

BETWEEN : Tu'ipolotu 'Ilavalu : Appellant;

A N D : Rex : Respondent.

Coram : Burchett J  
: Tompkins J  
: Beaumont J

Counsel : Siosifa Tu'utafaiva for appellant  
S.V. Tapueluelu for respondent

Date of Hearing : 20 July 2000

Date of Judgment : 21 July 2000

### JUDGMENT OF THE COURT

The appellant was charged with fraudulent conversion of property. The particulars alleged that being the manager of Tonga's non Government Association she, on or about the 19th and 23rd October 1992 received \$2,200 from the complainant for the purpose of building a house, which she fraudulently converted to her own use or benefit.

She was also charged with obtaining by false pretences. The particulars alleged that on or about the month of October 1992 she obtained \$2,200 from the complainant for herself by false pretences.

Following a defended hearing, she was found guilty of both counts. On 13th August 1999 the Chief Justice sentenced her to three years imprisonment on the first count, and two years imprisonment, concurrent, on the second count. He ordered restitution of \$2,200 to the complainant or a further six months imprisonment. We were advised from the bar that she has not been able to pay this amount. Effectively, therefore, she has been sentenced to three and a half years imprisonment.

She appealed against conviction and sentence. The appeal against conviction has been abandoned. She was not granted bail pending the hearing of her appeal.

### **The offending**

The appellant ran an organisation called the Tonga non Government Association. Ostensibly this organisation was established to provide housing for persons who could not obtain houses by normal means. It was the prosecution case that the organisation was a shell through which the appellant conducted a fraudulent operation

As the result of an advertisement, the complainant saw the appellant at the organisation's office. She wanted a house for her son. The total cost was to be \$2,200. She paid the full amount. The house has never been built, nor has she received back any of her money.

In his judgment, the Chief Justice sets out in detail the evidence tendered by the prosecution to support the charges. He expressed his conclusion thus:

"On the evidence I have heard, I have absolutely no doubt that this was a fraud. Whether it started as a genuine attempt to set up such a charitable organisation I do not know but the evidence shows that by the time the complainant paid her money it was a sham. Large sums of money must have been received and there is no evidence that anything more than a very small amount was paid for housing. On the other hand the evidence is compelling that the money has been dissipated and the person I'm satisfied is shown by the evidence to have been responsible for that is the accused."

### Reasons for sentence

The full reasons given by the Chief Justice for imposing these sentences are not available. But we do have the Chief Justice's notes which summarise the reasons. The Chief Justice said that he was willing to believe that it was a genuine attempt, but once it started she did nothing but blatantly spend the money. It was his view that she played on people who were too small or lacking in influence to be able to do much.

Later on the day of sentencing, as the result of an application for bail pending appeal, he was told by counsel then appearing for the appellant that she has a heart problem and had previously travelled to New Zealand for that reason. That application for bail was declined.

### Grounds of appeal

Counsel for the appellant submitted that the total sentence imposed was excessive. In support he submitted that the Chief Justice wrongly took into account the appellant's conduct in relation to other persons seeking to acquire houses, and that the sentences imposed did not have sufficient regard to rehabilitation, and to giving the appellant the opportunity to show that she could be trusted.

Although the appellant had told him that she had heart problems and high blood pressure. Mr Tu'utafaiva accepted that he could not rely on the appellant's state of health, since he did not have any medical evidence in support.

He submitted that the appellant was still endeavouring to raise money overseas with a view to making restitution, and that to suspend part of the sentence would give her an incentive to act honestly in the future. He submitted that an appropriate term of imprisonment was two years.

### Conclusion

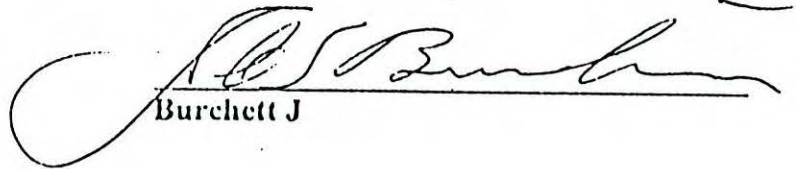
The appellant is aged 39. Her counsel is unaware of her having any previous convictions. The Court does not have the benefit of a probation officer's report. We were advised that her sentencing immediately followed the Chief Justice finding her guilty.

Although she was convicted on both counts in the indictment, they arise out of the same series of events relating to her involvement with the Association. Accordingly, the Chief Justice was correct in making the sentences imposed on each concurrent.

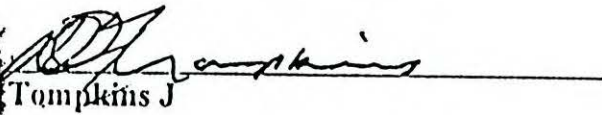
In considering the culpability of the offending, regard can be had to all the surrounding circumstances including generally her conduct in dealing with persons who came to the Association seeking to acquire a house. But she is to be sentenced only for the acts in respect of which she has been found guilty. We were advised that she has since been charged and found guilty of a similar fraud, in respect of which she was sentenced to six months imprisonment, that sentence to be concurrent with the sentences for the offences to which this appeal relates.

When regard is had to her previously apparently blameless record, to the amount involved, which, while no doubt significant to the complainant, is not large compared to amounts often involved in fraud charges, to the fact, which the judge accepted, that she

The appeal is allowed. The sentences imposed in the Supreme Court are quashed. In lieu thereof she is sentenced to two years imprisonment on count one, and eighteen months imprisonment on count two, those sentences to be concurrent. The further sentence of six months imprisonment in default of paying the amount of the restitution ordered remains. We see no justification for suspending any part of the sentence.

  
Burchett J



  
Tompkins J

  
Beaumont J