Savage, of two years and five months imprisonment, is manifestly excessive on the grounds that:

(a) The starting point of three years and six months imposed by the learned judge was manifestly excessive;
(b) The learned judge failed to properly discount the starting point by one third to reflect the appellant's guilty plea;
(c) The learned judge failed to make any allowance for mitigating factors following this guilty plea;
(d) The learned judge failed to address the submission regarding the appropriateness of an order under s 28 Niue Act 1966; and
(e) In light of the circumstances, ordering the appellant to pay restitution of $3344 is wrong in principle.

[4] It is submitted that given the circumstances, the starting point adopted by the Chief Justice was too high, on the grounds that the offending was not "premeditated well in advance", and furthermore the fire was only minor, and merely damaged two doors and the surrounding framework, totalling $3,344 worth of damage.

[5] Counsel for the appellant submits that the precedent established in New Zealand case law reiterates that a starting point of three years and six months is manifestly excessive.[1]

[1] See New Zealand cases referred to in the appellant's submissions regarding sentencing for arson: *R v Gilchrist* CA 429/90, 15 April 1991; *Lefebvre v Police* HC Christchurch CRI-200802907, 10 July

[6] The appellant contends that the law affords him a discounted starting point of one third on the basis that he pleaded guilty at the first available opportunity.[2] It is also contended that the Chief Justice accepted that the appellant was entitled to the fullest discount, however this intention was not implemented.

[7] It is submitted that the judge erred in the mathematics of determining the starting point after the one third discount was applied. The appellant submits that the correct amount of time should be 27 months, not 29 months, on the basis that a 42 month starting point, minus one third amounts to 28 months. If another month is subtracted to reflect his time in custody, the total should be 27 months, and not the 29 months stated by the judge.

[8] It is submitted that the sentencing judge failed to make any allowance for mitigating factors, including the circumstances surrounding the appellant's upbringing, the actions of his father, and the position of the appellant as a pawn in a long standing feud between his father and the father of Asian Talafasi, whose house was the target of this arson.

[9] Counsel for the appellant contends that the method used in starting the fire, and the injuries sustained, illustrates that this act was impulsive and unplanned.

[10] It is further submitted that the appellant's age is a mitigating factor. He was only 19 years old at the time. His genuine remorse for his actions should also be considered.

[11] It is submitted that the shooting and injuring of the appellant should be considered as mitigating factors on the grounds that this act was carried out by Asian Talafasi in retaliation for the arson.

[12] Counsel for the appellant submits that the judge should have considered a non-custodial sentence, as provided by s 28 Niue Act 1966, as a sentencing option. Section 28 states that a judge may at any time discharge the prisoner from custody on the condition that they labour on public works in Niue for the term of which they have been sentenced. It is submitted that a sentence of this nature would still hold the appellant accountable for his actions and act as a deterrent, but because it would be community based, it would also be rehabilitating.

2008; *R v O'Sullivan* HC Whangarei CRI-2007-088-5182, 19 August 2008; *R v Wonnacott* [2009] NZCA 414; *R v Chadderton* CA464/99, 27 March 2000.

[2] *Hessell v R* [2010] NZSC 135.

[13] In relation to the sentence of reparation, it is submitted that the Court must have regard to the ability and the means of the defendant to pay, and in this instance the appellant is young, unemployed and has no assets.

[14] It is further submitted, that the judge failed to reduce the length of the imprisonment in recognition of the order of reparation.

[15] Counsel for the appellant also contends that the judge failed to address the submission that Asian Talafasi ought to institute civil proceedings against the appellant to recover the cost of repairs. It is submitted that this would have allowed the appellant to then file a counter claim against Asian Talafasi because of the shooting.

[16] Consequently, it is submitted that if an order for reparation is made, a further discount is necessary in order to recognise this.

[17] In conclusion, counsel for the appellant submits that a final sentence, ranging between six and twelve months would be appropriate, and no order for reparation should be made. Furthermore, after six months in custody, the Court should order that the remainder of the sentence be non-custodial, as provided for by s 28 of the Niue Act 1966.

Case for the respondent

[18] Counsel for the respondent submits that the sentence of three and a half years imprisonment was not manifestly excessive on the basis that the appellant set fire to a house he knew was occupied, and, as the Chief Justice noted in sentencing, this is "near the top end of seriousness for arson".[3]

[19] Further, it is submitted that this sentence is a necessary deterrent in light of the recent spate of fires in the village.

[3] *Police v Tahega* Minutes of the Niue High Court (Criminal Division) Thursday 22 March 2012, Chief Justice Patrick Savage presiding.

[20] Counsel for the respondent states that there is no tariff case for sentencing of arson cases in New Zealand, however, the principle appellate court decisions of *R v Gilchrist* and *Howarth v R*[4] provide some guidance.

[21] *Howarth v R* sets the starting point for arson sentences at three to five years, and the respondent submits that given the seriousness of the present case, namely setting fire to a house at night in which there was a sleeping occupant, a starting point of three and a half years is appropriate.

[22] It is submitted that a discount of nearly 30 per cent is an appropriate reflection of the mitigating factors, including the guilty plea, the appellant's youth, and his troubled upbringing.

[23] Counsel for the respondent asserts that in light of the seriousness of the offending, consideration of s 28 Niue Act 1966 is inappropriate, on the grounds that a sentence other than imprisonment would be "manifestly inadequate".

[24] Counsel for the respondent submits that under s 287(1) of the Niue Act an order for restitution may be enforced in the same manner as a fine.[5] The respondent maintains that the guilty plea establishes liability for the damage caused, and this judgment debt allows the victim to avoid a civil process for recovery, which is also in the public interest.

[25] It is further submitted that the reparation order cannot be given much weight by way of mitigation, on the basis that there appears to be no prospect of the debt being repaid during the term of the appellant's sentence.

An approach to sentencing in Niue

[26] This decision provides an opportunity for the Court to set some guiding principles as to the approach for sentencing in a case where the accused pleads guilty. The intention is to promote consistency in sentencing, clarity for the courts, court users, and victims.

Assistance of New Zealand authorities

[4] *Howarth v R* [2010] NZCA 523.
[5] Niue Act 1966, ss 287(3) and 241.

[27] Counsel for the applicant has referred us to a number of New Zealand decisions with regards to the approach to be adopted when sentencing.

[28] What must be remembered is that New Zealand sentencing cases are, in the main, based on the New Zealand Sentencing Act 2002. While some guidance may be taken from New Zealand decisions, it is important to recognise that Niue decisions must be decided within the Niue context and based on Niue law.

[29] Whereas New Zealand sentencing law is highly prescribed by the New Zealand Sentencing Act 2002, Niue does not have a Sentencing Act. Nevertheless, New Zealand and other Pacific jurisprudence do provide this Court with a valuable point of reference.

Any sentencing approach must still allow discretion

[30] With any approach it is important to allow discretion for a proper judicial evaluation of individual cases. The circumstances of an offence and of the offender present an almost infinite variety from case to case. In setting any guidelines or approach to sentencing, a sentence must retain some discretion within the guidelines, or even the ability to depart from them if the particular circumstances of the case justify such departure. The treatment of each case must depend on its facts.

[31] Sentencing is not a mathematical exercise, but requires proper judicial evaluation of individual cases.

[32] In our view, the following three steps provide a simple approach to sentencing:

(1) First Step - The first step calls for the sentencing judge to establish a provisional sentence having considered the aggravating and mitigating factors relevant to the offending for an adult offender. Here the judge will evaluate relevant matters taking into account a combination of features reflecting the culpability of the offending together with aggravating or mitigating factors relating to the offending and overall criminality involved. This is commonly referred to as the starting point.

(2) Second Step – Once the starting point is fixed, the second step then takes account of aggravating and mitigating factors relating to the offender's personal circumstances. For example, prior offending of a similar nature may be an aggravating factor and an offender's genuine remorse may be a mitigating factor.

An evaluation of these factors may result in an increase or a reduction from the starting point.

(3) Third Step - Where a guilty plea has been entered, a reduction credit for the guilty plea can be granted. Making this a separate step ensures that it is clear that the defendant is getting credit for the guilty plea, and exactly what that credit is.

[33] The credit that is given for a guilty plea must reflect all the circumstances in which the plea is entered, including whether it is truly to be regarded as an early or late plea, and the strength of the prosecution's case. Consideration of all relevant circumstances and factors will identify the extent of the true litigatory effect of the plea.

[34] It is well recognised that there are benefits which flow from a guilty plea. We do not intend to traverse all of them, however do note that a guilty plea benefits the efficient administration of justice. Along with avoiding the need for a trial, it saves the Government costs associated with the judiciary in providing prosecution and defence services, as well as the time of those who would otherwise had to participate in the trial process. There are also benefits in saving the fees that would otherwise have to be paid to witnesses, and other costs associated with the use of the court facility.

[35] In addition to savings in public expenditure and decreasing demand on State resources, the social utility of guilty pleas provides benefits for witnesses, and in particular for victims, who are spared the stress of giving evidence in the adversarial context of a criminal trial. A guilty plea will also often assist victims and their families emotionally by the acknowledgment of responsibility for the offending.

[36] While a person should be given some credit for pleading guilty, it is generally accepted in other jurisdictions, and in particular New Zealand, that the maximum reduction for a guilty plea should not exceed 25 per cent.[6]

What factors should the sentencing judge take into account?

[37] There will be an infinite number of mitigating or aggravating factors that the Court could turn its mind to. These will be case-specific.

[38] Factors we would expect the Court to take into account when sentencing include: the age of offender; whether the offender has pleaded guilty, and if so at what stage the

[6] *Hessell v R* [2010] NZSC 135.

guilty plea was made; the conduct of the victim; the offender's involvement in the offence; any remorse shown by the offender; any evidence of the offender's previous good character; any evidence of premeditation on the part of the offender and, if so, the level of premeditation involved; and the number, seriousness, date, relevance, and nature of any previous convictions of the offender, and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time.

[39] This list of factors is not exhaustive, nor is it noted in terms of priority. In fact, we would expect that the weight to be given to each factor will be considered and determined by the Court in each case.

[40] Further, it is important to note that nothing prevents the Court from taking into account other aggravating or mitigating factors as appropriate.

Step 1 – the starting point in this case

[41] The starting point given by the High Court in this case was three and a half years. We think this was excessive.

[42] The maximum sentence for arson in this jurisdiction is five years. Counsel referred us to a number of New Zealand authorities where the courts had imposed a starting point of three to five years imprisonment for arson. The offence of arson carries a maximum sentence of 14 years in New Zealand.

[43] While it is acknowledged that a great deal of assistance can sometimes be gained from looking at sentencing cases in other jurisdictions, due to the fact-specific nature of each case, it is important to recognise that some comparisons will be of limited value.

[44] The New Zealand Court of Appeal decision *Howarth v R*[7] is most helpful in providing an overview of New Zealand authorities relied on to ascertain an appropriate starting point for sentencing in cases of arson. *Howarth v R*, refers to cases where a starting point in the vicinity of five years imprisonment was adopted in arson cases where there was risk to life, although it was acknowledged that a judge had it within a judge's discretion to take a starting point of eight years in such a case.[8]

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[7] *Howarth v R* [2010] NZCA 523.
[8] Paragraph 48.

[45] The New Zealand Court of Appeal's review of New Zealand authorities suggests that a starting point for an arson sentence in the seven to eight year range is very rare. Other authorities reviewed adopted starting points in the three to five year range. It is important to remember that this is based on an available maximum sentence of imprisonment of 14 years for this crime.

[46] Crown counsel suggested that for the maximum term of five years to be imposed for arson, there would have to be full destruction of property and loss of life, which could of course also result in an additional charge of murder.[9]

[47] In the situation before the Court in this instance, although it is clear that there was risk to life, the damage to the property was limited.

[48] In our view the nature and extent of the damage was not at the higher end, in that the house was not burnt to the ground. The extent of the damage was limited to a door and its surrounds.

[49] Further, the financial cost of the damage was also not at the higher end. The total cost of damage was $3,344.

[50] However, in our view, what removes this arson from simply the destruction of property is that it happened in a volatile environment following a slate of arsons. It took place in the dark of night with the appellant deliberately seeking out the property in question and setting fire to it knowing it was inhabited. These factors cannot be overlooked when determining the starting point.

[51] As a consequence when we balance these aggravating factors against the fact that both the physical and financial damage was relatively minor, and taking some guidance from New Zealand cases, it is our assessment that the starting point should have been three years.

Steps 2 & 3

[52] In all other respects we concur with the Chief Justice's assessment.

[53] Clearly the Chief Justice considered the mitigating factors of the defendant's unfortunate up-bringing, his youth and how easily he was misled.

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[9] *Tahega v Police* Minutes of the Niue Court of Appeal, Tuesday 15 May 2012, Justice W W Isaac presiding, along with NF Smith J and CT Coxhead J, at 8.

[54] These mitigating factors were balanced against the defendant's previous offending, particularly his involvement in previous arson offences.

[55] In our view, the High Court has combined steps two and three of the approach set out above. We see nothing wrong with this. That is, the Judge has evaluated mitigating and aggravating factors along with the guilty plea to arrive at a discount of some 30 per cent on his starting point of three and a half years.

[56] As we have already noted, a guilty plea should, at the maximum, mean a 25 per cent reduction in sentence. The total reduction in this matter was 30 per cent. Based on a 25 per cent maximum possible reduction, there was a further reduction by the Judge taking into account mitigating and aggravating factors. That reduction of five per cent, or one month, was well within the Court's discretion.

[57] While we agree with the factors that have been taken into account and the reduction assessed, a clearer approach would have been to first establish a provisional sentence, or starting point, and then provide a reduction or increase taking into account the mitigating and aggravating factors, and finally to provide a clear reduction for the guilty plea.

[58] We agree with the one month reduction granted by the High Court for the time spent in custody and the mitigating circumstances, and also the 12 month reduction for his guilty plea. On this basis, with a starting point of three years, we arrive at a final sentence of two years and one month.

Injuries to the defendant

[59] We do wish to make specific mention of one issue that the appellant submits the High Court failed to take into consideration.

[60] Counsel submitted that the shooting of the appellant, and the injuries that he sustained, should be considered as mitigating factors on the grounds that this act was carried out by Asian Talafasi in retaliation for the arson.

[61] In our view, this asks the Court to give the appellant a reduction in his sentence for suffering injuries in the course of committing a criminal offence.

[62] We acknowledge that the appellant did suffer serious injuries. However, the person who caused those injuries has been charged, convicted and sentenced. There lies the consequence with regard to the perpetrator of those injuries.

[63] We see this situation as being somewhat different to the case *R v Petricevic*[10] referred to us by counsel. In that case, the offending against Petricevic and his family occurred some time after the initial offending - not during the course of that event. Further, it is unclear whether the perpetrators in that case had already been convicted and sentenced, as has happened in this case.

[64] We are not of the view that the injuries suffered in the course of committing this criminal offence should be considered as a mitigating factor in sentencing, especially given the perpetrator of the shooting has already been convicted and sentenced.

Section 28 Niue Act 1966;

[65] As noted above, counsel for the appellant submits that the judge should have considered a non-custodial sentence as a sentencing option, as provided for by s 28 Niue Act 1966.

[66] Section 28 of the Niue Act 1966 states:

> **28 Labour instead of imprisonment**
>
> (1) Any person sentenced to imprisonment or committed to prison in Niue may, by order of a judge of the High Court made either at the time of sentence or committal or at any time thereafter, be discharged from custody on condition that he labours on public works in Niue for the term or the residue of the term for which he has been so sentenced or committed.
>
> (2) Every prisoner so discharged shall perform the labour so appointed for him under the control and subject to the direction of some officer nominated for that purpose by [the Premier].
>
> (3) If any prisoner so discharged makes default in the due performance of the labour so appointed for him, or is guilty of any insubordination or other misconduct, whether in respect of that labour or otherwise, he may be arrested without warrant by any officer of police or of prisons; and a judge of the High Court may in his discretion (without the necessity of any judicial inquiry) revoke the discharge of that prisoner and commit him to prism for a period equal to that for which he would have been imprisoned subsequent to the order of discharge had no such order been made, with such deduction (if any) as the judge thinks fit, having regard to the seriousness of the default, insubordination, or misconduct, and to any labour duly performed by the prisoner in accordance with the conditions of his discharge.

[10] *R v Petricevic* [2012] NZHC 785.

(4) Where pursuant to subsection (3) of this section a prisoner is committed to prism for a term expiring before the date on which, if he had not been discharged under this section, the original period of imprisonment would have expired, then, on the expiration of the term for which he is committed pursuant to that subsection, the order of discharge made under subsection (1) of this section and the provisions of subsections (2) and (3) of this section shall again apply to him for the residue of the term for which he was originally sentenced or committed.

[67] It is clear from the minutes of the case that the Chief Justice did turn his mind to this section, and it was well within his discretion to do so. However in his view, the circumstances and seriousness of the offending meant that consideration of s 28 was not warranted.

[68] We agree with the Chief Justice on this point.

Compensation for loss of property

[69] Section 287(1) of the Niue Act states:

287 Compensation for loss of property –

(1) On the conviction of any person for any offence, the High Court may order the offender to pay to any person such sum as it thinks fit by way of compensation for any loss or damage to property suffered by that person through or by means of the offence.

(2) Where on the arrest of the offender any money was taken from him, the High Court may in its discretion order the whole or any part of the money to be applied to any such payment.

(3) Any order for payment under this section may be enforced in the same manner as a fine.

(4) An order under this section shall not affect the right of any person to recover by civil proceedings any sum in excess of the amount recovered under the order.

[70] The obvious advantage of this section is that the victim does not have to take civil proceedings in order to prove the debt. We agree with the Crown submission that it is not in the public interest for the victim to be forced to take action in the civil jurisdiction to establish liability for the damage to his house due to arson.

[71] Section 287(3) provides that an order for compensation may be enforced in the same manner as a fine.

[72] In our view, the compensation in effect constitutes a judgment debt and is enforced as such pursuant to s 241 of the Niue Act 1966 which states:

Enforcement of fines

(1) *Every fine imposed upon any person by the High Court shall constitute a judgment debt due by that person to the Crown*, and payment thereof shall be enforceable and recoverable accordingly by writ of sale or any other civil process of execution in the same manner in all respects as if the debt had been recovered in civil proceedings at the suit of the Crown.

(2) Any person upon whom any such fine has been imposed may, by warrant under the seal of the High Court, be committed to prison by a Judge of that Court for a period not exceeding 6 months, but shall be entitled to be discharged from imprisonment on payment of the fine.

(3) When any person has been so committed to prison, no proceedings or further proceedings shall thereafter be taken for the enforcement of the fine by way of civil process under this section.

(Emphasis added)

[73] We recognised the appellant's limited capacity to make repayment due to imprisonment and losing his employment. However, the appellant is not being asked to repay the amount by weekly payments as is common with reparation orders. When and how the compensation order will be enforced is something for the victim to pursue if at all.

[74] This debt is somewhat different to a reparation order in New Zealand. In New Zealand reparation does not constitute a judgment debt as such.

[75] We do not think that in imposing the compensation order there should be a discount to the imposed imprisonment.

[76] In our view the Chief Justice was within his discretion to impose the compensation order in the manner he did.

Decision

[77] We therefore uphold the appeal in part. We agree that the starting point of three and a half years was excessive. In all other respects we concur with the Chief Justice.

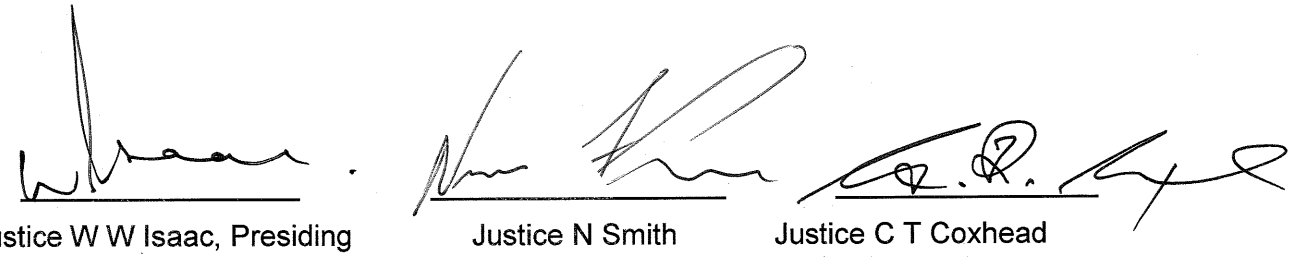
[78] The sentence to be imposed is therefore:

(a) Mr Tahega be sentenced to two years and one month in prison; and

(b) Compensation be ordered in the sum of $3,344.00.

[79] A copy of this decision is to be sent to all parties.

Dated the 25th day of June 2012



Justice W W Isaac, Presiding Justice N Smith Justice C T Coxhead