IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

IN THE MATTER	of Article 60(2) of the Constitution of the Cook Islands, and Sections 54 and 56 of the Judicature Act 1980-81
	CA 18/05
BETWEEN	**PERI VAEVAE PARE** Appellant
AND	**THE POLICE** Respondent
	CA 19/05
BETWEEN	**POLICE** Appellant
AND	**PERI VAEVAE PARE** Respondent

Coram: Barker JA
Henry JA
Paterson JA

Counsel: Mr P J Davison QC and Mr J B Samuel for Peri Vaevae Pare
Mr T Elikana for Police

Hearing: 29 May 2006
Judgment: 02 June 2006

JUDGMENT OF THE COURT

INTRODUCTION

1. The Appellant was charged with three counts under Section 251A of the Crimes Act 1969 of using, with intent to defraud, a document capable of being used to obtain a pecuniary advantage. After a judge-alone trial before Williams CJ, in November 2005 the Appellant was convicted on all three charges. On 25 November 2005 the Chief Justice ordered that the Appellant appear for sentence if called upon by the Court to do so within a period of 12 months from that date and

that he pay within 14 days the sum of $5,000 towards the cost of the prosecution.

2. On 4 December 2005 the Appellant was given leave to appeal against his conviction and on 10 December 2005 the Crown was given leave to appeal against the sentence imposed on the Appellant following his conviction.

BACKGROUND

3. The Appellant, at the time of the alleged offending, was a Minister of the Crown. His portfolios included the Ministry of Internal Affairs. In 2004 the Disability Division of the Ministry of Internal Affairs and Social Services commenced a Special Assistance Fund Project (the project) providing building materials and labour for the homes of people with special needs.

4. Mrs Numanga was the project co-ordinator. She played a key role in screening applicants and administering the project, including requesting funds from the Ministry to meet payments due for materials and labour. Mr Tangapiri was a builder involved in the project who also assisted in the assessment of building requirements for the project. He was also employed by the Appellant to complete additions to the Appellant's own home. These additions were not part of the project.

THE CHARGES

5. All three charges referred to Mr Tangapiri, who was originally jointly charged with the Appellant, but who pleaded guilty on the morning of the trial. The substance of each charge was that the Appellant

arranged matters so that building materials for use on his own house additions were paid for by the Crown as part of the project.

6. The charges alleged that the Appellant "together with Patrick Tangapiri" used invoices to obtain for himself six sheets of hardboard, louvre frames and blades, and one cubic metre of ready-mix concrete. The total value of the products was $463.50.

7. Mrs Numanga played a role in obtaining the sum of $463.50 from the Ministry, but she was not charged. The Chief Justice and the Appellant and his counsel learned from the Crown's opening that she was not to be prosecuted. In replying to an application that there was no case to answer made at the end of the Crown case, Mr Elikana said she had been given immunity. The form that "immunity" took is not clear. Both Mrs Numanga and Mr Tangapiri gave evidence for the Crown. Without their evidence, the Appellant could not have been convicted.

8. The Crown case against the Appellant can be summarized. It was said that he used a similar method in respect of each lot of materials. At a meeting in the Appellant's office with Mrs Numanga on the 17 August 2005, 12 applications for assistance were considered. Prior to that meeting the Appellant had told Mr Tangapiri that, because of a shortage of hardboard and cement, supplies should be bought and stockpiled at the Appellant's home. After the meeting on 17 August Mr Tangapiri was instructed by the Appellant to purchase 20 sheets of hardboard and to stockpile them at the Appellant's residence. This was a greater number of sheets than were required for the project at that time. The Appellant had told Mr Tangapiri that he required some hardboard for his own renovations.

9. On 18 August 2005 Mr Tangapiri and Mrs Numanga purchased 20 sheets of hardboard from a local supplier. As the Ministry did not have an account with the supplier, Mrs Numanga paid for the hardware and some cement purchased with her own cheque. The product was, on 18 August, delivered to the Appellant's residence. The hardboard was placed on the front porch. The Appellant customarily stored his own materials at the back of the house. The next morning Mr Tangapiri and another worker installed six of the sheets on the Appellant's renovations. When the Appellant arrived home that evening, he saw that the hardboard sheets had been installed. Mr Tangapiri took the remaining 14 sheets to the home on which they were to be installed as part of the project.

10. Mrs Numanga obtained a refund from the Ministry for the cheque she had issued for the hardware and cement by inserting on the invoice a reference to a person who was to receive assistance under the project. By this method, the Ministry through the project had paid for the hardboard from the order which went into the Appellant's renovations. Mrs Numanga's evidence was that she had been told that some of the hardboard was for the Appellant's residence. She had included the cost of that hardboard in her refund claim to the Ministry because "the Minister needed them and no questions asked."

11. Mr Tangapiri's evidence was that the Minister wanted some hardboard for his renovations. The Appellant told him to take the hardboard from the supply in front of the house (this was the hardboard which was eventually paid for by Ministry funds). At that time, the Appellant's own hardboard was stored at the back of the house.

12. The evidence in respect of the louvre frames and louvre blades was similar. Mr Tangapiri said the Appellant asked him to order them through the account of a person being assisted by the project. This

was done and the louvre and louvre blades used in the Appellant's renovations were paid for by the Ministry as part of a claim on project funds. The ready-mix concrete was delivered to the Appellant's property as part of a two cubic metre order, with one-half of the order going to a project house, but the project paid for the complete order.

13. The Appellant gave evidence which was in direct conflict with that of Mr Tangapiri and Mrs Numana. He denied having instructed Mr Tangapiri to use materials which were to be charged against the project. He said that he believed the hardboard used on his residence came from his own stock of materials, held at the rear of his property. There was a challenge to the identity of the louvre frames and blades used on the residence, and as to the ready-mix concrete. The Appellant contended that he was to received an account for the one cubic metre delivered for his purposes and that he was still awaiting that when the police investigation commenced. Supporting defence evidence was also called.

14. The Appellant had become aware that a police investigation had commenced, and called a meeting which included Mr Tangapiri and Mrs Numanga. It was suggested that a list of all materials used on the Appellant's residence but invoiced to the project be compiled. This was done, showing the items now forming the three charges. The Appellant arranged for payment of the total amount of $463.50 as "reimbursement of funds." On the same afternoon of that meeting the Appellant requested the Secretary for Internal Affairs to write a letter addressed to the Appellant and on Ministry letterhead. The letter acknowledged help given by him to the project in the form of materials valued at over $500 and the use of a private vehicle. The following month the Appellant requested Mrs Numanga to make up a list showing that the 20 sheets of hardboard had all been used for project purposes. Mrs Numanga declined to type out and sign such a list.

15. In a written decision dated 22 November 2005, the Chief Justice gave detailed reasons for holding that the three charges had been proved. In essence, he accepted the evidence of Mr Tangapiri and Mrs Numanga and rejected the exculpatory explanations given by the Appellant. He also rejected the allegation that there had been a "set up" of the Appellant, involving Mrs Numanga and the person laying the original complaint with the police.

GROUNDS OF APPEAL

16. The appeal against conviction is based on a number of grounds which will require separate consideration. While individual grounds were relied upon, it was also submitted that the cumulative effect of the alleged errors made the trial unfair and the verdict unsafe.

17. The grounds of appeal will be considered under the following headings:

(a) Misapplication of s. 68 Crimes Act 1969
(b) Evidence of accomplices
(c) Propensity evidence
(d) Inappropriate inference
(e) Inadequate Disclosure
(f) Inadmissible evidence (Mr Pitt)
(g) The Dates of Offending.

SECTION 68 CRIMES ACT 1969

18. Mr Davison submitted that there has been erroneous and confusing attention given to and application of s. 68(2) of the Crimes Act 1969, constituting an error of law affecting the safety of the convictions.

19. In his decision, the Chief Justice stated that the Crown had to prove "that there was a common purpose involving the Appellant, Mr Tangapiri and Mrs Numanga." He referred to s. 68, which provides:

"68 Parties to offences – (1) Every one is a party to and guilty of an offence who –

a. Actually commits the offence; or

b. Does or omits an act for the purpose of aiding any person to commit the offence; or

c. Abets any person in the commission of the offence; or

d. Incites, counsels, or procures any person to commit the offence.

e. (2) Where two or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose."

20. The Chief Justice considered that the case fell within s. 68(1)(b) "and/or" s. 68 (2), and that under s. 68(1)(b)(c) or (d), an accused need not know precisely the primary offence intended to be committed nor the way in which it was going to be committed, *"thus in this case the three parties needed only to know that some offence involving misuse of public money was intended."* He expressed the same view as to the applicability of s. 68(2). The Chief Justice concluded from the evidence that there was a common intention and purpose to use the invoices in question to secure payment from public money for building materials supplied to the Appellant for use on his own property. In the

course of the decision, there are several references to the requirements of s. 68(2) and the existence of a common purpose.

21. With respect, we agree with Mr Davison's criticism of this approach. As regards the Appellant, this case fell squarely under s. 68(1)(a), with Mr Tangapiri and Mrs Numanga being parties under s. 68(1)(b). Each information charged the Appellant, together with Mr Tangapiri, with fraudulently using a document with intent to obtain a pecuniary advantage, and obtaining for himself (the Appellant) specified building materials.

22. Put simply, the Crown case was that the Appellant, with the assistance of Mr Tangapiri and through the agency of Mrs Numanga, used the invoices to procure building materials by wrongful use of public money. There was no room for the operation of s. 68(2), which is directed to a situation where parties intend to commit a particular offence (for example robbery or burglary) and a different offence, such as murder, eventuates. Here, the only offence said to have been contemplated and committed was under s. 251A(b). The inapplicability of s. 68(2) in such a situation is stressed in cases such as R v Curtis [1988] 1 NZLR 734,740 and R v Hardiman [1995] 2 NZLR 650, 655.

23. We are also of the view that in stating that under s. 68(1)(b)(c) and (d), an accused need not know the primary offence intended to be committed by the principal, the Chief Justice could be understood to be stating the requirements too widely. For secondary liability under s. 68(1), knowledge that the principal intends doing certain acts that constitute the offence in fact committed is required – see the discussion in Adams on Criminal Law, (4th Student Edition) at CA66.19.

24. It is not clear from the transcript how s. 68(2) came to feature in the Chief Justice's decision. The Crown opening, and its submissions on the no-case application and in its closing address, appear to be directed to s. 68(1). The allegation was, in short, that the Appellant had issued instructions to Mr Tangapiri to include his own materials in the order for the project materials, payment for which was processed by Mrs Numanga who was also aware that some of the materials invoiced were being diverted for use on the Appellant's property. The defence submissions do not seem to address s. 68(2), other than to contend that the actions of Mr Tangapiri and Mrs Numanga as co-conspirators were not to be attributed to the Appellant because there was no common intention, the Appellant having acted on his own and not in concert with the other two persons. Whatever the reason behind the consideration of s. 68(2), we are satisfied that in the circumstances of this case the approach was erroneous.

25. The issue then is whether this approach has led to a miscarriage of justice. Properly analysed, the charges under s. 251A(b) required the Crown to prove beyond reasonable doubt that the invoices were capable of being used to obtain a pecuniary advantage, that the Appellant caused them to be so used, and that he did so with fraudulent intent. It was not disputed that the first element was satisfied on the evidence. There are then clear findings by the Chief Justice in respect of both the hardboard and the louvre windows that the Appellant instructed Mr Tangapiri to order the materials required for his own residence to be included in those required for project purposes, and that Mrs Numanga knew the invoices which she submitted for payment were false in conveying that all materials were for project use. Also as regards the ready-mix concrete, the Chief Justice found that the Appellant had instructed Mr Tangapiri to include in the project order the cement required for his own residence. The

invoice presented by Mrs Numanga included that which was delivered to the Appellant's residence.

26. There are express findings that, in all three cases, the Appellant was acting with a fraudulent intent in giving the instructions to Mr Tangapiri, knowing that payment for materials used on his own property would be made from project funds.

27. There was ample evidence to support these critical findings, and Mr Davison did not contend to the contrary. There is also no doubt the critical elements we have identified were fully traversed and addressed in the course of the hearing. The findings therefore established the necessary elements in each case to make the Appellant liable as a principal under s. 68(1)(a). The fact that the decision can be read as also establishing that the three persons participated in the common purpose of wrongfully obtaining payment from project funds for building materials used on the Appellant's residence has no significance. Such a common purpose approach simply made all three persons liable as s. 68(1) parties to s. 251A(b) offences. We have carefully considered Mr Davison's submission that the focus on common purpose and s. 68(2) has led to the decision on proof of the elements of the charges, particularly that of fraudulent intent being, unsafe or insufficiently based. We are satisfied that that has not resulted, and that in this respect there is no risk of a miscarriage of justice having occurred.

ACCOMPLICES

28. Mr Davison submitted that the Chief Justice had given undue weight to the evidence, in particular that of Mr Tangapiri, and had not exercised the required degree of caution in considering his testimony and accepting him as a wholly truthful and reliable witness. The need for caution of course arises from the fact that Mr Tangapiri was, according

to the Crown, a joint offender. He had pleaded guilty shortly before his trial and that of the Appellant was due to commence, and was still awaiting sentence when he gave evidence.

29. Both Mr Tangapiri and Mrs Numanga were required to be treated as accomplices, the Crown case being that they were parties to the offending. There is no statutory provision in the Cook Islands equivalent to that introduced in 1986 in New Zealand, under which corroboration of the evidence of an accomplice is not required for an accused person to be convicted, and it has become unnecessary for a warning to be given to a jury relating to the absence of corroboration. The common law must therefore apply, which in essence states that although a person may be convicted on the uncorroborated evidence of an accomplice, a jury should be warned of the danger of so doing. The danger is that accomplices may minimize their own roles or exaggerate that of the accused, thus promoting their own interests. There is also the danger, relevant here, that an accomplice may be influenced in the hope of receiving a more lenient sentence if assistance is given to the Crown. A similar approach to assessing the evidence of an accomplice must be taken by a trial Judge in the context of a Judge-alone trial. The issue under this head is whether the Chief Justice did exercise the requisite caution.

30. From the outset it is clear the Chief Justice was aware of the requirement. In the early stages of the Crown's opening address, he noted that he had to exercise "the usual caution" about the evidence of Mrs Numanga and Mr Tangapiri. Mr Samuel, in his closing address for the defence, referred to and stated in correct form the rule to which we have earlier referred.

31. In his decision, the Chief Justice recognized that the evidence of these two witnesses "must be scrutinized with care" and the need to look for

evidence from an independent source "to support or contradict" their evidence. He stated that he kept that in mind when assessing the evidence. Although the reference to contradicting evidence is unusual, it is quite clear that the Chief Justice was careful to direct himself on the need for caution. He went on to note that there was ample independent evidence supporting both witnesses, referring in particular to what he termed admissions by the Appellant's by way of conduct following the instigation of the police investigation.

32. The conduct in question included the payment by the Appellant of the value of the materials, following Mrs Numanga compiling a list of those materials and contained in her letter of 27 September 2005. The Chief Justice treated this exercise as an admission of guilt by the Appellant. We doubt whether these actions warranted such a description, as there was no inferential acknowledgment that the Appellant had acted fraudulently. The payment and the circumstances of it however confirm through the Appellant that materials used on his residence represented costs incurred by the project, which required reimbursement. To that extent, there was corroboration of Mr Tangapiri's evidence that materials invoiced for the project were used for other purposes. That was significant because there was no sensible explanation for Mr Tangapiri diverting those materials to the Appellant's renovations without the Appellant's knowledge.

33. The second aspect of conduct relied upon was the evidence that, on the afternoon of 27 September, the Appellant asked the Secretary for Internal Affairs (Mr Rairi) to write a letter acknowledging the Appellant's support in providing materials for the project team to a value not exceeding $500, and in providing free-of-charge his own vehicle for team purposes. Although arguably this was not corroborative, the Chief Justice was justified in regarding it as special pleading in the context of the police investigation, and as of significance in assessing

the Appellant's credibility. There was also the witness Poiri Metua, who confirmed that some hardboard stockpiled in the front of the Appellant's residence, which had been invoiced to the project, was used on the residence. He was also involved in bringing window louvres and panes to the residence from materials consistent with those ordered from Fare Supplies for the project.

34. The main thrust of Mr Davison's submissions in relation to Mr Tangapiri was that he was demonstrably unreliable because of his status as an accomplice. Having reviewed the evidence, and in particular the criticisms identified by Mr Davison, we are not persuaded that the Chief Justice was unjustified in his conclusion that Mr Tangapiri was truthful and reliable. To the contrary, a consideration of his evidence, particularly when under cross-examination strongly supports the finding. There were no demonstrable discrepancies, inconsistencies or shortcomings in his evidence. Is it also necessary to bear in mind that the Chief Justice made adverse findings on the credibility of the Appellant, and this also necessarily went into the mix when deciding where the truth lay.

35. Accordingly we see no reason to interfere with the important findings on credibility; nor does the way in which the Chief Justice reached his conclusions in this regard give cause for concern. Importantly, due consideration was given to the need for caution in assessing the accomplice evidence.

PROPENSITY EVIDENCE

36. Evidence was led by the Crown to establish that the Appellant used Government workers on the renovation of his residence during working hours, while their wages were being paid by the project, at no cost to himself. Mr Tangapiri was one of these workers. In opening, counsel

for the Crown said the evidence was to be adduced "by way of background." The Appellant was also cross-examined on this topic, and accepted that what happened was inappropriate.

37. Mr Davison submitted that this evidence was irrelevant, not probative of any issue in the case and was highly prejudicial. Further, it was used by the Chief Justice in the nature of evidence of propensity as evidenced by the finding that it *"showed him behaving as a 'free rider' using Government resources without paying for them. He appeared to have a blind spot on this matter."* Its use was said to be improper and erroneous.

38. Mr Elikana submitted that the evidence was relevant as to credibility and to show the relationship between the Appellant and Mr Tangapiri. He submitted that the relevance was reinforced by the position taken by counsel for the Appellant who in his final address asked "why, it must be asked would the Minister who had set up and facilitated the project be motivated to commit the offences he has been charged with?"

39. We note that trial counsel took no exception to the evidence when it was led, nor to the cross-examination. Further, we are of the view that the evidence led was relevant. The Appellant's defence was in effect that Mr Tangapiri and Mrs Numanga had acted either independently or that they had misunderstood his instructions. He acknowledged that they were to order the materials for him but claimed that he expected to pay for them. The comment in counsel's final address, referred to in the previous paragraph, highlights an aspect of the defence – the Appellant was not a person who would misuse Government funds. The evidence was relevant to rebut the defence of innocent use of Government funds. This point cannot assist the Appellant.

40. We also note Section 61 of the Judicature Act 1980-1981. No judgment of the High Court is to be set aside on appeal on the ground of the improper admission of evidence, unless the Court is of the opinion that a substantial miscarriage of justice has taken place. Even if the view was taken that the evidence were inadmissible, it is difficult to tell how, in the circumstances, it could be said to have resulted in a miscarriage.

INAPPROPRIATE INFERENCES

41. We have already referred to Mr Pare paying $463.50 by way of reimbursement for the materials in question. The Chief Justice treated this as an admission of guilt. It was submitted that this inference was not open, as the facts were equally consistent with innocence.

42. Although as we have earlier discussed we doubt whether these actions went so far as to constitute an admission of fraudulent conduct, we do not take the view that they were equally consistent with innocence. When seen in full context, they could well be considered as self-serving and at least confirmatory of the use of project materials on Appellant's own residence.

43. The issue is whether such undue weight was given to the circumstances of the payment that a miscarriage may have resulted for this reason alone. We are not so persuaded.

INADEQUATE DISCLOSURE

44. The basis of this ground of appeal is that the Police had supplied only limited disclosure to a pre-trial request for full and comprehensive discovery/disclosure Included in the material discovered were the witness statements, briefs of evidence for all witnesses, a schedule of

exhibits taken by the Police in relation to the inquiry and copies of all photographs taken. Particular documents, which it is submitted should have been discovered, were the documents relating to the immunity granted to Mrs Numanga and those relating to Mr Tangapiri changing his plea to guilty on the morning that the trial began.

45. The Crown position was that pursuant to section 99 Criminal Procedure Act 1980-81 its only obligation was to disclose the written statements required for the purposes of a preliminary proceeding and this was done. Further, no application had been made for an adjournment of the trial, so the Appellant could not say he had suffered prejudice.

46. We were advised that the question of discovery was raised with the Chief Justice before trial, and, as a consequence, he delayed the start of the trial for several hours so that the Appellant's counsel could inspect the Police file before the hearing commenced. This was done.

47. While there was no documentation supplied on Mrs Numanga's immunity or Mr Tangapiri's change of plea, Mr Elikana advised from the bar what he understood the position to be. He knew of no procedure in the Cook Islands where the Solicitor-General executed a document granting immunity from prosecution with or without conditions. All that normally happens, as happened with Mrs Numanga, was that the Police advise that in exchange for a witness giving evidence they will not prosecute him or her. The Solicitor-General and her staff play no part in such matters nor in discussions regarding changes of pleas. These are matters for the Police. In this case, counsel understood that there was no documentation entered into with either Mrs Numanga or Mr Tangapiri on these matters.

48. While it is a matter for the Crown, it is our view that immunity from prosecution should be documented and the terms, if any, made available to the defence. The terms may be relevant to credibility of the witness and form a legitimate basis for cross-examination and criticism.

49. We also note that this Court in Police v Jason Arioka (CA 15/05 9 February 2006), a decision given after the Appellant's hearing, stated that the Police's obligation to disclose pre-trial may go beyond the obligations contained in s. 99 Criminal Procedure Act. The Court observed that under some circumstances failure to make additional disclosure may be a breach of the fair trial requirements of the Constitution and lead to a miscarriage of justice.

50. However on analysis this ground cannot assist the Appellant. Apart from the issues involving Mrs Numanga and Mr Tangapiri, counsel for the Appellant had an opportunity to peruse the Police file before the hearing commenced. This was done and no application for an adjournment was made. No submission was made that the Appellant was prejudiced by this late discovery.

51. The only matter of possible substance relates to Mrs Numanga's immunity - but it appears that there were no such documents to disclose in that respect. Furthermore, no steps were taken to obtain production of such documents, if they existed, for the purposes of this appeal. The same considerations apply to Mr Tangapiri's change of plea. This Court cannot act on conjecture, particularly when it was within the Appellant's power to have had the issue of the existence or non-existence of relevant documents resolved.

INADMISSIBLE EVIDENCE

52. The original complaint against the Appellant came in the form of a letter written by a Mr Pitt. He gave evidence and produced as an exhibit his letter of complaint which included an attachment setting out a detailed series of complaints. Mr Davison submitted that all of Mr Pitt's evidence and the letter of complaint were irrelevant and inadmissible. It was further submitted that the Chief Justice's consideration of this evidence was prejudicial to the Appellant.

53. We agree that Mr Pitt's evidence-in-chief, which consisted basically of his reading the letter, was inadmissible. However, we do not see that it had serious consequences because it was admitted in this case. It did not figure in the Chief Justice's reasons for conviction, and in substance, the objectionable material did no more than set out what was later given in sworn evidence. Again, no objection was made to receipt of the evidence. We are satisfied that its admission has not led to a substantial miscarriage of justice in this trial. The position may have been different in the context of a jury trial.

THE DATES OF OFFENDING

54. It was submitted that the wrong dates for the alleged offending were included in the charges, and this led to a focus of attention on events that occurred on those dates and presumably distracted the Chief Justice from the true inquiry.

55. In each information, the date of alleged use of the document was the date on which the invoice was raised. Mr Davison submitted that there was no "use" as such until the time the invoice was presented to the Ministry for payment. There is nothing in this ground.

56. The matter was raised during the trial and the Chief Justice analyzed the position in 6 paragraphs in his judgment. His analysis clearly

shows he was familiar with all relevant dates. He noted that Courts have been ready to adopt a flexible approach to dates alleged in informations when the case involves, as this did, a series of acts forming part of a continuing transaction which is completed when an objective is achieved. The Chief Justice also noted that s. 47(1) Criminal Procedure Act gave the Court wide powers which would enable it to amend an information to conform with the proof, and if necessary, he would have done so here as there was no prejudice to the Appellant.

57. We agree with the Chief Justice. It may have been preferable to have alleged that the offence occurred over a period, commencing with the date of the invoice when the process of purchase was initiated, and ending on the date it was presented for payment. But even assuming the complaint has validity, which is arguable, no prejudice has been demonstrated.

RESULT

58. We have determined that the Chief Justice erred in respect of some individual grounds of appeal but the errors were not such as to warrant setting aside the convictions on that ground. It is also our view that the cumulative force of those errors is not such that we have any concern that the convictions were unsafe and should have not been entered. No miscarriage of justice has been demonstrated. The appeal against conviction is accordingly dismissed.

CROWN APPEAL AGAINST SENTENCE

59. The Crown has appealed against the sentence imposed upon the Appellant on 25 November 2005 by the learned Chief Justice on the grounds that it was manifestly inadequate.

60. The Chief Justice, on each of the three charges, entered convictions against the Appellant and ordered him to come up for sentencing if called upon within 12 months, pursuant to s. 113 of the Criminal Procedure Act 1980-81. A further order was made that the Appellant pay $5000 towards the costs of the prosecution. That sum was paid by him on 5 December 2005.

61. At the sentencing hearing, the Chief Justice had before him some 25 testimonials from a wide range of persons in the community, all supportive of the Appellant, testifying to his good character and affirming his many contributions to the community over the years. There was also a probation report which also spoke highly of the Appellant as a person of good character, always willing to offer assistance.

62. The probation report mentioned also the Appellant's hitherto blameless life as a good family man and the fact that his wife is unwell, requiring continuous medical treatment in New Zealand. The author of the report, after noting the seriousness of the offending, recommended a sentence of six months' imprisonment. We doubt the advisability of the probation service recommending any particular term of imprisonment. The service should assess whether an offender is suitable for some community-based sentence and should set out matters relevant relating to the offender for the Court's consideration. It is the role of Crown counsel at the sentencing hearing to make submissions to the Court on the appropriate sentence, particularly where imprisonment is a possibility.

63. The sentencing Judge had also the benefit of thorough and thoughtful submissions from counsel for the Appellant which stressed that the

offending was quite out-of-character and that the Appellant was unlikely to re-offend.

64. Counsel sought a discharge without conviction under s. 112 of the Criminal Procedure Act 1980-1. The granting of this request, rejected by the Chief Justice, would have meant that the Appellant could have retained his seat as a Member of Parliament.

65. Section 9(1)(h) of the Electoral Act 2004 states that the seat of a Member of Parliament should become vacant

> *"..... if the member is convicted in the Cook Islands or any part of the Commonwealth of any corrupt practice or other offence punishable by death or imprisonment for a term of one year or more."*

The offences on which the Appellant was convicted carry a maximum sentence of five years' imprisonment.

66. Section 9(4) of the Electoral Act 2004 requires the Speaker of the House to declare in writing that a seat has become vacant when it appears that an event under s. 9(1) has occurred such as a conviction in terms of s. 9(1)(h).

67. By an order dated 10 December 2005, the Chief Justice granted a stay order, pursuant to s. 58 of the Judicature Act 1980-1, that the convictions be stayed pending the hearing of the Appellant's appeal against conviction. Consequently, the Speaker was unable to make the declaration of vacancy under s. 9(4). He must now do so, since the appeal against conviction has been dismissed. The Registrar is directed to inform the Speaker officially of the dismissal of the conviction appeal.

68. We consider that the decision of the Chief Justice to grant a stay pending the determination of the appeal was the only practical course in the circumstances. The Electoral Act 2004 makes no reference as to what is to happen when there is an appeal against a conviction to which s. 9(1)(h) relates. For the Speaker to declare the seat vacant with a possible consequent by-election would be a strange result should an appeal against conviction ultimately succeed. Such a result could never have been contemplated by the legislation.

69. The option of discharging the Appellant without conviction was rejected by the Chief Justice as inappropriate because of the misuse of public money, despite the Appellant's blameless record and his wide contributions to the community.

70. The Chief Justice noted that he had to balance the serious nature of the offending with the Appellant's personal circumstances. He emphasized the need for all in public office not to betray the trust of the people by inappropriate use of public funds. Because corruption was a deadly and insidious evil that strikes at the heart of any democratic society, the Court must inject a strong element of deterrence in its sentencing. It was no complete answer to say that the amounts involved were not great.

71. The Judge then summarized the matters which he took into account in the Appellant's favour as follows:

(a) He has been an achiever in local society, having made a great contribution to the Cook Islands medical laboratory

(b) He has tried hard, as a Minister, to assist the less fortunate

(c) The offending was an aberration in a blameless life

(d) The scale of offending was not significant nor did it take place over a long period

(e) Conviction would mean losing his seat in Parliament which would be a major financial and reputational blow

(f) He was most unlikely to re-offend.

72. In the very special circumstances of the case, the Chief Justice considered imprisonment inappropriate. In the unlikely event of offending during the one year period, a three-month term of imprisonment would be likely to be imposed.

73. Counsel for the Crown submitted that the sentence imposed under s. 113 was manifestly inadequate. It placed too much emphasis on the Appellant's record, his unlikelihood of re-offending and his loss of a parliamentary seat over the need for deterrence of Members of Parliament and senior civil servants from committing similar offences. The sentence failed to send a suitable message to the community.

74. Counsel referred to the decision in Drollett, to which the Chief Justice specifically adverted. There, a sentence of 16 months had been imposed on a public servant who had misappropriated $27,159 over a period of time. Counsel mentioned the case of Areai but we do not refer to that case because it is subject to appeal. Counsel submitted that the three month term of imprisonment, mentioned by the Chief Justice, should be imposed by this Court on the Crown's appeal against sentence.

75. Counsel for the Appellant submitted that it had not been shown that the sentencing Judge had proceeded on a wrong basis. Counsel stressed the Appellant's exemplary record and the adverse consequences of a conviction. Counsel advised that the co-offender, Tangapiri, had also been convicted and ordered to come up for sentence within six months. He was required to pay only $500 towards costs.

76. In our view, the sentence under review was lenient and might not have been one which some individual members of the Court might have imposed had they been sentencing the Appellant at first insance. However, that is not the test on an appeal against inadequacy of sentence. The test is whether the sentence was manifestly inadequate, or, put another way, was outside the limits properly available to the sentencing Court.

77. We have come to the view that the sentence should not be increased. We find it significant that the Chief Justice heard a considerable amount of evidence in this case, including that of the Appellant. He was therefore better placed to assess the circumstances of the offending than if he had been called upon to sentence an offender on a guilty plea. He was entitled to give serious weight to the Appellant's blameless life and record of exemplary community service. The financial and reputational loss of losing a parliamentary seat is something that cannot be underestimated as a penalty.

78. Accordingly, we do not consider that the sentence of the Chief Justice, whilst merciful to the Appellant, was so inadequate as to justify intervention by this Court. Since a community-based sentence was fairly pointless for a man in Appellant's situation, imprisonment was the only feasible option to that which was taken. The Chief Justice in the exercise of his sentencing discretion, was entitled to "pull back" from the option of imprisonment in the particular circumstances of this offending and this offender, given the inexorable consequence for the Appellant of a conviction.

79. We emphasize that this is an exceptional case and that those who misuse public money should expect a serious penalty.

80. The Crown's appeal against sentence is dismissed.

Barker JA	Henry JA	Paterson JA