Mr. Kefu.

14/09/16.

IN THE COURT OF APPEAL OF TONGA

CRIMINAL JURISDICTION AC 10 of 2016

NUKU'ALOFA REGISTRY [CR64 of 2015]

BETWEEN: GUSTAVO LEONARD TONGA

- Appellant

AND : R E X

- Respondent

Coram : Moore J
Blanchard J
Hansen J
Tupou J

Counsel : Mr. W. C. Edwards SC for the Appellant
Mr. 'A. Kefu SC for the Respondent

Date of Hearing : 7 September 2016

Date of Judgment : 14 September 2016

JUDGMENT OF THE COURT

[1] Mr. Tonga has appealed to this Court against a sentence of two and a half years' imprisonment, with the final year suspended, imposed upon him after he pleaded guilty to a charge of serious fraudulent conversion of property under s.162(1)(a) of the Criminal Offences Act. Such offending has a maximum penalty of imprisonment for 10 years: subs (3)(a).

The Facts

[2] Mr. Tonga owned and managed a small business. He expanded it and began buying cars and trucks from New Zealand sources and re-selling them in Tonga. To finance this expansion he borrowed TOP $200,000 from Westpac Bank of Tonga. The business was not successful, in part at least because of the weakening of the Tongan currency. By 2009 the business was in trouble. It had a liquidity problem and there were difficulties meeting repayments due to the bank.

[3] In these circumstances, the appellant entered into an arrangement with the Prison Department pursuant to which it paid to him TOP$225,000 which was to be used to purchase on behalf

of the Department six vehicles from New Zealand. This money was paid into the bank account of the business but only one vehicle was purchased, for TOP$60,000, and delivered. A large part of the balance of TOP$165,000 was used to pay business creditors. In utilising the Prison Department's money in his business the appellant seems to have hoped that the fortunes of the business would change for the better and enable him to pay for and deliver the other five vehicles. That never happened, the bank froze the account and the business became insolvent.

[4] It took a very long time before any criminal charge was brought in 2014. In the meantime the Department had pursued a civil action, obtaining judgment but no payment. Further delays followed until eventually a trial date was set for 10 June 2016. But on that day Mr. Tonga pleaded guilty.

The sentence

[5] Mr Tonga is 43 and of previous good character. He has represented Tonga at rugby. It is accepted by the prosecution that the offence arose out of the failure of his business and that he is remorseful. In sentencing him on 21 July 2016 Cato J took these matters into account, noting also that Mr. Tonga had had the

matter hanging over his head for a long time though "partly he is the author of his own misfortune in that regard". His wife and family are American citizens but to his credit he had chosen to remain in Tonga and face the charge. The Judge remarked that the conviction might well mean that joining his family in the United States would be really difficult.

[6] Cato J referred to the 10 years maximum penalty. He said that the fixing of a starting point for sentencing in cases of this kind was difficult. In the circumstances he believed a starting point of 4 years was appropriate. He took into account what he called an early guilty plea, remorse and previous good character, for which he deducted 18 months. That brought the judge to a sentence of two and a half years' imprisonment. He suspended the final 12 months for two years on condition that Mr. Tonga commits no further crimes punishable by imprisonment during that period.

The wrong charge

[7] Only since the sentencing has it been appreciated that Mr. Tonga should never have been charged with serious fraudulent conversion, which is a new offence introduced only in 2012, some time after the offending. The appropriate charge was one of

fraudulent conversion under the version of s.162 in force before 2012. The old s.162 was repealed by the 2012 Amending Act but is preserved for previous offending by s.15(b) of the Interpretation Act [Cap.1] which reads:

> *Whenever any Act repeals either in whole or in part a former Act the repeal shall not, in the absence of any express provision to the contrary, affect or be deemed to have affected*
>
> .....
>
> *(b) Any offence committed, or any right, liberty, obligation or penalty acquired or incurred under the repealed Act;*
>
> .....

[8] Counsel were content that we treat the appeal as one against the invalid conviction as well as against the sentence and that this Court should use its power under s.18(2) of the Court of Appeal Act [Cap.9] to substitute a conviction under the previous s.162. Section 18(2) reads:

> *(2) Where an appellant has been convicted of an offence and the judge, or in the case of a trial by jury, the jury could on the indictment have found him guilty of some other offence, and on the findings of the judge or jury, as the case may be, it appears to the Court of Appeal that the judge or jury must have been*

*satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by such judge or jury a verdict of guilty of that other offence and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of great * severity [sic].*

* This must be a misprint for "greater severity".

[9] It will be observed that the subsection is not very aptly worded for application to a situation where the conviction has followed a guilty plea because it speaks in terms of a "verdict" of guilty. When, however, reference is made to s.16, which sets out the right of a convicted person to appeal against conviction and sentence, it is noteworthy that it speaks only of a person "convicted on a trial". Yet it could never have been intended that a person who had been convicted after a plea of guilty should have no right to appeal against sentence, with leave, under s.16(c). It has rightly been assumed that "trial" in s.16 includes a proceeding in which a plea of guilty is made and a conviction entered by the Court and a sentence is imposed.

[10] The same approach has to be taken under s.18 (2) to adapt it to circumstances like the present, to which we are sure that, consistently with s.16, it is meant to apply. The words "the judge could on the indictment have found him guilty of some other offence" should be read as referring to the acceptance by the judge of a plea of guilty to some other offence for which, but for the plea, the appellant could on the indictment have been found guilty. In this context "on the indictment" has been held by the Supreme Court, in a judgment concerned with same expression in s.42(3) of the Criminal Offences Act, to refer to a situation where the allegations in the indictment "amount to or include an allegation of the other offence expressly or impliedly": *R v Pohahau* [2003] Tonga LR 270 at 277 per Ward CJ.

[11] Similarly the words "the verdict found by such judge" should be read as referring to the acceptance of the guilty plea and entry of a conviction; and the words "a verdict of guilty of that other offence" as referring to acceptance of a guilty plea and entry of a conviction for the other offence.

[12] Accordingly, we are empowered to quash the conviction under the new s.162 and to substitute a conviction under the section as it stood in 2009 when the offending took place.

A new sentence

[13] Section 18(2) requires that we pass "such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of [greater] severity".

[14] Mr. Kefu responsibly conceded that Cato J's starting point of four years, whilst appropriate where the maximum penalty was 10 years, was not appropriate for this offending under the old s.162 which had a maximum penalty of 7 years. Mr. Kefu suggested a new starting point of 3 years. Mr. Edwards submitted that it should be two and a half years.

[15] This was serious offending involving the loss of a large sum of public money and a betrayal of the trust reposed in Mr Tonga by the Prison Department, although we can accept that he did not originally set out to defraud the Department and did so only as a means of trying, unsuccessfully, to save his business from

insolvency. We agree with Mr. Kefu's assessment of the appropriate starting point.

[16] There was no disagreement by either counsel with the other components of Cato J's sentence, namely a deduction of 18 months for the mitigating factors to which he referred, including the guilty plea, and the suspension of the last 12 months of imprisonment.

Result

[16] The Orders of the Court are:

(1) The appeal against conviction is allowed and the conviction under s.162 as amended in 2012 is quashed;

(2) A conviction under s.162 as it stood before the 2012 Amendment Act is substituted under s.18(2) of the Court of Appeal Act;

(3) Mr. Tonga is sentenced to imprisonment for 18 months to run from 21 July 2016.

(4) The final 12 months of that sentence is suspended for 2 years on condition that Mr. Tonga commits no further crime punishable by imprisonment during the period of the suspension.

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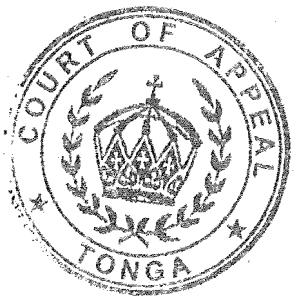
Moore J



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Blanchard J

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Hansen J

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Tupou J