



IN THE DISTRICT COURT OF NAURU

CRIMINAL JURISDICTION

Criminal Case No. 91/2017

THE REPUBLIC OF NAURU

-v-

NICHOLSON KEPAE

SENTENCE

*Coram: Penijamini R. Lomaloma*

*Prosecution: Filimone Lacanivalu*

*Defence: Ravunimasei Tagivakatini*

*Hearing: 29 April 2019*

*Sentence: 2 May 2019*

**CATCHWORDS:** *Section 469 of Criminal Code 1899; sentence; damaging property—Child offender; undue delay leading to lenient sentence.*

**Introduction**

1. You pleaded guilty to one count of Burglary contrary to section 419(1) of the Criminal Code 1899 and one count of Theft contrary to section 398 and IV of the Criminal Code of Queensland 1899 (Adopted). The charge of burglary carries a maximum sentence of 14 years imprisonment and the second count carries a maximum sentence of 7 years imprisonment.

**The facts**

2. The facts are that at between 1 and 2 am in the morning of 26<sup>th</sup> November 2015, you, together with several other boys entered the home of Mrs Tia Aingimea in Meneng and stole from therein a Samsung S6 Mobile phone and other items including cash.

A woman sleeping in her bedroom woke up and saw a silhouette of a young boy in her room. She yelled out in shock and ran to wake her aunt, Mrs Tia Aingimea who went to the living room and discovered that the back door was open and a louver was missing from one of the windows.

3. Two boys saw and recognized you whilst you were running away from Mrs Aingimea's home. You were then taken by the Police and when interviewed, you admitted that you were with other boys at about 3 a.m. across from the complainant's residence when you agreed with them to go and burgle her house. You told the Police the name of the other boys but none have been charged so far. You said two of your group went around the back of the house, broke in and opened the door for all of you to enter and steal whatever you could get your hands on before returning to your homes.
4. You took the Samsung S6 mobile phone and this was recovered by Police and returned to the complainant. The mobile phone is valued at more than 5 pounds.
5. You admitted these facts and I convicted you as the court does not have the discretion to enter a conviction against you under the Criminal Code 1899.

### Seriousness

6. The starting point in any sentence is to look at the objective seriousness of the offending by looking at the culpability and the harm caused, intended or likely to be caused by your offending.

### First Count—Burglary

7. This was an intentional act and therefore highest on the culpability scale. There was no evidence of any preplanning on your part and it appeared your group decided at 3:00 a.m. to break in and you carried it out very quickly after that. For the first count of burglary, the aggravating factors are:-
  - a. That it was done at night;
  - b. In a dwelling house that was occupied;
  - c. There was more than one of you involved.
8. Breaking into someone's home at night when they are asleep is a very serious offence because the law recognizes and protects the sanctity of a person's home and it must be protected as it is the family refuge. Breaking into homes creates additional dangers for the vulnerable children and females as offenders are often tempted to commit sexual offences on the sleeping occupants of the house, offences that would not have been possible if the offender had not entered the house in the first place. There is a high probability of violence and counter-violence if the burglars or the occupants of the home try to defend themselves or their property.

9. The aggravating factors mentioned above increases the culpability of the offending greatly. Although the physical harm is minimal, I can infer that the occupants of the house will suffer some psychological trauma from the offending.
10. I would rate your offending on the first count at around the midpoint of the seriousness scale.
11. On the second count of theft, it was an intentional act and the harm caused is not great because the phone was returned to the owner. I would assess the seriousness of the second count at below the midpoint for seriousness.

### Mitigation

12. You were born on the 8<sup>th</sup> of April 2000 and you were 15 years and 7 months at the time of the offending. The following factors were advanced in your mitigation:-
  - a. Your young age;
  - b. You are a first offender;
  - c. You co-operated with police;
  - d. You pleaded guilty at the first opportunity;
  - e. You are remorseful;
  - f. Your counsel said peer pressure led you to commit this offence;
  - g. There has been an unexplained pre-trial delay of 2 years before the charges were laid and post-trial delay of 16 months before you appeared in court for the first time.
  - h. You have rehabilitated yourself by not re-offending since then.

### Sentencing of Young Offenders

13. In sentencing of young offenders, the Victorian Court of Appeal said in R v Mills [1998] 4 VR 235, at page 241:<sup>1</sup>
  - a. *Youth of an offender, particularly a first offender, should be a primary consideration for a sentencing court where that matter properly arises.*
  - b. *In the case of a youthful offender rehabilitation is usually far more important than general deterrence. This is because punishment may in fact lead to further offending. Thus, for example, individualized treatment focusing on rehabilitation is preferred. (Rehabilitation benefits the community as well as the offender.)*
  - c. *A youthful offender is not to be sent to an adult prison if such a disposition can be avoided, especially if he is beginning to appreciate the effect of his past criminality. The benchmark for what is serious as justifying adult imprisonment may be quite high in the case of a youthful offender; and where*

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<sup>1</sup> Quoted in Ross on Crime, 6<sup>th</sup> Edition, Miko Bargaric, Thompson Reuters, 2013 at para 19.2175.

*an offender has not previously been incarcerated, a shorter period of imprisonment may be justified.*

14. Section 48(b) of the Child Welfare and Protection Act provides that “a sentence of imprisonment may only be imposed against a child as a sentencing option of last resort.”
15. I have taken account of the seriousness of the offending and I would have given you a custodial sentence if you were an adult. However, you were a child at the time of the offending and being mindful of the provisions of section 48(b) of the Child Welfare and Protection Act 2016, I consider a custodial sentence is not necessary.

### **The Second Count— Theft**

16. The phone you stole was returned and therefore on the second count, there has been no monetary loss. The offence was intentional and I would rate the seriousness of this offending at below the midpoint on the scale.

### **Delay**

17. There has been considerable delay involved in your case. Article 10(2) of the Constitution provides that “a person charged with an offence shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court.” In Australia, the Commonwealth Constitution does not protect individual rights expressly and there is no Bill of Rights but the common law protects this right to a trial within a reasonable time and judges have enforced this provision vigorously either by staying prosecutions or by using delay as a powerful mitigating factor.
18. In *R v Todd* [1982] 2 NSWLR 517 (CCA) Street J said at 519-520:-  
*“Where there has been a lengthy postponement, whether due to an intestate sentence or otherwise, fairness to the prisoner requires weight to be given to the progress of his rehabilitation during the term of his earlier sentence, to the circumstance that he has been left in a state of uncertain suspense as to what will happen to him when in due course he comes up for sentence on the subsequent occasion, and to the fact that sentence for a stale crime, long after the committing of the offences, calls for a considerable measure of understanding and flexibility of approach — passage of time between offence and sentence, where lengthy will often lead to considerations of fairness to the prisoner in his present situation playing a dominant role in the determination of what should be done in the matter of sentence; at times this will require what might otherwise be a quite undue degree of leniency being extended to the prisoner.”*
19. In *R v Robertson (2007)*<sup>2</sup> Rothman J, said at 125:

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<sup>2</sup> 177 A Crim R 121 (NSW CCA)

*A delay in investigation and prosecution of an offence may, when lengthy, lead to a degree of leniency being extended: R v Todd[1982] 2 NSWLR 517 (CCA). Delay is a factor to the extent that it affects fairness because, for example, of changed circumstances, additional suspense or anxiety, significant periods on conditional liberty, inexplicable delay by the prosecuting authority, and the like: see R v Khamas (1999) A Crim R 499.*

20. In R v Enzo Mencke [2014] NRDC 109 of 2014, this Court dealt with a similar case where there was a delay of 4 years between offence and trial and the Court said it would have awarded a custodial sentence if it was not for the long delay.
21. The summary of facts shows that you were interviewed by Police and admitted the offence on the same day you committed the offence. The charges were filed over 2 years later and served on 11<sup>th</sup> January 2018. You failed to turn up in Court and a bench warrant was issued which was not executed until March 2019. You have not re-offended since these offences were committed and this showed that you have taken steps to rehabilitate yourself.

### Tariff

22. In R v OIO & ORs<sup>3</sup> children were sentenced to community service for theft. In R v Baby Kakioeua,[2017]<sup>4</sup>, this Court sentenced the offender who was 20 years old at the time to 3 months imprisonment for this offence. In R v OIO (2018)<sup>5</sup> the defendant OIO was sentenced to 2 months imprisonment for burglary and 1 month imprisonment for theft. In R v OIO(2018)<sup>6</sup>(unreported), the same defendant was sentenced to 14 months on one charge and another for 12 months to be served consecutively for the offence of burglary under the Crimes Act 2016. He was a child who had not learnt from the leniency of the Court. He was sentenced to 6 months imprisonment for the theft where the property was not recovered.

### Your sentence

23. I have taken account of the factors mentioned above and I consider because you were a child of 15 years at the time of the offending, that a custodial sentence is not necessary. You are not employed and you are unlikely to be able to pay a fine. Because of the long delay, the court will have to exercise greater leniency than would otherwise.
24. I convict you of the offence charged and I sentence you to 1 years' probation for count 1 and 1 years' probation consecutive on count 2 under the Criminal Justice Act 1999 on the following conditions:-

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<sup>3</sup> (NRDC) Criminal Case No. 13 of 2018 (Unreported)

<sup>4</sup> 2017 NRDC Crim Case No. 68/17(unreported)

<sup>5</sup> NRDC Criminal Case No. 5 of 2018

<sup>6</sup> NRDC 34, 74 & 75 of 2018

- a. You will report within 24 hours of this order for probation to Ryletta Daoe, who is hereby appointed your probation officer at the Registry of the Supreme Court of Nauru ;
  - b. You will reside with your parents sat Meneng and not change your place of residence without leave of the Probation Officer;
  - c. You shall keep the peace, be of good behaviour and commit no offence against the law.
25. You are to take note of the provisions of s.16 of the Criminal Justice Act 1999 that should you breach the probation order or fail to comply with the orders made therein or should you commit another offence during the period of the probation, then you may be resentenced for both the new offences and this offence.
26. You have 14 days to appeal.



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**PENIJAMINI R. LOMALOMA**  
**Resident Magistrate**

