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

AC 19 of 2018
[CR 90 of 2018]

BETWEEN : **REX**

Appellant

AND : **LOLEINI 'ALA**

Respondent

Coram: **Paulsen P**
 Handley J
 Blanchard J
 Randerson J

Counsel: **Mr 'A Kefu SC and Mrs L Fakatou for the Appellant**
 Mr S Tu'utafaiva for the Respondent

Hearing: **8 April 2019**
Date of Ruling: **17 April 2019.**

JUDGMENT OF THE COURT

The appeal

[1] Miss 'Ala pleaded guilty in the Supreme Court to one count of embezzlement. She appeared for sentence on 7 November 2018. Niu J discharged Miss 'Ala without conviction under s. 204 of the Criminal Offences Act. Under s. 204(2) of the Criminal Offences Act, the discharge is deemed to be an acquittal.

[2] On 22 November 2018, the Crown was granted leave to appeal the ruling on sentence.

[3] Before this Court the parties are in agreement that Niu J ought not to have discharged Miss 'Ala without conviction and that a custodial sentence, suspended in full or part, was appropriate. Despite that consensus, this case raises the issue of general importance as to the correct approach to be taken to the application of s. 204 of the Criminal Offences Act. We address that issue below.

The facts

[4] Miss 'Ala was 26 years old and employed by a local business. She was a trusted employee and responsible for doing the banking. On 22 November 2017, she was given \$22,500 in cash to deposit into her employer's bank account with MBf Bank. She did not do this. She had \$14,375 deposited into her own account with BSP Tonga Bank that she had opened a few days earlier. She then parked a vehicle opposite the Royal Tombs and staged a robbery by causing injuries to herself and scattering loose banknotes inside the vehicle. She laid a false complaint with the Police that she had been robbed. The balance of the money still in her possession, as well as some of her employer's money that she withdrew from her bank account, amounting in total to more than TOP\$11,000 was spent on drinks, dining, partying and shopping. The Police were suspicious of Miss 'Ala's complaint and obtained records from BSP Tonga Bank which revealed the large sum deposited into her bank account. Miss 'Ala then admitted to the Police what she had done.

[5] Miss 'Ala pleaded guilty to embezzlement at the first opportunity. At sentencing counsel were in agreement that a suspended custodial sentence was the appropriate outcome. Although the possibility of his doing so was not raised by the Judge with counsel, in his written ruling of 7 November 2018 Niu J discharged Miss 'Ala without conviction.

The jurisdiction

[6] Section 204 of the Criminal Offences Act provides:

Discharge without conviction

(1) Where a court is of the opinion, having regard to the circumstances including the nature of the offence and character of the offender, that it is inexpedient to inflict punishment and that a probation order is not appropriate, it may make an order discharging him absolutely or alternatively discharging him subject to the condition that he commits no offence during such period, not exceeding 3 years from the date of the order, as may be specified therein.

(2) A discharge under this section is deemed to be an acquittal.

(3) A court discharging an offender under this section may —

(a) make an order for payment of costs or the restitution of any property; or
(b) make any order for the payment of any sum that the court thinks fair and reasonable to compensate any person who, through, or by means of, the offence, has suffered —

(i) loss of, or damage to, property;

(ii) emotional harm; or

(iii) loss or damage consequential on any emotional or physical harm or loss of, or damage to property.

[7] The leading authority in Tonga on the application of s. 204 has been *R v Tu'ihā'ateiho* [2015] Tonga LR 44. In that case, Cato J held that in considering whether to exercise its discretion to grant a discharge without conviction the Court was required to have regard to the seriousness of the particular offending and the circumstances of the particular offender, including the direct and indirect consequences of a conviction. It was only if the direct and indirect consequences of a conviction were out of all proportion to the gravity of the offence that it was proper for a discharge to be given.

[8] This approach is consistent with how the statutory provisions conferring on the Court the power to grant a discharge without conviction have been applied in other jurisdictions (*Edwards v The Queen* [2015] NZCA 583; *State v Batiratu* [2012] FJHC 864 and *R v O'Toole* (1971) 55 Cr App R 206).

- [9] Before it may grant a discharge without conviction under s. 204 the Court must be of the opinion that 'it is inexpedient to inflict punishment and that a probation order is not appropriate'. The case law demonstrates that the Courts have considered it inexpedient to enter a conviction in a range of circumstances, such as where the offender is morally blameless, the offending is merely technical, minor or trivial or, exceptionally, where special circumstances exist justifying the Court exercising mercy to an offender. The aspect that all such cases share is that the direct or indirect consequences of the entry of a conviction is not proportionate to the gravity of the offending.
- [10] The correct approach that the Court must take in considering whether to grant a discharge without conviction under s. 204 is as follows. First, the Court must assess the seriousness of the offending including the gravity with which it is viewed by Parliament along with all aggravating and mitigating factors relevant to the particular case before it. Secondly, the Court must consider the character and circumstances of the offender which will include any previous offending, the effect of the entry of a conviction on his career, his finances, his reputation, any civil disabilities that flow from the entry of a conviction as well as any indirect consequences. Thirdly, the Court must be satisfied that the consequences of entering a conviction are out of all proportion to the gravity of the offending. Finally, the Court must stand back and consider whether in all the circumstances of the case the granting of a discharge without conviction is the appropriate result.
- [11] The circumstances where it will be appropriate to grant a discharge without conviction will rarely arise and the Court should exercise its discretion sparingly. It will not be sufficient that an offender is generally a person of good character, has no prior convictions, is a young person or that the victim has forgiven them. If it were otherwise discharges without conviction would be routinely given.
- [12] The Court will not accept mere speculation about the consequences of the entry of a conviction. It can only act upon evidence and the offender will need to provide proof to satisfy the Court that there is a real and appreciable

risk that adverse consequences will ensue (*DC (CA47/13) v R* [2013] NZCA 255 at [43] referred to in *Edwards* (supra) at [25]).

- [13] This requirement can be illustrated by reference to the submission often advanced that the entry of a conviction will prevent an offender from travelling overseas. In *Edwards* (supra) the New Zealand Court of Appeal held that in such a case the offender would generally need to satisfy the Court that under the law of the jurisdiction concerned the fact of the conviction must be disclosed, that in consequence of the conviction the offender was *prima facie* prevented from entering the jurisdiction and that there was no alternative entry process available or, if there was, such process was unreasonably difficult or uncertain. Furthermore, the Court noted at [27]:

If all of these things can be established, a sentencing court must further be satisfied that the offence is not so serious that it would be wrong to allow the applicant to present himself to foreign immigration authorities without disclosing it.

The decision under appeal

- [14] After setting out his understanding of the facts of the case, Niu J concluded that Miss 'Ala's offending was out of character for her and that she had acted because she believed had been treated unfairly by her employer. He expressed the view that young people should not be imprisoned for being foolish because they will be 'hardened, rather than taught by such sentences' and 'condemned' as criminals as a result of which 'many, if not most of them reoffend'. He said that s. 204 had been enacted because it was the Legislature's intention that convictions should not be recorded in such cases.
- [15] The Judge then considered the punishments that the Court might impose in this case. He concluded that it was inexpedient to impose any of them. This was principally because to do so would require a conviction to be entered against Miss 'Ala which he said would be a 'bar and obstacle for her to obtain employment or obtain a passport or visa for her to travel to another country'.

He was mindful also that Miss 'Ala's employer had wanted the charge withdrawn.

- [16] As an appellate Court, before we can allow this appeal we must be satisfied that Niu J was wrong to grant the discharge without conviction based on our own assessment of the merits (*Drake v R* [2019] NZCA 56 at [5]). The Judge fell into error in a number of respects and we are satisfied that his decision was wrong for the reasons that follow.
- [17] First, the Judge did not refer to *Tu'iha'ateiho* (supra) or any other authorities that have followed it and did not consider whether the consequences of entering a conviction were out of all proportion to the gravity of Miss 'Ala's offending.
- [18] The Judge also did not have regard to any of the cases where it has been held that a custodial sentence will generally be appropriate in cases of embezzlement. Most recently, in *R v Tau'alupe* (Unreported, Court of Appeal, AC 08 of 2018, 26 March 2018) this Court noted that sentences for embezzlement have generally required the offender to spend some time in custody. This is because of the serious breach of trust invariably involved, the difficulty of detection and the importance of deterrence.
- [19] We do not agree with Niu J's conclusion that s. 204 was enacted to avoid convictions being entered against the young and foolish. We have found nothing in the Cabinet papers relating to the 2012 Amendments to the Criminal Offences Act that enacted s. 204, in the words of the section or in case law to support such a conclusion.
- [20] The Judge also engaged in speculation on a range of matters. There was no evidence before him about the effects of the entry of convictions on young people generally or that many (or most) young offenders who are convicted of an offence reoffend. There was no evidence that the entry of a conviction would be an obstacle to Miss 'Ala obtaining employment or travelling to another country either.

[21] In addition, the Judge reached his decision in a procedurally unfair manner in two respects. First, as noted earlier the Judge did not raise with counsel the possibility that he might discharge Miss 'Ala under s. 204. Whilst he was not obliged to accept counsel's submissions as to the appropriate sentence, in circumstances where he intended to depart from them in such a significant respect he was obliged to raise that possibility with counsel. Secondly, no arguments were advanced to the Judge that the entry of a conviction would be an obstacle to Miss 'Ala's future employment or travel. Again if the Judge intended to rely on such matters he should have raised them with counsel.

Our assessment of the case

[22] Miss 'Ala's offending involved a significant breach of trust and the taking of a substantial sum of money. The gravity of the offending was intensified by Miss' Ala staging a robbery and laying a false complaint to the Police. She was fortunate not to have faced other charges. In addition, Miss 'Ala embezzled from her employer not because of economic need but out of resentment and to fund frivolous activities. This was offending of a serious nature clearly justifying a custodial sentence.

[23] Miss 'Ala was a first time offender but there is nothing relating to her character or circumstances to suggest that the entry of a conviction will have any direct or indirect consequences upon her other than those that ordinarily flow from her criminal offending. Specifically, there is no evidence that the entry of a conviction will be an obstacle to Miss 'Ala's future employment opportunities or travel overseas.

[24] The consequences of entering a conviction against Miss 'Ala are not out of all proportion to the gravity of the offence. This offending was so serious as to make a discharge without conviction inappropriate. It was not within the range of outcomes that the Judge below could have considered were open to him.

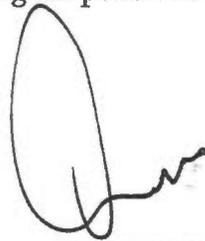
The appropriate sentence

[25] Counsel were in agreement that the appropriate outcome for this Crown appeal is that Miss 'Ala be convicted and sentenced to a fully suspended period of imprisonment. We have decided to follow that course although it should not be regarded as a precedent in future cases. Miss 'Ala can consider herself lucky that she will not be required to serve a period of imprisonment.

Result

[26] The appeal is allowed. The order discharging Miss 'Ala without conviction is quashed.

[27] Miss 'Ala is convicted on the one count of embezzlement and is sentenced to two years imprisonment. This sentence shall run from the date of this judgment but is fully suspended on the condition that Miss. 'Ala commits no offences punishable by imprisonment during the period of the suspension.



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Paulsen P



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Handley J



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Blanchard J



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Randerson J