

IN THE COURT OF APPEAL OF TONGA  
CRIMINAL JURISDICTION  
NUKU'ALOFA REGISTRY

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26/03/18

AC 8 of 2017

[CR47 of 2017]

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BETWEEN: REX

- Appellant

AND : VOLA FOLAUHOLA TAU'ALUPE

- Respondent

Coram : Handley J  
Blanchard J  
Hansen J

Counsel : Mr. V. Mo'ale for the Appellant  
Mr. 'A. Kefu SC for the Respondent

Date of Hearing : 21 March 2018

Date of Judgment : 26 March 2018

## JUDGMENT OF THE COURT

- [1] The respondent pleaded guilty to five counts of embezzlement and two counts of falsification of accounts. He was sentenced by the Lord Chief Justice to one year and six months imprisonment, fully suspended on condition that he:
- (a) not commit any further offences punishable by imprisonment for a period of two years;
  - (b) serve 12 months probation;
  - (c) undertake 60 hours of community work.
- [2] The Crown seeks leave to appeal against sentence under section 17B of the Court of Appeal Act, contending that the Lord Chief Justice erred in not requiring the respondent to serve a custodial sentence.

### Facts

- [3] The respondent was 20 years of age at the time of the offending. He had been working for the Tonga Development Bank at Pangai, Ha'apai since 20 August 2014. He was given responsibility for travelling to outer islands of Ha'apai in the last week of each month to conduct bank business. His tasks included opening accounts and receiving funds for deposit.
- [4] Over a period of two months the respondent was asked to open new accounts by four prospective customers and to deposit into their accounts sums ranging from \$500 to \$13,000, and totalling \$20,025. The respondent kept the money, using it to pay off debts owed by his parents. He attempted to conceal his offending by

failing to produce bank saving passbooks, failing to record the deposits and, in the case of the \$13,000 deposit, falsifying an entry in the passbook.

- [5] The respondent stopped taking money some time before the offending was detected. He made an unsuccessful attempt to obtain a personal loan which would have enabled him to pay back the money. He then wrote to his employer confessing to his dishonesty. He co-operated fully with the police and pleaded guilty at the earliest opportunity.

#### The sentence

- [6] In his decision the Lord Chief Justice reviewed a number of sentencing decisions of this Court and the Supreme Court. He decided that an appropriate starting point was two years six months imprisonment.
- [7] The Judge had received a highly laudatory pre-sentence report. It showed the respondent to come from a good family, to have done well at school and to be in good standing in the Church and the community. The report writer described him as "a great asset to the Government and the community". He was assessed as genuinely remorseful. A non-custodial sentence was recommended. That option was supported by the Bank which has reimbursed its customers.
- [8] In his decision the Judge summarised mitigating factors in the following way:

*"[18] In my view quite a lot can be said in mitigation for Mr. Tau'alupe. The amount that he has taken is substantial but is*

*towards the lower end of the scale of the cases that I have referred to above. The offending took place over a relatively short period and had ceased well before it was detected. I accept that Mr. Tau'alupe had taken steps to try and repay the money but as this was by way of a loan from the Bank itself I do not think that entitles him to great credit. He has no previous convictions and has been otherwise of good character. He admitted his offending and has been fully cooperative with the Police and pleaded guilty to the offence at the first opportunity. He appears to be a man who genuinely recognises that he has done wrong and is prepared to accept the consequences, whatever they may be. He has apologised and shown genuine remorse. I do not think that there is any likelihood that he will reoffend."*

- [9] The Judge discounted the sentence by one year to reflect mitigating factors – nine months for the early guilty plea and remorse and an additional three months for other factors personal to the respondent. He then turned to the question that is of pivotal importance in this appeal, whether to suspend all or part of the sentence and said this:

*"[22] Turning to the question of whether I should suspend any part of the sentence I have considered the principles in Mo'unga v R [1998] Tonga LR 154 and note that a suspended sentence may be appropriate where an offender is young and of previous good character, is likely to take the opportunity offered by the sentence to rehabilitate himself and where there has been co-operation with the authorities. These circumstances are applicable in this case. I believe that this offending was entirely out of character for Mr. Tau'alupe and that he is a young man who, notwithstanding his offending, has a great deal to offer his community. I also note that the Tonga Development Bank has forgiven Mr. Tau'alupe and wishes that the sentence imposed*

*provides him an opportunity to do good in the community. For those reasons the suspension of his sentence is warranted but subject to conditions which will of themselves amount to a significant restriction on Mr. Tau'alupe's liberty."*

[10] The Judge then imposed the sentence earlier set out.

### The Appeal

[11] For the Crown, Mr. Kefu had no quarrel with the starting point adopted by the Judge nor with the discount given for mitigating factors. His concern was with the Judge's decision to suspend all of the prison sentence. He contended that in embezzlement cases a sentence which did not require the offender to spend time in custody should occur only in exceptional circumstances. He submitted that only the last six to nine months should have been suspended. Recognising, however, that this is a Crown appeal and the sentence of community service has been served, he suggested suspending only the last three months with the three months imprisonment taken to be already served.

[12] In his admirably succinct and focussed submissions, Mr. Mo'ale defended the sentence as appropriately giving effect to the principle that, if at all possible, young first offenders with good prospects should not be sent to prison. He reminded us of the potential for harm to a young person exposed to a prison environment for even a short time.

### Discussion

[13] We acknowledge that sentencing for embezzlement raises special difficulties for the sentencing Judge. Because of the serious

breach of trust invariably involved, the difficulty of detection and the importance of deterrence, sentences have generally required the offender to spend some time in custody, even when the amount taken was relatively modest. An example to which we were referred is *R v Tangata'iloa* (Supreme Court, CR99/00, 3 May 2001) where a junior bank teller who had embezzled a total of \$6,627.40 was sentenced to two years imprisonment with the final six months suspended for one year.

[14] There is, however, no general rule that in cases of embezzlement a prison sentence should invariably be served. Nor should there be. Sentencing is fundamentally a discretionary process and highly fact-dependent. It requires the application of established principles to the facts and circumstances of the particular case. Often a delicate balancing exercise is required. Provided the sentencing Court has applied the relevant sentencing considerations to the circumstances of the offending and the offender, an appellate Court will not intervene unless the final sentence clearly indicates that something has gone wrong. That is usually because it is simply outside the available range.

[15] In this case the need to impose a sentence that reflected the gravity of the offending and the special importance of deterrence was clearly recognised by the Lord Chief Justice. However, when it came to deciding whether to suspend all or part of the sentence, he was obliged to have regard to the interests of the respondent and the interest of the wider community in his rehabilitation. As the Judge acknowledged, it required a consideration of the youth of the offender, a previously unblemished record and the


prospects of rehabilitation. In this case the attitude of the respondent's employer was also a relevant consideration.

[16] It is well established that the sentencing of young offenders raises special considerations: see for example the discussion in *R v Churchward* [2011] NZCA 531 at [77]-[92]. An offender's youth may impinge on an assessment of their culpability. As Mr. Mo'ale said, prison for any period is known to carry an enhanced risk of trauma for young people. And, as this Court recognised in *Mo'unga v R* [1998] Tonga LR 154, young offenders have a greater capacity for rehabilitation.

[16] In our view the Judge did not err in giving particular weight to these countervailing considerations. His was a carefully reasoned, nuanced decision which appropriately gave effect to the relevant sentencing considerations.

Result

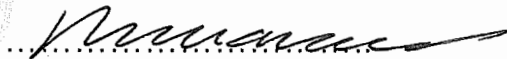
[17] Leave to appeal is granted but the appeal is dismissed.

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**Handley J**

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**Blanchard J**

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**Hansen J**

