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IN THE SUPREME COURT OF TONGA
 CRIMINAL JURISDICTION
 PANGAI REGISTRY

CR 47 of 2017

BETWEEN: REX

Prosecutor

AND : VOLA FOLAUHOLA TAU'ALUPE

Accused

BEFORE LORD CHIEF JUSTICE PAULSEN

Hearing : 12 May 2017.
Date of Ruling: 12 May 2017.

Counsel : Mr. J Lutui for the Crown
The accused in person

RULING ON SENTENCE

[1] Mr. Tau'alupe has pleaded guilty to five counts of embezzlement contrary to section 158 Criminal Offences Act. Five alternative counts of theft were withdrawn. He has also pleaded guilty to three counts of falsification of accounts contrary to section 159(c) of the Criminal Offences Act. He appears today for sentence on the counts of embezzlement and falsification of accounts.

[2] A summary of facts was read to the Court and Mr. Tau'alupe takes no issue with anything contained in it. It is not necessary to set the summary of facts out in full. It is sufficient to say that Mr. Tau'alupe is 21 years old and from

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August 2014 was employed by Tonga Development Bank at Pangai. His duties required him to travel to the outer islands of Ha'apai to provide banking services to customers including withdrawals, deposits and collecting monthly loan repayments. On five occasions between December 2015 and February 2016 Mr. Tau'alupe collected money from customers totalling \$20,025 and failed to account for that money to his employer. In the same period on three of the occasions referred to Mr. Tau'alupe falsified bank records by omitting to record deposits into customers saving account passbooks. On 16 May 2016 Mr. Tau'alupe wrote to his employer confessing to using money that had been given to him by customers. He has been cooperative with the Police and admitted all of his offending. He is a first time offender.

The prosecutions submissions

- [3] The prosecution notes that Mr. Tau'alupe was in a position of trust and the offending included deception of his employer and customers. It acknowledges however that Mr. Tau'alupe is a first time offender, pleaded guilty at the first opportunity, cooperated with the Police, has genuinely apologised to the Bank and has shown genuine remorse for his conduct. The prosecution referred me to two other relevant decisions which I refer to below.

The pre-sentence report

- [4] I have been provided with a pre-sentence report that provides useful information and references. Mr. Tau'alupe is 21 years old and comes from a good family. He did well at school and has been the bread winner for his family. He has been respected in the community and in the Church which he attends. He is married with no children. Despite his offending his family stands by him.

- [5] As far as his employment with the Tonga Development Bank is concerned Mr. Tau'alupe started work as a Sub-Treasury clerk and because of his good performance he was entrusted with the role of loans officer also. According to his statement to the Probation Officer he took the money because he was attempting to clear loans of his parents but had attempted to process a personal loan to repay the money when complaints were made and the loan was declined and the matter referred to the Police.
- [6] The report writer says (and I accept) that Mr. Tau'alupe is genuinely remorseful and has offered a genuine apology to the Bank. He clearly much impressed the report writer who describes him as a great asset to the government and society. The report recommends a non-custodial sentence of supervised community work.
- [7] There are attached to the report two references. One from Fr Saone Vahe the Catholic Parish Priest of Ha'apai and the other from Paula Finau the Town Officer of Hihifo. The references are useful to me and they speak highly of Mr. Tau'alupe as an individual.
- [8] I asked the report writer to ascertain the attitude of the Tonga Development Bank to the recommendation of a community based sentence. I am advised that the Bank would be satisfied with a sentence of supervised community work so that Mr. Tau'alupe can restore good to the people he has hurt by his offending while at the same time making him learn from his mistake. I am further advised that the Bank has forgiven Mr. Tau'alupe for what he has done.

The nature of embezzlement

- [9] Embezzlement is a serious crime. It involves a breach of trust and for that reason is often difficult to detect. Without trust the commercial community cannot function effectively as employers must be able to trust their

employees and unless businesses can function and flourish there will be few employment and commercial opportunities for the people of Tonga (*Wall v R* [2001] Tonga LR 238 and *R v Bloomfield* [2013] Tonga LR 165). For this reason the Courts have made it clear that in cases of theft as a servant a penalty which deters such offending in the offender and in others is required.

Comparable cases

- [10] In arriving at the appropriate sentence in this case I have had regard to a number of previous decisions.
- [11] In *R v Minisale* (Court of Appeal CA 13/99, 23 July 1999) the accused was found guilty after trial of embezzlement of \$47,310.23. He was in a senior position of trust with no previous convictions. On appeal he was sentenced to three years imprisonment with the last months suspended for two years.
- [12] In *R v Tangata'iloa* (Supreme Court CR 99/00, 3 May 2001), a case with some similarities to this one, the accused was employed as a bank teller and pleaded guilty to a series of charges involving embezzlement of \$6,627.40. He was sentenced to two years imprisonment on each count concurrently with the final six months suspended for one year.
- [13] In *R v Wall* [2001] Tonga LR 238 the accused who was in a senior position with an insurance company pleaded guilty to 11 counts of embezzlement totalling \$181,008. He had no previous criminal record and was cooperative with the Police as soon as confronted by his employer. Some property that had been purchased was recovered. The accused was sentenced to four years imprisonment on each count to be served concurrently with the last 12 months suspended for two years.
- [14] More recently there have been two significant decisions. In *R v Bloomfield* [2013] Tonga LR 165 the accused was convicted after trial of embezzling \$204,033 from her employer. She had no convictions, was previously of good

character and had strong community support. She was given some limited credit for a late expression of contrition. She was sentenced to four years and four months imprisonment with the last 12 months suspended for two years.

[15] In *R v Cocker* (CR3/13) the accused pleaded guilty to embezzlement, falsification of accounts and theft. She had converted \$99,450 and there were a large number of incidents over about a two year period. She was a first time offender, married with one child, had a good education and was in a senior position. She was sentenced to three years imprisonment (from a starting point of 4 years and 6 months). The final year of her sentence was suspended on conditions.

[16] Finally *Kaufusi v R* (Court of Appeal. AC14 & 15 of 2014, 31 October 2014) involved appeals by Ms Latu and Mr Kaufusi who had been convicted of embezzlement and falsification of accounts. They worked for Westpac Bank and converted money by manipulating foreign exchange rates. As far as Ms. Latu was concerned she was convicted after trial. The charges against Ms. Latu involved 19 separate transactions amounting to \$30,917.60. She had no previous convictions and was sentenced by the Judge at first instance to 2 years and three months imprisonment after deducting 6 months for her previous good character from a starting point of 2 years and nine months. The final 6 months of her sentence was suspended to take account of her youth but the judge was sceptical about the sincerity of her remorse describing her apology as belated and convenient. The Court of Appeal did not interfere with the sentence whilst expressing sympathy for Ms Latu that the sentence was stern and that the Judge would not have been criticised had he been prepared to grant a longer period of suspension. In Mr. Kaufusi's case, he had pleaded guilty during his trial and had embezzled \$41,301.03 on 48 occasions. He was sentenced to 2 years and 8 months imprisonment with 9 months of the final year suspended for two years. Relevant to Mr. Kaufusi

his family had repaid all the money stolen and the issue on appeal was whether the trial Judge had made proper allowance for Mr. Kaufusi's previous good character and the making of reparation. Again the Court of Appeal considered that whilst the Judge could have suspended more of Mr. Kaufusi's sentence there was no apparent error of principle in the Judge's approach and did not interfere with the sentence he imposed.

Aggravating factors

[17] I have already mentioned the dim view that the Courts take to offending of this kind. It is the case that the accused deliberately breached the trust of his employer on five occasions.

Mitigating factors

[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.

Decision

- [19] The maximum penalty for the offences of embezzlement and falsification of accounts is seven years imprisonment. I accept that in cases like this sentences which discourage others from similar offending should be imposed.
- [20] Looking at Mr. Tau'alupe's offending as a whole and particularly having regard to the amount he converted, the number of offences, the period over which they occurred and the fact that Mr. Tau'alupe was in a position of trust I do not consider it appropriate to simply impose a sentence of community work as proposed in the pre-sentence report. I consider that it is necessary to impose a sentence of imprisonment and the appropriate starting point for the purposes of sentence is two years and 6 months imprisonment.
- [21] However, as I have noted there are significant mitigation factors in this case. Mr. Tau'alupe is entitled to credit for his early guilty plea and the full cooperation that he has offered to the Police. For this I allow him a discount of 9 months on his sentence. I also give him credit for his previous lack of convictions and his genuine expressions of remorse and acceptance of responsibility. I allow another 3 months for these factors. That means in total I impose upon him a sentence of 1 year and 6 months imprisonment.
- [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.

The result

[23] On each count of embezzlement and falsification of accounts Mr. Tau'alupe is convicted and sentenced to 1 year and six months imprisonment to be served concurrently. The sentence is fully suspended subject to the conditions:

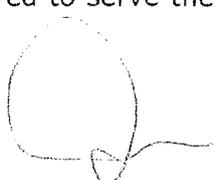
[23.1] Mr. Tau'alupe is not to commit any further offences punishable by imprisonment for a period of 2 years.

[23.2] Mr. Tau'alupe is to serve 12 months' probation.

[23.3] Mr. Tau'alupe is to undertake 60 hours of community work involving cleaning of the areas for Koulo to the Lea'aetohi Field and such other areas as directed. This work is to be performed under the supervision of Miss Lesita Palu an officer in charge of the Governor's Office and at such times as directed by her. Miss Lesita Palu shall report in writing to Mr Patelisio Pale of the Probation Service at least once every two months on the number of hours and details of the work performed by Mr. Tau'alupe during that period.

[24] Mr. Tau'alupe, you should understand that if you fail to comply with any of these conditions you may be recalled and required to serve the full sentence of imprisonment.

PANGAI, HA'APAI: 12 May 2017


O.G. Paulsen
LORD CHIEF JUSTICE

