

14/09/17

**IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY**

CR 15 of 2017

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BETWEEN: REX

Prosecutor

AND : SALOME POUSINI

Accused

BEFORE LORD CHIEF JUSTICE PAULSEN

**Hearing : 12 September 2017.
Date of Ruling: 14 September 2017.**

**Counsel : Miss L. Macomber for the Crown
Mr W.C. Edwards Snr SC for the accused**

RULING ON SENTENCE

[1] The accused Salome Pousini pleaded guilty shortly before trial to one count of embezzlement contrary to s.158 Criminal Offences Act and one count of money laundering contrary to s.17(1)(a) Money Laundering and Proceeds of Crime Act 2000. These are serious offences. Embezzlement is punishable by imprisonment for a period not exceeding 7 years. The maximum penalty for money laundering is imprisonment for 10 years or to a fine not exceeding \$500,000 or both. Three counts of forgery and three counts of knowingly dealing with forged documents were withdrawn by the Crown.

rec'd 14/09/17
AK

The facts

- [2] I have before me the indictment, a pre-sentence report, the submissions of Counsel along with a lengthy statement and additional documents prepared by Miss Pousini to which no specific objection was taken by the Crown.
- [3] Miss Pousini is a 21 year old single woman. She successfully completed her seventh form exams in December 2013 and found employment with an insurance company (FAT) as an office co-ordinator. I understand that FAT is owned by the complainant (TM), TM's husband and one other person.
- [4] From March 2016 until her dismissal in July 2016 Miss Pousini was assigned duties as a loan officer for a related finance company (FFL). An amount of around \$4,000 was unaccounted for from FFL. TM blamed Miss Pousini and said it was her responsibility to repay it. I refer to this sum as the 'shortfall'. Miss Pousini did not believe she was responsible for the shortfall and she has never been charged with taking this money. Miss Pousini was concerned about the allegation and the obligation to repay such a large sum and offered to resign and was surprised when TM persuaded her not to do so.
- [5] TM had signing authority on FAT's bank accounts with ANZ and the Bank of the South Pacific. She advised Miss Pousini that she intended to withdraw money from FAT's accounts for her own requirements. Over the period 6 May 2106 to 5 July 2016 TM gave Miss Pousini 14 signed blank cheques. TM instructed Miss Pousini that she required specific amounts from the bank. She told Miss Pousini to complete the cheques for that amount along with an additional amount for herself. Miss Pousini then completed the

cheques, cashed the cheques at the bank and gave TM the amount she required. The balance of the money was used for her own purposes. Miss Pousini says, and I accept for present purposes, that TM told her that the additional amounts could be used to repay the shortfall, repay a loan that Miss Pousini had taken out with another related entity and also as a 'bonus' for herself. I also accept that during this period TM regularly took Miss Pousini away from her usual duties and out for meals at restaurants around Nuku'alofa.

[6] For sentencing purposes Counsel are agreed that I can proceed on the basis that the 14 cheques drawn on FAT's bank accounts totalled T\$73,276. Of that sum T\$38,426 was paid to TM. Miss Pousini added T\$34,400 for herself. She used T\$4,000 to repay the shortfall and T\$1,000 to make up an amount required by TM. Of the balance the Police have recovered a motorcar purchased with this money for T\$8,900 and T\$6,532 which was held in the bank account of a friend of Miss Pousini. That leaves a sum of approximately T\$15,000 unaccounted for.

[7] Miss Pousini took steps to hide the money she had taken from her family. She deposited money into the bank account of a friend. The money laundering charge arises because in one instance Miss Pousini withdrew an amount of T\$26,000 from FAT's BSP account and retained T\$18,900 for herself. She used T\$8,900 of that money to purchase a motorcar. Miss Pousini also took steps to hide the motorcar. I am satisfied by her actions (and the content of her statement to the Court) that Miss Pousini was aware that she was acting dishonestly. As time went on she got carried away and drew out large sums of money. She must have been aware that she could never have been entitled to that money.

[8] Disagreements arose between TM and Miss Pousini. Miss Pousini says things came to a head when FAT was required to make payment of a death claim for which it had inadequate funds. TM then alleged that Miss Pousini was stealing from FAT. Miss Pousini says that she was told by TM to admit that she had stolen the money and that TM would protect her and everything would be alright. As a result Miss Pousini says she signed an agreement at the offices of FAT's lawyer acknowledging she had taken all the money. Everything was not alright and Miss Pousini was arrested the next day. Miss Pousini was fully co-operative with the Police when arrested.

The submissions and the pre- sentence report

[9] Mr. Edwards submitted that there is a special feature of this case which is that Miss Pousini acted on the instructions of TM who was one of the owners of FAT and who was at all times aware of the cheques cashed and the amount taken by Miss Pousini. He argued that the manner in which the cheques were cashed was carefully planned by TM to trap Miss Pousini into admitting and becoming liable for the full amount TM later complained was stolen. Mr. Edwards emphasised that Miss Pousini is a first time offender, of good character and from a good family, who was naïve and under the influence and control of TM and not fully comprehending of the significance or consequence of her actions. He submitted that a conviction will mean that Miss Pousini cannot take up an opportunity open to her to obtain residency in New Zealand which is 'out of order with the nature of the offence and how the offending occurred'. In those circumstances he submitted that Miss Pousini should be discharged without conviction under s.204 Criminal Offences Act (as

amended in 2012) subject to her making a payment of T\$2,000 towards the costs of the prosecution.

[10] Miss Macomber argued that it is not appropriate to discharge Miss Pousini without conviction because the offences are serious ones involving breaches of trust and motivated by greed. Miss Macomber submitted that a custodial sentence is required which might, in the Court's discretion, be partially suspended.

[11] The pre-sentence report provides helpful information of Miss Pousini's family background, education and employment history and the circumstances of the offending. The report writer also emphasised that Miss Pousini is a first time offender, the involvement of TM in her offending, that the entry of a conviction on these charges will prevent Miss Pousini from obtaining a position that she has successfully applied for with New Zealand Immigration and from obtaining residency in New Zealand following her success in a ballot. The recommendation is that Miss Pousini be discharged without conviction on the condition that she enter into a good behaviour bond.

Discussion

[12] The approach that I take to sentencing Miss Pousini is as follows. First, I must determine the appropriate starting point for sentencing purposes. Secondly, I must adjust that for personal aggravating and mitigating factors relevant to Miss Pousini. Thirdly, I must consider what discount is appropriate to reflect Miss Pousini's guilty plea. In addition, in light of Mr. Edwards' submissions I must also consider whether there are grounds to discharge Miss Pousini without conviction.

- [13] I take the offence of embezzlement as the lead and most serious offence in the circumstances of this particular case. Miss Macomber provided me with a number of comparable cases. I have considered them all along with others which I recently referred to and relied upon in *R v Tau'alupe* (Supreme Court, CR 47/2017). It is not necessary for me to set out in detail my analysis of the cases.
- [14] In arriving at the starting point for sentencing purposes I have had regard to the fact that the Courts have consistently regarded embezzlement as a serious offence, that the amount that Miss Pousini took from FAT was significant, the fact that Miss Pousini's offending was repeated on 12 occasions over a period of two months and that (subject to what I say below) was motivated by greed.
- [15] I am in agreement with Miss Macomber that it is appropriate to impose a custodial sentence for this offending and that the appropriate starting point based on the authorities is between 2 years 6 months and 3 years imprisonment. In the present case I am adopting the lower figure of 2 years and 6 months as the starting point for the reason that follows.
- [16] I agree with Mr. Edwards that this case has a special feature in the role that TM played in Miss Pousini's offending. The Court has not heard from TM and I do not in those circumstances accept Mr. Edwards' submission that she had devised a careful plan to trap Miss Pousini. However, it appears that TM signed blank cheques on FAT's account and gave them to Miss Pousini and that those cheques were subsequently cashed with some of the proceeds paid to TM. I accept that TM told Miss Pousini to add something for herself or at least must have been aware that she was doing so. I also accept that

Miss Pousini was under the influence of TM, who was both older and in a position of authority over her. One must regard TM's conduct with a good deal of suspicion but viewed in its very best light TM created the circumstances that lead to Miss Pousini's offending. This is not to say that this absolves Miss Pousini from responsibility for her own actions but it is in my view certainly an important matter to be taken into account.

[17] Miss Macomber referred to matters which she submitted were aggravating features of Miss Pousini's offending but in my view with two exceptions they are inherent in the nature of the offence. The exceptions are the submissions that Miss Pousini acted out of greed and does not seem entirely remorseful for her actions. I accept that Miss Pousini had no need for the money she took and in that respect she acted out of greed but that will usually be the case with offending of this kind and does not justify an uplift on the starting point. It may be said that Miss Pousini does not appear remorseful because she has disputed the amount that it was said she stole and she has advanced from the beginning the argument that she was told to make the withdrawals by TM. I do not consider that these matters demonstrate a lack of remorse. Miss Pousini was originally charged with embezzling almost T\$75,000 and was correct to dispute that. For reasons I have already given I accept that TM's conduct is a relevant mitigating factor that it is proper for Miss Pousini to raise. I do not add any uplift on the starting point on this basis either.

[18] There are a number of mitigating factors that Miss Macomber has properly recognised. Miss Pousini is a first time offender. She was a good student and comes from a good and supportive family. Other

than in respect of these matters she has shown herself to be of good character. When Miss Pousini was arrested she was fully co-operative with the Police and freely admitted to her offending. I allow Miss Pousini a discount of 6 months on the starting point for these mitigating factors.

[19] Miss Pousini is also entitled to credit for her guilty plea. Miss Pousini's earlier pleas of not guilty were entered only because of the dispute over the amount she was said to have taken. Miss Macomber responsibly accepts that Miss Pousini is entitled to full credit for her guilty plea as she pleaded guilty immediately upon the Crown amending the indictment to reflect more accurately the amount taken. I allow Miss Pousini 7 months discount for her guilty plea.

[20] The result is that on the offence of embezzlement the appropriate sentence is one of 1 year and 5 months imprisonment.

[21] I must now consider Mr. Edwards submission that it is appropriate to discharge Miss Pousini without conviction. The principles to be applied in such cases were discussed in *R v Tu'iha'teiho* [2015] Tonga LR 44 and *Police v Tapueluelu* [2015] Tonga LR 221. In *Tu'iha'teiho* Cato J referred to the judgment of Richardson J in *Fisheries Inspector v Turner* [1978] 2 NZLR 233 where he observed that the Court

...must have regard to the seriousness of the offence and to the gravity with which it is viewed by Parliament; to the seriousness of the particular offending; to the circumstances of the particular offender in terms of the effect on his career, his pocket, his reputation and any civil disabilities consequential on his

conviction; and indirect consequences. And if the direct and indirect consequences of a conviction are, in the Court's judgment, out of all proportion to the gravity of the offense, it is proper for a discharge... to be given.

[22] To similar effect in *Tapueluelu* at [13]. I stated:

As to the approach that the Courts should take to the question of whether it is inexpedient to inflict punishment, this involves a balancing of the gravity of the offending by reference to the character and circumstances of the offender and the facts of the particular case against the direct and indirect consequences of conviction. The Court must determine if the indirect and direct consequences of a conviction would be out of all proportion to the gravity of the offending..

[23] In the circumstances of this case it would be clearly inappropriate to grant Miss Pousini a discharge without conviction. This kind of offending is all too common in Tonga and causes great harm to the development of business. The Courts have stressed on a number of occasions that embezzlement is a serious crime and that the commercial community cannot function effectively unless employers are able to trust their employees. As a consequence a major consideration is sentencing in cases of theft as a servant is the need for deterrence (*Wall v R* [2001] Tonga LR 238 and *R v Bloomfield* [2013] Tonga LR 165).

[24] Miss Pousini's conduct was serious offending and whilst I have accepted and given her credit for the role played by TM she knowingly took substantial sums to which she was not entitled. Her offending was certainly not 'trivial' as the pre-sentence report

suggests. It is important that sentences are proportionate to the offending and that the Courts act in the public interest and protect it from the serious consequences of embezzlement by employees.

[25] I accept that Miss Pousini will suffer hardship as a result of her conviction. She will lose an employment opportunity and be unable to obtain residency in New Zealand. These are consequences of a conviction of which she should have been well aware. Many Tongans gain residency overseas and it would be entirely wrong if the Courts were to send a message that conviction for serious offending could be avoided by raising such an entitlement or intention. The application for a discharge without conviction is therefore refused.

[26] I turn now to consider whether to suspend all of some part of Miss Pousini's sentence. The relevant principles are set out in *Mo'unga v R* [1998] Tonga LR 154. 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. All of these circumstances are applicable in the present case.

[27] This offending was entirely out of character for Miss Pousini and whilst she acted unlawfully she also acted under the influence of an older person in a position of authority over her. Miss Pousini is young and intelligent and must have a lot to offer the community. In those circumstances I consider that it is appropriate to suspend Miss Pousini's sentence in full.

[28] Miss Macomber submitted that a partial suspension might be appropriate in this case but that it was important that Miss Pousini serve some part of her prison sentence as a deterrent to other

offenders. There may be a view that a fully suspended sentence is in some way a 'let off' for an offender who has got away without consequences for their offending. This is a crude perspective. It certainly can never be thought to be the case here where the fact of a conviction will have serious consequences for Miss Pousini regardless of the sentence imposed by the Court. Furthermore, fully suspended sentences are commonly imposed subject to conditions which in themselves constitute demanding sentences and act also as significant restrictions on an offender's liberty. It is also the case that if the conditions are not complied with the offender may be required to serve their prison sentence. I intend to impose such conditions in this case.

The result

[29] On the count of embezzlement Miss Pousini is convicted and sentenced to 1 year and 5 months imprisonment. On the count of money laundering she is sentenced to six months imprisonment to be served concurrently. These sentences are fully suspended subject to conditions that:

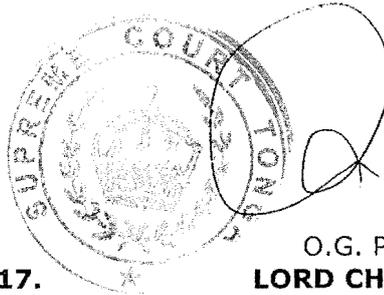
- [29.1] Miss Pousini is not to commit any further offences punishable by imprisonment for a period of 2 years.
- [29.2] Miss Pousini is to serve 12 months probation.
- [29.3] Miss Pousini is to do 60 hours of community work undertaking general cleaning of public places on such days and at such times as directed by the Probation Service but no less than 4 hours on each occasion. Miss Pousini is to report to the Probation Service Office

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CR 15 of 2017

at Kausela Road, Nuku'alofa before 9am on 15
September 2017.

[30] Miss Macomber asked me to make an order for the forfeiture of the motor vehicle. Upon doing my own research I am not clear what authority is being relied upon for the making of such an order in this case but I also understand that Miss Pousini will voluntarily give up the motor vehicle. I reserve leave to hear further submissions on this issue if required.



NUKU'ALOFA 14 September 2017.

O.G. Paulsen
LORD CHIEF JUSTICE