

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)**

**CR NO'S 467 – 474/12
465 & 466/12**

POLICE

v

AKISI NAILEVU MUSSELL and CHRISTOPHER WILLIAM MUSSELL

Hearing date(s): 29 June 2012
Counsel: Mr Ruffin and Ms Henry for the Crown
Mr Manarangi for the Defendants
Date: 29 June 2012

SENTENCING NOTES OF WILLIAMS J

[1] Mr and Mrs Mussell, it is common when people are being sentenced that they either stand in the dock or at least they stand but nowadays so much needs to be covered in sentencing - and this particularly applies to this case - as far as I am concerned you can remain seated until I ask you to stand.

[2] You pleaded guilty, as you know, on 18 June 2012 to a number of charges under the Financial Transactions Reporting Act 2003 (the 'FTR Act') offences called Structuring by counsel. Mr Mussell's first offence was in December last year. The remaining seven were in a brief period in late March/early April this year, and Mrs Mussell has pleaded guilty to two charges covering that latter March/April period.

[3] On each of the charges the maximum penalty that could be imposed is either a jail sentence of 12 months or a fine of \$10,000. But the Crown has responsibly asked that a jail sentence not be imposed and it is not an option I would have pursued in this case in any event.

[4] However, for the reasons that I will elaborate on as I proceed, these are serious offences which strike at the financial reputation of the Cook Islands. The charges brought against you are the first that have come to Court under the FTR Act and the outcome in this case will be fines.

[5] But now this matter and therefore people's obligations under the Act are very much in the public mind the next defendants to come up for sentencing on similar offending should not be sanguine about the chance of escaping jail.

[6] The Crowns charging you with the number of offences you face was as a result of prosecutorial discretion. It was very properly challenged by Mr Manarangi for you, but I upheld it in a ruling at the beginning of last week, 18 June 2012. Leaving aside the December offence, which rather stands out on its own, as long as the Crown charges at least two transactions, which they allege fulfil the statutory criteria particularly as to the intent with which the transactions were undertaken, it is a matter for the Crown to decide how many transactions should be encompassed within the charge.

[7] In this case the Crown chose to lay seven charges for the March/April period against you, Mr Mussell, and two against you Mrs Mussell. Given that that is within the Crown's power, Mr Manarangi very properly but unavailingly asks me to treat all the offending over that relatively brief period as one offence.

[8] The Summary of Facts sets out the latest business that you have both established and worked at hard to make relatively secure. The fact is, as Mr Manarangi said, the offending in this case was probably discovered by a side-wind as a result of the Police investigation of others who have yet to be dealt with by the Court. But on seven occasions between 24 March and 4 April, Mr Mussell, you banked sums of money all under \$10,000 into your two different bank accounts. For the most part the pairs of transactions were \$5,000 and \$3,000. Later they were \$5,000 and \$4,000, and \$5,000 and \$3,000.

[9] And on two occasions Mrs Mussell, on 8 and 11 April 2011, it seems when your husband was overseas, you banked two pairs of transactions, again separately into the two accounts you hold. There was potentially a defence under s 10 of the FTR Act which reads:

10. Financial institution must report financial transactions - (1) A financial institution must, within 3 working days, report to the FIU, within a time and in the form and manner that may be prescribed, -

(a) any transaction of an amount in cash exceeding \$10,000, or any other amount that may be prescribed, in the course of a single transaction, unless the recipient and the sender is a financial institution;

(b) the sending out of the Cook Islands at the request of a customer of any electronic funds transfer exceeding that \$10,000, or any other amount that may be prescribed in the course of a single transaction;

(c) the receipt from outside the Cook Islands of an electronic funds transfer, sent at the request of a customer, of an amount exceeding \$10,000, or other amount as may be prescribed, in the course of a single transaction.

(2) Nothing in paragraph (1)(a) overrides requirements relating to suspicious transactions reports.

(3) Paragraph (1)(b) does not apply when the financial institution sends an electronic funds transfer to a person or entity in the Cook Islands, even if the final recipient is outside the Cook Islands.

(4) Paragraph (1)(c) does not apply when the financial entity receives an electronic funds transfer from a person or entity in the Cook Islands, even if the initial sender is outside the Cook Islands.

(5) If a financial institution contravenes subsection (1), the financial institution commits an offence punishable by -

(a) in the case of an individual, to a fine of up to \$10,000;

(b) in the case of a body corporate, to a fine of up to \$50,000.

(6) Every person commits an offence who conducts 2 or more transactions or electronic funds transfers that are of an amount below the threshold set out in subsection (1) if, having regard to the matters in subsection (7), it would be reasonable for the Court to conclude that the person conducted the transactions, or transfers in that manner or form, for the sole or dominant purpose of ensuring, or attempting to ensure, that no report in relation to the transactions or transfers is required to be made.

(7) The matters referred to in subsection (6) are -

(a) the manner and form in which the transactions or transfers were conducted, including, without limiting the generality of this, all or any of the following:

(i) the value of the currency involved in each transaction or transfer;

(ii) the aggregated value of the currency involved in the transactions or transfers;

(iii) the period of time over which the transactions or transfers occurred;

(iv) the interval of time between any of the transactions or transfers;

(v) the locations at which the transactions or transfers were initiated or conducted; and

(b) any explanation made by the person about the manner or form in which the transfers were conducted.

(8) Every person who contravenes subsection (6) is liable on conviction -

(a) in the case of an individual, to a fine of up to \$10,000 or a term of imprisonment of up to 12 months, or both;

(b) in the case of a body corporate, to a fine of up to \$50,000.

[10] I said that as a result of the Crown's method of proceeding there was potentially a defence, but when the circumstances set out in subsection 7 are applied to the intention with which those deposits were made it was clear that there was really little effective defence available to you. The manner in which the transactions were conducted, the value and aggravated value, the period of time, the intervals between the deposits, locations, all of those pointed very firmly in favour of a conclusion that the transactions were carried out in that form for the sole or dominant purpose of intending to ensure that the transactions would not be reported.

[11] Indeed, it seems that at some stage - I infer at or just before the December transaction - you made an attempt to deposit \$10,000 into the account and may have been told by the Bank that a deposit of that amount would trigger a reporting obligation. The implication is that you thereafter structured the Bank deposits you were making deliberately to avoid the Bank having to report what you were doing.

[12] I said at the outset that this was serious offending, and I repeat what I said on Monday of last week, that the Long Title to the Act - "An Act to facilitate the prevention, detection, investigation and prosecution of money laundering and other serious offences and the enforcement of the Proceeds of Crime Act 2003 by requiring financial institutions to undertake due diligence measures and other measures to combat money laundering" - and a consideration of the place of the act in the statutory and financial obligations of the Cook Islands makes clear that this is serious offending.

[13] The Cook Islands is deeply dependent on its banking industry and on its banking industry being regarded as having integrity, not just by the people in the Cook Islands and its financial institutions, but worldwide. And it is fundamental that in order to maintain that integrity, to maintain the good name of the Cook Islands in worldwide banking circles, the statutes require to be honoured.

[14] Now, that, I hope, makes clear that this is a grave matter and a matter which in the future, for others who similarly offend, may well lead to a jail sentence.

[15] The Probation Office has filed helpful reports in respect of you both. In your case Mr Mussell, it appears you are qualified as a naval architect in the UK, you have been in the Cook Islands for a long time, you and Mrs Mussell married in 2005 and have two young children. It is clear that in a succession of businesses you have been moderately successful and that you have played a useful part in the business community of the Cook Islands and in the hospitality industry. You obviously worked hard in the Waterline Restaurant, both of you. You pay yourself only a modest sum from the restaurant, and it is suggested that the genesis of this offending was when your efforts to improve your position in the restaurant were destroyed or seriously damaged by a series of cyclones coupled with the inability of businesses in this country to obtain insurance against such disasters. So you had to restart, and it seems you started putting money away for that purpose. For the reasons I will come to, I am not entirely persuaded by that excuse but I certainly accept that that was part of the motivation, although the way in which you effected it is a different question.

[16] You failed to pay tax for quite a period and that matter, like your secret savings, has now come back and threatens to impoverish you both.

[17] However, this is the first offence in the Cook Islands for either of you. Mr Manarangi candidly acknowledges Mr Mussell's offending outside this country which took place some years ago, and the penalty that was imposed. I can assure you that that plays no part in your sentencing on this matter. It was a long time ago in another country, an offence of a different character, and I simply do not have any detail as to what happened or why.

[18] You have been cooperative with the authorities. You are both clearly remorseful for what you did and you are justifiably concerned about your business reputation and credibility. But the suggestion in the Probation Office report that you are both "highly ethical" rather flies in the face of what you did on this occasion. This was not, as is suggested, just a foolish mistake.

[19] As Mr Ruffin says, when these statutes came into force there was widespread advertising undertaken at the time - when you lived in the Cook Islands - as to what was required of taxpayers, business people and financial institutions, and you must have known of those obligations. Even had you forgotten them, the notification by the Bank, probably at about the time the first deposit was being made, should have reminded you of what your obligations and the obligations of all business owners are.

[20] You have both filed a series of testimonials and references from friends and supporters. They stand you in good stead and entitle you to a reduction in what might otherwise be the sentence to be imposed upon you.

[21] For the Crown, Mr Ruffin and Ms Henry's submissions deal with the type of offending set within the context of the statutory regime, and draw my attention to some New Zealand cases which may provide a measure of guidance. They are really not of great assistance given the difference in the statutory regimes, the different type of offences, and the fact that no two jurisdictions are ever completely comparable.

[22] Mr Manarangi's full submissions also assist you. He suggests you put this cash in a safe because of the hurricane damage and the need to ensure that you had money available to meet any further cyclone damage. He suggests that there is other material on the file to suggest that what finally flushed you out with your savings was the plea from your son, Mr Mussell, for funds to try and forestall a mortgagee sale.

[23] I need to try and fashion a sentence which will denounce what you did, punish you for what you did, deter others - and I have already said something about that - and acknowledge the gravity of your offending.

[24] I agree with the Crown and have already said that this is serious offending set within a regime of statutory obligations designed to ensure the integrity of the Cook Islands commercial and banking community.

[25] The fact that you did not pay tax for a number of years is scarcely an excuse. People who do not pay their tax simply impose a greater obligation on those who do pay their tax. It means that people who do not pay their tax have more money to do things like refurbish their restaurant, than people who conduct their business affairs in a legitimate fashion.

[26] Were the funds husbanded to meet the cost of future hurricane damage? Perhaps they were. But that suggestion lacks credibility when there are so many other easier ways to put money aside to ensure you could repair your restaurant in the event of cyclone damage when you could not get insurance. It could simply have been earmarked in a separate account. It could have been sent offshore. There were a number of ways it could have been done without it being secreted in a safe, and only drawn out from savings to meet a family crisis.

[27] And if you were keeping this money for the legitimate purpose you have outlined, and only used it to help your son, what was wrong with letting your funds be reported by the Bank? It was your obligation.

[28] The inference is that you wanted to continue to secrete the funds and would not have deposited them had it not been for the son's financial concerns.

[29] I agree with the Crown too that, in the circumstances of this matter, by a rough translation of the maxima from New Zealand, the starting point in your particular case as the first offenders to come before the Court on this offence is about \$3,000 or \$3,500 per offence. Even Mr Manarangi agrees with that. But, against what I have said about the offending, you have substantial mitigating features to reduce the penalty but ought to be exacted on you, your pleas of course of guilty, the success you have made in business against difficult odds, and your business reputation and credibility which will have been damaged by what I am told is the extensive publicity concerning this matter. The impact on you both and your family stems from exactly that.

[30] Even had I been considering a jail term for you, Mr Mussell, I would not have considered it for Mrs Mussell because of the effect on the family and the two young children. But otherwise I can see no basis to differentiate between you. There was no suggestion Mrs Mussell did this because she was under some pressure from you, Mr Mussell, or that she was not a willing party. So the offences need to be dealt with approximately equally.

[31] Despite Mr Manarangi's plea, in my view, the December offending by you, Mr Mussell, is the most serious. It was at that point, or thereabouts, that you knew that what you intended doing was going to result in the Bank reporting the transaction and you took what has to be regarded as a sly method to avoid that.

[32] But I accept that it is a prosecutorial decision to bring seven charges for the March/April period against you, Mr Mussell, and two against your wife.

[33] In my view, after starting at about \$3,500 for a fine on the December offence, the mitigating factors need to be taken into account plus the overall totality of the impact on your family finances and the circumstances in which you now find yourselves also taken into account. I think the fine for the December offence should be \$2,000.

[34] As far as the March/April offences are concerned, as I said, I see no reason to differentiate between them, or between you, but having regard to all the circumstances that I have outlined in my remarks to date, it seems to me that a fine on each of those offences of \$1,000 would be an appropriate one.

[35] Overall, as I calculate it, the pair of you will be paying \$11,000 by way of fines. That seems to me to meet the totality principal and to meet the justice of your case in dealing with this, the first such offence to come before this Court.

A handwritten signature in cursive script, appearing to read "H Williams", written in black ink. The signature is fluid and somewhat stylized, with a long, sweeping initial "H".

Hugh Williams, J