

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

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**CR 90 of 2018**

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**BETWEEN:**

**REX**

**Prosecutor**

**AND:**

**LOLEINI 'ALA**

**Accused**

**BEFORE HON. JUSTICE NIU**

**Counsel : Ms. 'E. 'Akau'ola for prosecution  
Mr. S. Tu'utafaiva for defence**

**Hearing of Submissions : 9 September 2018  
25 October 2018**

**Date of Sentence : 7 November 2018**

**SENTENCING**

**The facts**

1. The accused is a single mother aged 26 living with her widowed mother and 2 brothers and her 1 year old illegitimate child.
2. Although she had got to form 6 at school, she did not pass the external examinations.
3. She had several jobs since leaving school in 2010. She was 19 then. She worked as a shop assistant first and then worked for one fish shop and then another fish shop and finally worked for the complainant fish shop in November 2015.
4. No reason is given as to why she changed jobs but she states that when she started with the last job she was getting \$150 per week. It may be she changed jobs because of the better pay in the other jobs, in view of her mother being widowed, to help with their living expenses.

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5. No date is stated as to when her father died and what effect that had on her education but it appears that she took too long to be at school, being 18 years old at form 6. She then began work at age 19.
6. She exhibited maturity by taking on the responsibilities of care for her mother and siblings by working well and hard for all their sake in their unfortunate circumstances. The complainant employer saw that and paid her \$150 per week. She worked well and hard even more. In 2016 she became pregnant but she carried on and she had that child in 2017. She appeared to become more determined to work that much harder.
7. She says that her employer was so pleased with her work that he promised to raise her wages. She then worked even harder. She not only did her normal work, she also did the office paper work and delivery of documents and banking, cleaning and also fish weighing and packing and working into after hours.
8. The promised raise, she says, never came. And in November 2017, she was entrusted with not only the banking she was also entrusted with the paying of the wages of the other workers, whilst the employer went overseas. It was then, she says, she found out that the other workers, who had only started working after her, were getting paid the same as she was being paid.
9. I would imagine she felt cheated by the employer because what she then did was so out of character, and most irresponsible, and in fact consistent with revenge upon the employer. She staged a robbery, a faked robbery by which she embezzled \$22,500 of the employer's money.
10. At least that is what she says she did. We are not told the particulars because the police officer investigating the robbery, and who suspected that the robbery was staged by the accused, did not give the particulars of what he found. He did not even attach in the police file of this matter the statement made by the accused when she complained that she had been robbed. It appears to have been filed in a separate file in respect of the staged robbery. It should have been filed in the file of this embezzlement instead, as evidence of the embezzlement.
11. What she did was she opened her own bank account at BSP Bank on 1 November 2017 and on the 7 November 2017, she had \$14,375.00 of the \$22,500 deposited into that Account. She then went and parked the vehicle she was using in the parking area of the Basilica Church (opposite the Royal

## CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

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Tombs at Nuku'alofa). She then cut injuries on her hands with a knife and then scattered loose pa'anga notes of \$5s, \$20s and \$50s and bits of a torn plastic bag inside the vehicle. She then called the police and told them that she had been robbed. Then she called her workplace and told them that she had been robbed of all the money.

12. It appeared that she believed that the police and the employer's manager believed her story and she then, consistent with her irresponsible action and aim to avenge her employer, went out and spent the money she kept (\$8,125) on drinks, dining and partying with friends in different places, including shopping for the home and for her illegitimate child. Not only did she use up all the \$8,125 she had kept, she also withdrew \$2,894.50 from the \$14,375 she had deposited into her BSP Bank account, it seems, in order that the employer did not have any of its money back. She spent all that money (\$11,019) between the 7<sup>th</sup> and 10<sup>th</sup> November 2017, when she was arrested.
13. On 12 November 2017, the employer and the accused came to an agreement that the balance of the money in the bank (\$12,029.50) be paid back to the employer, the complaint to the police to be withdrawn and the accused to repay the amount used by her (\$11,019) in part payments. They conveyed it to the police. The police did not accept it and proceeded to prosecute the accused, which has resulted in her appearance before me now for sentence.

**Guilty plea**

14. The police, being suspicious that such a robbery as described by the accused could not have been carried out at about midday in open and public place as the Bassilica parking in Nuku'alofa, obtained a court order by which the BSP Bank revealed the deposit of the \$14,375 into the accused bank account the same morning in which the alleged robbery took place. Upon putting that to the accused, the accused readily confessed and described what she did.
15. When charged in the Magistrate Court she did not contest her committal, and when she was charged in this Court, before the Lord Chief Justice, she plead guilty straight away. That was on 13 July 2018.

**No record**

16. The accused has no previous record of offending.

**Submissions**

17. Mr. Tu'utafaiva for the accused produced a letter from the employer dated 27 August 2018, in which the employer stated as follows:

"[The accused] was a good staff to us starting from November 2015. In November 2017 she did wrong to the company and we already forgive her because of her daughter and we accept all her apologies for everything she did. All we request is for the money from her BSP account of the amount of \$12,029.50 which this money is belonged to the company and must be returned to the company's account."

18. Mr. Tu'utafaiva also produced a letter from a store dated 9 October 2018, in which the owner stated as follows:

"[The accused] has been employed in our store from 17<sup>th</sup> September 2018 up to now.

[The accused] been working without supervision since joining our store at the market. She is hardworking and reliable worker and possesses necessary skills such as people skills enhances the development of our little store. Although her salary per week is \$100.00 for your information. Her ability to consistently manage our shop given the limited time she has worked with me, proves that she will be an excellent and trustworthy person."

19. He also produced 3 receipts of payments by the accused:

21/9/2018	\$100
28/9/2018	\$100
5/10/2018	\$100

to the complainant company in respect of her debt thereto.

20. He submitted that in the circumstances an appropriate sentence would necessarily be imprisonment in view of the breach of trust committed by the accused but that a suspension of that imprisonment be granted and that community service be imposed instead.
21. Ms. 'Akau'ola agreed with that and referred me to the case of *R v Kolomalu* (CR115/11) in which Ms. Kolomalu had embezzled \$21,051.20 from her employer's store, all of which could not be recovered. She was a first

offender, cooperated with the police and pleaded guilty right away. She was 28 years old and had one child. She was sentenced to 18 months imprisonment but it was fully suspended for 2 years and was to work community service of 120 hours.

**Sentence**

22. Whist I do not for one moment condone or overlook what the accused has done, that she has knowingly and embezzled her employer's money, I understand why she did it and I believe that she would not have done what she did, if she had been fairly dealt with by her employer. I am not saying that her employer unfairly dealt with her because I have not heard the employer's side; in fact the employer says in his letter that the accused did wrong to the company. But the accused believed, she had been unfairly and wrongly dealt with by the company, and she did what she did because of that. It was not only not her nature to do such a criminal act, it was also not her nature to be so wasteful of money as was shown by her spending and partying with her employer's money.
23. She was most foolish to have done what she did. But so do young people and if all young people are sentenced to imprisonment for being foolish they would all grow up with prison sentence hanging over them. At the same time, they would be hardened, rather than taught, by such sentences, especially with the stigma with which such sentences entail, such that they have the tendency to re-offend. Because they are young and foolish, they see themselves as having been condemned and imprisoned as criminals, and that that is all they can be, and many, if not most, of them re-offend because that is what they have been condemned to be. That cannot have been the intention of the Legislature in enacting the imprisonment sentences in the Criminal Offences Act.
24. Having now realised that that should not be allowed to continue, and in order that a conviction should not even be recorded against a person, in an appropriate case, the King and the Legislative Assembly enacted the provisions of section 204 of the Criminal Offences Act. It provides as follows:

"204 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 an acquittal.
- (3) A court discharging an offender under this section may –
  - (a) make an order for payment of cost or the restitution of any property; or
  - (b) make any order for 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.”

25. I consider that this is an appropriate case for the application of that provision. I am of the opinion that it is inexpedient to inflict a punishment. The punishments stated in the Act to be inflicted, namely,

- (a) imprisonment, is inexpedient because it deprives the accused's child of her (she is female) mother, the accused, she is only 1 year old and she should not be deprived of the comfort and love and care her mother she has known since birth, and be given those of another;
- (b) fine, is inexpedient because the accused cannot afford to pay a fine. If imposed, it would be paid by someone else for her and she is not thereby punished;
- (c) community work, is inexpedient because, to carry it out, the accused has to be convicted of this offence and such conviction would be recorded against her and it would be a bar and

obstacle for her to obtain employment or to obtain a passport or visa for her to travel to another country, which were no doubt the purposes or some of the purposes for which this s.204 was enacted;

- (d) suspended imprisonment, is inexpedient for the same reason.

I also consider that it would be inappropriate to order probation for the same reason, but that probation can properly be imposed as a condition of the discharge under s.204(1) itself.

26. I am also mindful that the complainant employer (company) had informed the police that it had wanted the charge against the accused withdrawn. In other words it did not wish that the accused be punished or imprisoned or be convicted of this offence.
27. I however consider that the accused be properly warned that she must not do anything that constitutes an offence in future, as a condition of her discharge without conviction. It acts like and has the deterrence of a suspended sentence as far as she is concerned.

**Orders**

28. Accordingly, I make the following orders:
- (a) The accused, Loleini 'Ala, is forthwith discharged without conviction under s.204 of the Criminal Offences Act.
- (b) This discharge is upon the condition that she shall not commit any offence within the next 2 years from the date of these orders.
- (c) The balance of \$12,029.50 in the plus saver account no. 2001382627 in the name of the accused at the Bank of South Pacific, Nuku'alofa, shall forthwith be paid to the complainant company.



*[Signature]*  
L. M. Niu J  
JUDGE

**NUKU'ALOFA: 7 November 2018.**