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

JP APPEAL 5/13
(CR NO'S 13-18/2013)

IN THE MATTER	of Section 76 of the Judicature Act 1980-81
AND	
IN THE MATTER	of an Application to appeal a decision of Justices of the Peace on sentence
BETWEEN	**IORANGI TEREAPII MOKOHA** of Aitutaki, Cook Islands **Appellant**
AND	**COOK ISLANDS POLICE** **Respondent**

Hearing: 19 July 2013

Counsel: Mr M Ioane for the Appellant
Ms M Henry for the Respondent

Judgment: 19 July 2013

JUDGMENT OF HUGH WILLIAMS J

[FTR 11:21:00]

[1] This Judgment deals with an Appeal by Iorangi Tereapii Mokoha against a sentence of 3 years imprisonment imposed on him by three Justices of the Peace on Aitutaki on 4 July 2013, on six charges of Theft as a Servant.

[2] The informations were laid on 20 May. Mr Mokoha pleaded guilty prior to 22 June and as mentioned, was sentenced on 4 July 2013.

[3] The charges were all of stealing foreign currency from guests at the Aitutaki Lagoon Resort and Spa where Mr Mokoha was employed as a maintenance man. There were three charges relating to January 2013, two of stealing amounts of AUD$150 and a third of stealing E$1000; one in February of stealing AUD$500; and two in March of stealing AUD$200 and $300 respectively.

[4] The history of the matter is that immediately after being sentenced Mr Mokoha instructed counsel for the first time and this appeal was lodged together with what was

called a motion for stay of execution. Strictly speaking it might perhaps have been an application for bail pending hearing but the distinction is unimportant. That was granted on 13 July 2013 (NZ time). Fortunately Mr Mokoha, whose sentence was directed to be served on Rarotonga, was able to be contacted. He remains at large on Aitutaki and was not present at the hearing of this appeal.

[5] Dealing with the appeal is eased by the responsible concession by Ms Henry, counsel for the Crown, that the sentence imposed was manifestly excessive. In addition, the Court's view is that it is imposed on a wrong basis, particularly without any regard to the totality of the sentence. Accordingly the matter needs to be approached on the footing that Mr Mokoha is to be resentenced and the appropriate penalty imposed.

[6] The facts of the matter show that Mr Mokoha was employed as a maintenance or 'odd-job' man at the Aitutaki Lagoon Resort. As such, he had access to rooms occupied by guests to conduct matters of maintenance and the like and, while doing that, stole the sums of money mentioned. They were offences motivated by greed. Because he gave into the temptation of seeing the money lying in the room, he simply took it.

[7] These offences were only able to be proved because Mr Mokoha's partner was foolish enough to take the sums in foreign currency to the bank in Aitutaki and ask for them to be changed into New Zealand currency. She was not charged because she told the Police she thought the money was derived from the sale of nu (coconuts). A sceptical approach suggests that that may have been naïve on her part to think that nearly $3000 worth of coconuts could be sold by the Appellant within three months and paid for all in large amounts of foreign currency but, in any event, she currently faces no charges.

[8] As a side light, Ms Henry advised that the Aitutaki Police are currently actioning complaints from guests at the Lagoon Resort during the same period of Mr Mokoha's employment where complaints were made of the theft of New Zealand currency but, of course, Mr Mokoha is to be sentenced and this appeal is to be determined solely on the charges he faced.

[9] When the matter came before the Justices of the Peace they very helpfully set out the reasons for them taking the view they did as follows:

> **The facts:**
>
> 1. A total of 6 charges of Theft as a Servant were brought against Mokoha by the Aitutaki Lagoon Resort & Spa
> 2. Each charge carries a maximum 5 years imprisonment
> 3. This equates to 6 x 5 = 30 years (aggregate) total
> 4. At the time of the theft Mokoha was employed by the Aitutaki Lagoon Resort & Spa as a maintenance man
> 5. Mokoha is aged 36 years and is married
> 6. Mokoha admitted to the theft
> 7. The commission of these offences were premeditated (inside knowledge)
>
> **Reasons**
>
> 1. The Crimes Act 1969 stipulates 5 years (max) imprisonment for case of Theft as a Servant
> 2. There are 6 charges against Mokoha
> 3. As a result of 6 charges brought against Mokoha and a penalty of 5 years imprisonment per case, this equates to a total of 30 years (aggregate)
> 4. When deciding on an appropriate sentence, it was correct to use the number 5 years as a starting point, hence our arrival at our number of 3 years.
> 5. We discussed the fact that the accused had no previous convictions. However, since the charges for his only and current offences were committed simultaneously (one after the other) and in (close proximity with one another), 6 x offences of the same kind over a very short time of 3 months, it was considered irrelevant to include that as a mitigating factor. It was also considered that there will be some negative impact on Tourism as a result of the incident via affected hotel guests.
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> The sentence handed out to the defendant would serve both as a punishment as well as a deterrent.

[10] The facts include that Mr Mokoha is the youngest of eleven children. He has been with a partner for some ten years and they have two young children. He also supports his partner's grandparents on what was at the time a modest income of $8.50 an hour. He had problems with alcohol up until about four years ago but has quit those, is remorseful and simply acknowledged that he gave into temptation.

[11] The Probation Service generously recommended that the sentence be 12 months probation and in that they were supported by a number of testimonials placed before the sentencing Court.

[12] For the Appellant, Mr Ioane made the point that Mr Mokoha was not represented at any stage prior to being sentenced and he stressed his lack of previous convictions and the fact that he is now unemployed. It might be thought that a convicted thief on Aitutaki would be unemployable but apparently there is a job in another industry which he might possibly be able to obtain.

[13] For the Crown, Ms Henry, accepting that the sentencing actually imposed was manifestly excessive, drew attention to leading cases of *Nicholls v Police*[1] and *Quarter v Crown*[2]. In the former, the Appellant was charged with six counts of Theft as a Servant – again from a tourist resort – and in a case where there were substantial mitigating circumstances the sentencing judge chose a starting point of 3 years imprisonment. The Court of Appeal endorsed in that case, at least as a starting point.

[14] In *Quarter* the Appellant had been sentenced to 12 months imprisonment and $30,000 reparation. The Court of Appeal allowed the sentence in the sense of directing that she be resentenced 3 months after their decision. The main differentiating factor in *Quarter* was that Mrs Quarter had been delivered of a child only a few days before being sentenced in this Court. That, of course, can cause considerable problems for the prison authorities and in the Court of Appeal evidence was produced of particular problems that the Appellant suffered from as a result of the birth. In the final event Mrs Quarter was resentenced to 3 months imprisonment.

[15] Ms Henry also drew attention to the recent judgment in *Crown v Tipora Teresa Tupou Maihia*[3] where Potter J, after presiding over the trial, imposed a sentence of 18 months probation in a Theft as a Servant case, a sentence which initially led Ms Henry to suggest that probation would be the appropriate sentence in this case as well.

[16] Turning to the result that should ensue in this Appeal, it was with respect to the Justices of the Peace, a wrong approach for them to consider that as each of the charges Mr Mokoha faced carried a maximum term of 5 years imprisonment, he was facing a possible sentence of 30 years jail. That could only have been the case if each individual charge warranted the maximum sentence being imposed and if the

[1] [2002] CKCA 1
[2] CA 03/11, 9 June 2011
[3] CR 647/12, 10 May 2013

circumstances in which each offence was committed were such that cumulative sentences would have been appropriate.

[17] For offences of this sort, a sentence anywhere near the 5 year maximum would have been wholly inappropriate and because the offences were connected in time and circumstance, cumulative sentences would never have been appropriate.

[18] Further, what the Justices of the Peace overlooked in considering their sentence was the principle of totality. A Court sentencing a person for multiple offending needs, of course, to impose penalties on each offence separately but then, in considering the overall sentence the person must serve, needs to stand back and look at all the sentencing in its totality to settle on a term or a sentence which correctly reflects the overall nature of the offending.

[19] In this case, against the concession that the sentence actually imposed is manifestly excessive, it is correct, as Ms Henry suggested, to begin with *Nicholls*. That was not a tariff judgment in the sense that it contains a review of all the sentences imposed on Theft as a Servant charges and then settles on a starting point for the subsequent sentences for all such offences. The Court of Appeal do refer to a number of other cases but comment that it is difficult to see any principle or consistency arising. They do however say – and *Nicholls* certainly still stands for this principle – that persons convicted of Theft as a Servant need to understand that a term of imprisonment is the appropriate starting point.

[20] *Quarter* is a different case because of the factual circumstances earlier mentioned and *Maihia* may simply be one of those somewhat inconsistent cases affected by the factual circumstances of the trial.

[21] In this case the aggravating circumstances are first, that this was a set of six charges, not just one, although in *Nicholls* there were a number of charges as well.

[22] Secondly, the fact that a person is convicted of Theft as a Servant necessarily means there is an element of trust arising out of their employment which they have abused. That was certainly the case in Mr Mokoha's situation. He was given trusted access to guest accommodation at the Lagoon Resort and abused that trust by simply giving into temptation and repeatedly stealing large sums of foreign currency.

[23] The next important issue is that tourist traffic is of high importance to the Cook Islands economy generally and to Aitutaki in particular. It has little other income than the tourist trade. Thefts from tourists are mean thefts because the thieves know that in most cases by the time any charges against them come to a hearing the tourist will have long left the Cook Islands. For the sums involved they may be disinclined to return, and it is not economic to bring them back.

[24] It is important therefore that those who work in the tourist industry as employees of resorts, motels and the like which accommodate tourists, should come to appreciate that they cannot expect their actions to result in impunity. It would be highly detrimental to the tourist trade of the Cook Islands should people come to think that their money can be stolen by servants and they can effectively not be prosecuted.

[25] All those factors in combination in this case clearly indicate that a jail sentence should be the starting point for Mr Mokoha. Given the indications in *Nicholls*, 3 years is there said to be the starting point although it must be said that sentences imposed since *Nicholls* on Theft as a Servant matters have tended to be rather below the range the Court of Appeal indicated in that case. But in all events, Mr Mokoha is facing a jail term for the six charges to which he pleaded guilty.

[26] That jail term is aggravated by the fact that it relates to no fewer than six charges in the tourist industry. It is only because of the foolishness of his partner in endeavouring to translate the sums stolen into New Zealand currency that he got found out.

[27] Against that, there are a number of mitigating circumstances. He pleaded guilty at a very early stage of the matter and, in the circumstances as noted, had he defended the charges conviction may have ultimately proved to be difficult to obtain. He is now unemployed and will be known in the Aitutaki community as a convicted thief. He had no previous convictions prior to this matter but there were, not one, but, six charges. He has difficult family circumstances on which he is entitled to rely to reduce the sentence.

[28] As a result of all of that, the Court's view is that the appropriate sentence which should have been imposed on Mr Mokoha is one of 6 months imprisonment on

each charge with the sentences to be served concurrently and in Arorangi Prison on Rarotonga.

[29] On his release from jail he will be admitted to 12 months probationary supervision on Aitutaki and during that period he is to make reparation in the sum of $2,931.15 by such instalments as the Probation Officer directs.

Hugh Williams, J