

IN THE COURT OF APPEAL OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

APPEAL NO. AC 2 of 2010

BETWEEN : FILILA HAVILI
Appellant

AND : REX
Respondent

Coram : Burchett J
Salmon J
Moore J

Counsel : Mr T. Fakahua for the Appellant
Mr S. Sisifa for the Respondent

Date of Hearing : 13 July 2010

Date of Judgment: 14 July 2010.

JUDGMENT OF THE COURT

INTRODUCTION

[1] This is an appeal against sentence. The appellant pleaded guilty to four counts of embezzlement contrary to section 158 of the Criminal Offences Act CAP 18. The appellant was sentenced by the Chief Justice to nine months imprisonment with the last three months suspended for a period of two years.

BACKGROUND

[2] The circumstances leading to the conviction can be stated briefly. The appellant was a senior employee of the Westpac Bank of Tonga. At the time she committed the offences (between March and April 2009) she was a term deposit officer and proof operator. She had been an employee of the Bank for sixteen years. The offences were committed by the appellant transferring money payable to the Bank, into accounts maintained by her or her family. In total, \$2,141.64 was stolen. This money has been recovered by the Bank by deducting it from amounts payable to the appellant when she was dismissed.

[3] At the time of sentencing, the appellant was unrepresented. She made brief oral submissions. She referred to the fact that she was a mother of five children and she had a very small baby. She explained she had lost her job which was the family's only source of income. She said she was operating a canteen to pay for her children's education. Her explanation for taking the money was that she had repeatedly asked for a personal loan and it had been declined. She took the money on the assumption a further loan would be approved and she could then repay it. The Chief Justice had a detailed probation report describing the appellant's personal circumstances.

[4] In his sentencing remarks, the Chief Justice noted the circumstances of the embezzlement and the amount involved. His Honour observed, correctly, they were serious offences committed by the appellant when she was in a supervisory position. His Honour noted her personal circumstances including the fact she had a very young child. His Honour also noted that the appellant had no criminal record and had pleaded guilty at the first opportunity.

CONSIDERATION

[5] The appellant contends the sentence was excessive and, in the circumstances, she should not have been given a custodial sentence to be served in prison. Rather, the whole sentence should have been suspended or a fine imposed under section 30 of the Criminal Offences Act CAP 18. In relation to the proposed fine the appellant referred to R v Naidu [2001] Tonga LR 229. As to the custodial sentence, the appellant noted that four comparable cases relied on by the Crown involved the embezzlement or theft of much larger amounts of money.

[6] In our opinion, the sentence imposed was not manifestly excessive. The case of R v Naidu was a crown appeal against sentence. Two fines had been imposed by the sentencing judge, one for a count of forgery and another for a count of dealing with a forged document. The Crown contended in the Court of Appeal that the penalty was inadequate. The Crown was unsuccessful. However the Court of Appeal explained that offences of the kind they were considering involving an abuse of trust, normally warranted a custodial sentence. The appeal was dismissed having regard to the particular and unusual features of that case.

[7] In this matter, none of the particular and unusual features of R v Naidu are present. There is no reason in principle why a fine should be imposed in this matter rather than a custodial sentence. Indeed, as the Court of Appeal observed in R v Naidu, a custodial sentence is ordinarily appropriate for an offence involving dishonesty and abuse of trust.

[8] As to the four cases the Crown relied on in this matter, it is true the amounts involved were greater. But so too were the custodial sentences. Even when comparatively small amounts are involved (as in the present case) a significant element of the criminality is the dishonesty associated with the abuse of an office or position of trust. That element of criminality does not depend on the amount involved.

[9] The Chief Justice gave consideration to suspending the sentence having regard to the personal circumstances of the appellant. He decided to suspend part of it. We do not see any error in approaching the matter this way or any other error in the approach the Chief Justice took.

[10] The appeal should be dismissed with costs.



Burchett J

Salmon J

Moore J