LEAI (SOAVELE), PUA (FA'ATUPU), MATA'U (TUVAO), MASALOSALO (TAUPAU), TIMOTEO (LOLI), MAE'E (UAITA), LOKENI (TUASIVI),

and

MUIA'A (SUENA), PUA (ALOSIO), MAIAVA (MOLESI),

and

SAMUELU (ALOPOPO)

v

POLICE

Supreme Court Apia
26, 29, 30 November 1979
Nicholson CJ

CRIMINAL LAW (Sentence) - Sentencing process (Previous convictions) - Six of first-named appellants sentenced on basis of a previous conviction for a later offence - Sentences of three months' imprisonment imposed on them for being in possession of fish caught by the use of explosives - Sentences of two months' imposed on four others for same offence on the basis of no previous convictions - Matter of administrative coincidence that charges of later offences heard earlier - Sentences of three months' reduced to two months' as all defendants ought to have been treated as first offenders in the circumstances - Significance of a previous conviction in sentencing process not the existence of such conviction but the defendant's response to a previous sentence and his likely response to a further sentence: Garrow & Spence's Criminal Law, 4th Edn., 370, R v Betteridge (1942) 28 Cr App R 171, R v Rogers [1953] 1 QB 311, 316, The King v Casey [1931] NZLR 594 considered and applied.

- Being in possession of fish caught by the use of explosives - Maximum term of imprisonment increased from three months to one year in 1972 - Prevalence and seriousness of offence calling for term of imprisonment - Ten defendants sentenced to two months' as first offenders - Fine of $30 substituted for sentence of two weeks' imprisonment imposed on eleventh defendant who had accepted a fish from the catch.

GENERAL APPEAL against sentences.

Va'ai for appellants.
Nelson for respondent.

Cur adv vult

NICHOLSON CJ. This is an appeal against sentence by eleven appellants against sentences imposed in the Magistrate's Court at Tuasivi on the 24th October, 1979 in respect of convictions for being found in possession of fish caught by the use of dynamite. Of the appellants, one was sentenced to two weeks' imprisonment, three were

sentenced to two months' imprisonment, and the remainder were all sentenced to three months' imprisonment. The general ground for appeal is that the sentences were manifestly excessive.

It is necessary to examine the order of events relating to the hearing of this case. On the 12th June, 1979 all the appellants were found in possession of fish caught by the use of explosives. On the 22nd June, 1979 six of the appellants were again found in possession of fish caught by explosives. Those six were the appellants Soavele Leai, Fa'atupu Pua, Tuvao Mata'u, Taupau Masalosalo, Loli Timoteo and Uaita Mae'e. On the 15th August, 1979 both sets of charges were called for mention in the Magistrate's Court, and pleas of Not Guilty were entered. The hearing of the charges against the six of the appellants I have mentioned were set down for the 12th September, 1979 and the hearing involving all the appellants were set down for the 11th October, 1979. On the 12th September, 1979 the six named appellants were found guilty, convicted and sentenced by His Worship Mr Johns sitting at Sataua, and fined $40. On the 11th October, 1979 all the appellants appeared before His Worship Mr Thomsen at Sataua and were found guilty and convicted and remanded for sentence to the 24th October, 1979 and were sentenced in the manner I have described. It is against the sentences imposed by Mr Thomsen that the appellants had lodged their appeal.

The learned Magistrate in his preamble to sentence dealt at some length with the history of the legislation surrounding the charge and noted that, as a result of legislation passed in 1972, the maximum term of one year's imprisonment for possession of fish caught by explosives was provided for, and that prior to that, the maximum sentence had been three months' imprisonment. Thereafter, the Magistrate made reference to the seriousness of the effects of the offence upon the environment and upon the country's food resources. He then made the following observations:-

> For being in possession of fish caught by explosives, you, Soavele, Fa'atupu, Tuvao, Taupau, Loli and Uaita because of your previous convictions are each convicted and sentenced to three months' imprisonment, and you, Suena, Alosio, Molesi and Tuasivi, because of your clean Police records are each convicted and sentenced to two months' imprisonment, and you, Alopopo, as I have been informed you had only one fish, you are convicted and sentenced to only two weeks' imprisonment.

The learned Magistrate then went on to warn would be offenders of this kind that because of his concern over the prevalence of this offence that they could expect terms of imprisonment to be imposed as a certainty unless something very special in the way of circumstances intervened. The only relevant previous convictions for the six appellants who received the sentence of three months' imprisonment were the convictions imposed by Mr Johns, Magistrate on the 12th September, 1979, as I have already described.

Mr Va'ai for the appellants offered two grounds of argument. First of all he contended that the learned Magistrate ought not to have taken account of the convictions imposed by the Court on the 12th September, 1979 since it was a mere matter of administrative coincidence that both sets of charges were not dealt with in the same day and that had they all been dealt with in the same day, namely, 12th September, 1979 these sentences may well have been rather less than they were. He emphasised that the earlier offences were dealt with later. Further, he submitted in relation to all the sentences, and in particular that of the appellant Alopopo, that having regard to the general purposes of imposing terms of imprisonment the imposition of prison sentences for these offences was manifestly excessive. Mr Nelson on behalf of the State contended that the learned Magistrate imposing the sentence was entitled to take into account any convictions entered against the appellants prior to the date on which they were given sentence regardless of the chronological order in which the offences were committed. He

further submitted that the imposition of imprisonment was appropriate in all the circumstances.

I wish to say at once that in my view the prevalence of this offence, its serious possible consequences to the environment and to the supply of fish as a basic resource of the country, and the possible danger to life and limb involved in the use of explosives to catch fish, all lead me to conclude that unless there are special circumstances as the sentencing Magistrate indicated, terms of imprisonment ought to be imposed for these offences. It does not appear from the file before me that there were any special reasons for not imposing terms of imprisonment except in the case of Alopopo, he being found guilty merely by reason of accepting one fish which he found at his home when he arrived there. I find in these circumstances that a sentence of two weeks' imprisonment was manifestly excessive and I allow his appeal, quash the sentence of imprisonment, and substitute a fine of $30.00 therefor.

Turning to the cases of the six appellants who received sentences of three months' imprisonment, I am concerned to express my view regarding what effect if any the previous convictions entered on the 12th September, 1979 should have had on the severity of those sentences. In this respect I refer first of all to Garrow & Spence's Criminal Law, 4th Edition, page 370, where the following observations appear:-

> A sentence should not be increased merely because of previous convictions but they may be taken into account if they indicate that accused has a predilection to commit that particular type of offence and has been unresponsive to leniency.
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> The learned author then makes reference to R. v. Betteridge (1942) 28 Cr. App. R. 171 where Caldecot, L.C.J. said:-
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> We think that it is not right to hold over a man's past offences which have been dealt with by appropriate sentences, as we must assume past offences have been dealt with, and add them up and increase accordingly the severity of the sentence for a later offence. That is dangerously like punishing a man twice over for one offence. If a man who has been convicted shows himself unresponsive to leniency and persists in a life of crime, that is a reason for giving him the proper and deserved sentence in the particular case. If, on the other hand, there are some merits, it may be that the Court will treat him more leniently because he has shown himself in some way responsive to the warnings which he has had.

In Reg. v. Rogers [1953] 1 Q.B. 311 at page 316 Lord Goddard in the Court of Appeal was called upon to construe the words "convicted on at least three previous occasions" in relation to the Criminal Justice Act, 1948 of the United Kingdom. He held that two sentences passed on the same man at the same Court sessions would not count as passed on two separate occasions. He observed that, "that gives effect to the intention of the Act, because it will then have been shown that his three previous appearances in Court and the sentences imposed on him on three separate occasions have not done any good, and that the time has therefore come to impose a long sentence on him." Again, in The King v. Casey [1931] NZLR 594, the New Zealand Court of Appeal held that, "as far as possible, regard must be had to the intrinsic nature and gravity of the offence on which the prisoner is to be sentenced." And went on to observe that the sentence passed ought to bear some relation to such offence, and the sentence of a prisoner should not be increased merely because of his previous convictions, stating that, "Where by reason of a man's character, as evidenced wholly or partly by previous convictions, it is thought that the punishment should be increased", then that may be done.

I think it clear from the authorities to which I have referred that the importance of previous convictions in relation to sentencing is

not that they are in existence, but as providing to the Court some indication of the prisoner's character and his likely response to further sentences. The Court is not entitled to increase sentence merely because previous convictions exist. But, if it is shown to the Court that the prisoner's response to previous sentences has not been favourable, then the Court is entitled to increase the sentence it is going to impose. It follows, therefore, that no previous conviction should be taken into account in the sentencing process unless the prisoner is appearing for sentence in respect of an offence which was committed after he had experienced the sentences on his previous convictions. In the sentencing process in the present case therefore, the convictions and sentences imposed by Mr Johns, Magistrate, on the 12th September, 1979 should not have been regarded as previous convictions for the purpose of enhancing these sentences imposed on the six appellants on the 24th October, 1979. I conclude that the learned Magistrate should have treated them as first offenders, and I allow their appeals, and reduce their sentences from three months' imprisonment to two months' imprisonment.

Having regard to what I have already said about the prevalence of these offences, I can see no merit in the appeal against sentence of the remaining appellants and their appeals are dismissed.