Sentence Transcript of sentencing remarks

In passing sentence on the three of you, I accept that the first accused, Holani, may well have been the principal in this offence and, without his involvement, the offences could not have occurred. He is outside the jurisdiction and may not return to face trial.

I also note that Lewis CJ has sentenced another offender, Tuineau. I heard nothing of his involvement during the evidence before me but I note he was charged with one offence contrary to section 210(1)(e) and one of receiving stolen goods. Although the indictment on the file is marked in Lewis CJ's handwriting "On 28/7/97 Crown accepts a plea on count two only and seeks to proceed on that count only", there is an Order by Lewis CJ bearing the same date in which the accused is convicted on his own confession on both counts and sentenced to a fine of $10.00 on the Customs offence and a suspended sentence of imprisonment for receiving.

I regard Vakalahi as the more involved because of his more responsible position in the company. I do not distinguish between the other two.

Theft by an employee involves serious breach of trust that strikes at the very basis of business and, as such, will normally be punished by a sentence of immediate imprisonment. However, I intend to suspend the sentence in all your cases because you have had to wait a very long time for the conclusion of this case through no fault of your own and the threat of the sentence has been over you all that time. More important in this case is the extraordinary situation that the company from which you stole still does not accept it has lost anything and has continued to employ you all in the same capacity.

Counsel for the Crown has submitted that the court has no discretion as to the sentence on the Customs offences and must impose a sentence equal to three times the value of the goods for each conviction under section 210. I consider that places the court in an untenable position and I shall pass what I consider the proper penalty for those offences and add my reasons in writing later today.

None of you has any previous conviction and I proceed on the basis that the evidence related to this single incident.

Vakalahi: Counts 1 and 2: $1,000.00 fine or 4 months imprisonment in default of payment on each count

Count 3: 1 year imprisonment suspended for 1 year

Polelei and Fiu: Each of you is sentenced as follows:

Counts 1 and 2: $750.00 fine or 3 months imprisonment in default of payment on each count

Count 3: 1 year imprisonment suspended for 1 year

All accused shall have one month to pay. (Suspended sentence explained)

I now give my reasons for failing to impose a sentence of three times the value of the goods on counts 1 and 2 in each case.

Count 210(1) provides that any person who is guilty of an offence under any of paragraphs (a) to (c) "shall ... for each such offence incur a penalty of treble the value of the goods or $200 whichever is greater".

Mr Bloomfield for the Crown submits, as I have said, that this leaves the Court with no discretion and that this in not a fine but a commercial penalty for a commercial crime. He points to the use of both terms, "penalty" and "fine" in the Act and to the fact that, in this section, there is no alternative power given, for example, if there should be default. I am not satisfied there is any true difference between the two terms. If a person is convicted of an offence, the court shall impose a financial penalty and, whatever the word used, that is a fine.

Far stronger is his main submission that the section gives the Court no discretion in determining the scale of the penalty. He relies on the decision of the Court of Appeal in Vakameitangake and Kailahi v R, Appeal Number 19/97. I accept that case is on all fours with this one and the judgment clearly and unequivocally supports his contention. Such a decision is binding upon this court and so it is with some trepidation that I do not follow it but I understand from counsel that he will appeal this decision and I hope the Appeal Court will consider this point further and give some guidance on the points I raise.

The Appeal Court found that the use of the word "shall" in section 210 made it clear the court must impose the penalty and has no discretion. The word "incur" adds little. The Shorter Oxford Dictionary defines it as meaning "to render oneself liable to...". I consider that conveys no more than that such a penalty is possible so it would appear the crucial word is "shall" as the Court of Appeal found.

The courts have traditionally been reluctant to read any provision by the Legislature as effectively removing their discretion to determine sentence in an individual case. It is, of course, possible and does occur but the court should be slow to read a provision in such a way.

It is true that many penalty provisions create liability to a fine with the words "not exceeding" a particular sum but that is not always the case. I give a single example of a repeated form. Section 44 of the Plant Quarantine Act, Cap 127, as amended, provides that any person who is guilty of an offence against the Act "shall be liable to a fine of $5,000.00...". I do not believe it has ever been considered that is a mandatory provision

and I do not understand why the same word should be considered to have a different meaning in the two statutes.

If the provision in section 210 is indeed mandatory, each of the accused will be faced with a penalty on each of the first two offences of $21,000.00. I do not believe there is any real prospect the accused, married men with families who earn gross salaries of between $7,000.00 and $9,000.00pa will ever pay a total fine of $42,000.00. The maximum time the court can allow for the payment is three months.

I have always considered it a fundamental principle of sentencing that a court should not impose a fine when it is clearly outside the means of the person ordered to pay.

Counsel for the Crown agrees these fines will never be paid as has apparently occurred in similar cases previously. He does not consider there is any scope for an alternative default term of imprisonment and he, reasonably, suggests the public authorities are unlikely to execute distress in such a case. What is the point in the court imposing a penalty for a serious offence that everyone agrees will be ignored as the people involved walk through the door of the court? It seems to me that not only is the imposition of such a penalty an injustice but the attitude that will inevitably be shown to the court order is almost contemptuous.

Customs frauds are frequently complex and difficult to prove. In such circumstances this court has repeatedly said that an admission of guilt will result in a reduction of the sentence that would otherwise be passed. If this is a mandatory sentence, there is no value in a plea of guilty. How will the court deal with a case where one of two co-accused pleads guilty and the other does not but is convicted after a lengthy trial?

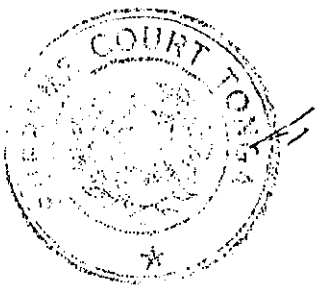
On the evidence in this case, it would appear that the Customs officer should be punished more severely than the minor players in the offence yet the court must punish each the same. I cannot accept that is just or reasonable. There is no scope for the court to give credit for previous good character or to distinguish between an accused shown by the evidence to have been up to his neck in such frauds for years and a driver reluctantly involved on a single occasion who subsequently assists the authorities.

The Court of Appeal in Vakameitangake's case has suggested that, where as here, two offences are charged under different paragraphs of the section arising out of the same facts, the court may, on the authority of Hunter v Chief Constable of the West Midlands Police, use its inherent power to order a stay if it would be an abuse of process to enter a conviction.

In Vakameitangake's case, the court was entering convictions after a plea of guilty. In this case, there was trial and conviction followed proof of each count. Once that is done, I am far from satisfied the court has any power to set aside a conviction once entered. If, on the other hand, it is to do so before conviction it will be deciding the question before it knows anything of the antecedents of the accused. With that knowledge it may well have

formed a different view of the wisdom of failing to convict of offences under parallel paragraphs.

If, as the Court of Appeal found, the court may mitigate the mandatory penalty by invoking such inherent power in relation to the number of charges on which it will record a conviction, I am unclear why it may not use the same power to reduce the penalty to prevent the injustice of passing a penalty that is totally beyond the ability of the accused to pay and which everyone accepts will be ignored by accused and government alike.



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