

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

**CR NO'S 446-447/18, 480/18
& 448/18, 479/18**

POLICE

v

DAVID TONORIO

Date: 21 September 2018

Counsel: Ms K Bell for the Crown
Mr N George for the Defendant

SENTENCING NOTES OF THE HONOURABLE JUSTICE PATRICK KEANE

[11:36:58]

[1] David Tonorio, you appear for sentence, firstly, for three burglaries, breaking and entering Vans Store, Panama, on 19 July 2018; and then on 2 August 2018, Prime Foods and Vonnia's Warehouse.

[2] You appear secondly for possession of cannabis on 3 August 2018, I have granted leave to the Crown to withdraw, as a result of your plea, possession for the purpose of supply or sale.

[3] You are for sentence finally for two cash thefts on 2 April 2018. You were convicted of that offence on 4 July 2018 and then became subject to a suspended sentence.

[4] On 19 July 2018, the date of your first burglary, you and an associate went to Vans Store Panama on his motorcycle. He remained outside as a lookout. You climbed onto the roof and entered through an open window.

[5] You took cash from the till on the ground floor and a more substantial quantity in an envelope underneath a table. You went out through the front entrance. You gave \$300 to your associate.

[6] You were left with \$4,000. When apprehended you said that you had spent the money on marijuana, alcohol, food and clothes.

[7] On 2 August 2018 you went into Avarua by yourself. You went to the rear of Polynesian Rentals, climbed the fence at the rear of Prime Foods, and got in by pulling back roofing iron. You attempted to force a safe without success. You left as you had entered.

[8] You then climbed the fence to Vonnia's Warehouse and once you got inside you got into the office by cracking an office window. You found cash, forced another office door and opened a safe using a screwdriver and hammer. You found more substantial cash.

[9] You left through the warehouse gate, cutting the padlock with a bolt cutter from inside the store. You hid the stolen cash inside a concrete pipe at home. You disposed of your top and hooded jumper at the Arorangi jetty. The police were able to recover \$13,113 from you when you were apprehended.

[10] Once more, when you were apprehended, you explained your offending as giving it a means to buy drugs, alcohol and food. You were then found in possession of 51.98 grams of dried cannabis. The offending for which you received a suspended sentence was all of a piece.

[11] On 2 April 2018 you were with your associate, the one who acted as lookout on your first burglary. You obtained two ATM cards from him. You both went into town. You drew \$600 cash with one card and \$200 with the other. You split the cash between you. You were identified from CCTV footage. Your share, \$400, was met by your mother; a cost to your family.

Presentence reports

[12] There are two presentence reports relating to you; one relating to the thefts, the other to your more recent offending.

[13] You are aged 17½ years. You are the second of three sons. You live at home with your parents. Your father is very unwell. Your mother carries the burden of the household with the help of you and your older brother.

[14] As your counsel has explained to me your family has a small farm with ten cows, a lot of pigs, and vegetables. It calls for a lot of work. Your mother describes you as a very good contributor. You work very hard. She relies on you, particularly because your father is so unwell.

[15] When you were taken into custody on 2 August 2018 you were then, I am told, still employed by T&M Heather as a plasterer. You had been working for them since February.

[16] In your earlier report your supervisor described you as a hard worker and a quick learner. That is why they were willing to keep you on.

[17] In your more recent report you explain that at T&M Heather you were earning between \$250 and \$300 a week. You gave that money to your parents. You were given \$70 back. \$70 did not finance your drugs, your alcohol or your food and that is why you offended earlier this year and more recently.

[18] Your presentence report recommends that you be sentenced to 18 months probation supervision with the first 9 months on community service; and that you be under a curfew between 7pm and 6am, you not purchase or consume alcohol, and you abstain from drugs.

Sentencing principles

[19] Your primary offences, the burglaries, carry under the Crimes Act 1969 a maximum term of imprisonment of 10 years. And two Cook Islands statutes govern

what sentence within that maximum your offending warrants – the Criminal Procedure Act 1980-81 and the Criminal Justice Act 1967.

[20] I am also assisted by the Sentencing Act 2002 (NZ). I must impose on you a sentence which denounces and deters you, hold you accountable for the harm you have done, induces you to accept responsibility, assists you and recognises the interests of your increasing victims.

[21] I must take account equally of the gravity of your offending and its seriousness, and what is known of the effect of your offending on those who have been subject to it.

[22] In the Cook Islands there is no tariff for burglary. *Senior v Police* has been applied: *R v Maoate*. It distinguishes between first time burglars, recidivist burglars and spree burglars.

[23] First time burglars may be sentenced to community based sentences, although that is not inevitable. Recidivist burglars are inevitably sentenced to imprisonment, sometimes for lengthy periods. Spree burglars are those who commit a lot of burglaries in a short time and help the police to recover what has been lost and accept responsibility for yet further offences. These categories are not hard edged.

[24] In the Cook Islands first time burglars have been sentenced to community based sentences. *R v Maoate* is one example. Recidivist burglars have been sentenced to lengthy terms of imprisonment. Instances are *Police v Kakino* and *Police v Taufahema*. The issue is where you lie.

Crown and defence submissions

[25] The Crown contends that your offending is more serious than *Maoate*. You are responsible for three commercial burglaries in which you used a lookout despite your denial. You acted in a premeditated and determined way, and you brought a level of sophistication to what you did.

[26] The sums you obtained, \$4300, from Vans, none of which was recovered and \$14,395, from Vonnia's, most of which was recovered, speak for themselves. You

were found as well with a significant quantity of cannabis, 51.98 grams, which is above the presumption for supply.

[27] You have appeared in the Children's Court for burglary and theft and contempt of Court. Although no convictions were entered, you are not to be regarded as a first offender. Furthermore, you committed the burglaries at a time where you were subject to a suspended sentence. And as a result the Crown contends for a lengthy term of imprisonment.

[28] Your counsel supports the recommended sentence essentially for the reasons set out in your helpful presentence report. He says that you are at the cusp. You are showing signs to becoming an accomplished burglar and an increasing dependence on cannabis. The two go together. If you continue as you are you will become a recidivist burglar.

[29] He asks me to accept the recommendation in the presentence report as your last opportunity. He says that despite your offending, which he accepts is serious, there are aspects to you which are very positive and deserve to be encouraged. If you remain in custody you will simply harden.

Conclusion

[30] David Tonorio, you present a real predicament on sentence. Your offending is very serious for all the reasons the Crown has identified. If you were an adult offender with previous convictions I would impose on you the sentence the Crown seeks – a lengthy term of imprisonment. But you are not yet quite at that point.

[31] I accept your counsel's submission that at age 17 you are at a point where you can stop this destructive pattern. You can wean yourself from drugs. You can stop spending time with the people with whom you offend. You can focus on your family and its farm.

[32] You can do the things that you said in your presentence report you would like to be doing in five years time. You have the ability to do that. Your mother and your employer have said so.

[33] You are a hard worker on the farm. You work hard as a plasterer. You learn quickly. What is troubling is that you have brought your energy and intelligence to your offending. Your burglaries were determined and involved intelligence. That has to stop.

[34] I am going to accept your counsel's submission therefore. I am going to give you that opportunity. You have been in custody since 2 August 2018. You know what prison is like now. So you know what you will face if you breach the sentence I am going to impose on you.

[35] A sentence in the community involves real risk, because it is a hard sentence. A sentence of imprisonment can simply be lived through. It is highly structured and you do what you are told. The sentence I intend to impose, like home detention in New Zealand, is hard because it will call for discipline on your part.

[36] If you breach it you come back to Court. But if you serve it, you will continue to help your family and accept your part on the farm. You will continue to learn a skill from you can gain a legitimate income, without being destructive to the community.

[37] Despite then the Crown's strong submission, I am going to sentence you, as recommended, for all your offending to the recommended sentence. You are placed on 18 months probationary supervision with the first 9 months on community service, subject to the following conditions:

- (a) You are to be on a curfew between 7pm and 6am, seven days a week;
- (b) You are not to purchase or consume alcohol.
- (c) You are to abstain from the consumption of any illicit drugs.



Patrick Keane, J