IN THE COURT OF APPEAL OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY APPEAL NO. AC 12, 13 of 2010

BETWEEN : TEMALETI 'INOKE TAFEA

First Appellant

'ANA FINAU VEIKOSO

Second Appellant

AND : REX

Respondent

Coram : Burchett J, Salmon J, Moore J

Counsel : Mr Tu'utafaiva for the Appellants

Mr Kefu and Ms Lafaiali'i for the Crown

Date of Hearing : 6 October 2010.

Date of Judgment : 8 October 2010.

JUDGMENT OF THE COURT

These are appeals against the convictions and sentences of the Appellants following a joint trial by a jury presided over by Shuster J. for fraudulent conversion of property being a cheque for $11,326 contrary to s.162(c) the *Criminal Offences Act* (Cap 18) and abetment of that fraudulent conversion of property. Each appellant was sentenced upon conviction to imprisonment for two and a half years, no part of which was suspended. It should be noted at the outset that the Crown, in our opinion very properly, conceded the sentences were manifestly excessive in the circumstances of the offences and those of the Appellants.

However, the first question is whether the convictions should stand. At the time of the alleged offences, each of the Appellants was employed by a company in the E.M. Jones Limited group, the First Appellant (Tafea) as a supervisor at the Ma'ufanga Petrol Station, and the Second Appellant (Veikoso) as a cashier and administrator. Some time in July 2008, Tafea asked Veikoso to help her with a shortage of funds (over $4,000) to be banked on behalf of the petrol station. Veikoso took the cheque the subject of the indictments, which belonged to and was due to be paid into the account of a different company in the group, and handed it to Tafea to cover her shortage. Tafea used the cheque for that purpose, and placed takings from the business in an amount of some $6500 representing the approximate difference between the shortage and the amount of the cheque in a safe in cash. Each of the Appellants acknowledged she had no authority to deal with one company's cheque in this way, so as to disguise a shortage of cash in another company, and each expressed contrition. At the trial, neither gave evidence.

Mr Tu'utafaiva urged upon us, in particular, that the summing up was one-sided; that the judge referred to confessions of guilt in response to the original charges of theft (which had become alternatives only at the trial) and told the jury "a confession alone can be sufficient to justify a conviction"; and that the judge failed to explain the elements of the alternative charge of theft. There is much force in these complaints. However, the judge did clearly tell the jury the theft charge could only be considered if they first acquitted the Appellants in respect of the fraudulent conversion charges, and he did tell them (although without significant emphasis) that the confession related to theft. The Appellants' case at trial seems to have concentrated on the minutiae of how the cheque was changed to money, but on the admitted facts, it is impossible to see a proper basis for an acquittal. We do not think there was any miscarriage of justice in the circumstances of these cases.

We turn to the appeals against the sentences. In his sentencing remarks, his Honour referred to the "glowing" references he had received in respect of the Appellants and to their honest co-operation with the police, but he did not refer directly to the fact that these mature aged women had both been of previous good character, having no prior convictions. He imposed the sentences of two and a half years, and added : "I don't go on to consider whether I can suspend in whole or in part the sentence of imprisonment which I have just passed and I decline to do so. ... This is a deterrent sentence applied under the principle of *R v Cunningham* that is to deter people from stealing from their employer."

His Honour did not give a reference to any report of *R v Cunningham.* It is, of course, usual and proper to cite reports, and in Tonga the Courts have an educative role which makes this specially

important. We assume the case is *R v Cunningham* [1993] 2 All ER 15 ; 96 Cr App R 422, where Lord Taylor of Gosforth CJ., speaking for the Court of Appeal, dealt with an appeal against a sentence of 4 years for robbery in a small shop at knife-point. Not surprisingly, his Lordship held (at All ER 17) that the sentencing judge was justified in taking "the need for deterrence into account". The essence of the view of the Court of Appeal was stated at 18 :

> "In the present case we consider the learned judge was right to regard the robbery as very serious and to bear in mind both the need for deterrence and the prevalence generally of offences of this kind.
> However, Mr Meredith's final ground of appeal is that the learned judge did not sufficiently have regard to the mitigating circumstances in the appellant's case, especially when compared with that of his co-accused, Cole, who received the same sentence. We think there is merit in this argument.
> This appellant was younger than either of his co-accused. He was of previous good character, whereas both his co-accused had records for dishonesty. Furthermore, the appellant co-operated with the police from the start, whereas Cole made no admissions and was putting forward an alibi until a very late stage. These were, in our judgment, matters relevant in mitigation of sentence within the meaning of s 28(I) of the [Criminal Justice Act 1991].
> Bearing them in mind, we consider that the sentence of four years passed by the learned judge was too long. We therefore quash that sentence and substitute for it a sentence of three years' imprisonment. The concurrent sentence of two years in respect of the offence of theft will stand. Accordingly the overall sentence is reduced to one of three years' imprisonment."

R v Cunningham was cited by Lord Taylor CJ in *R v Cox* [1993] 2 All ER 19 at 21-2, where he added:

> "Although an offender may qualify for a custodial sentence ... the court is still required to consider whether such a sentence is appropriate having regard to the mitigating factors available and relevant to the offender (as opposed to such factors as are relevant to the offence)."

See also *R v Baverstock* [1993] 2 All ER 32 at 39. *R v Cunningham* was cited in the important New South Wales decision *R v Henry* (1999) 46 NSWLR 346 where Spigelman CJ (at para. 29) emphasised :

> "A guideline judgment on the subject of sentencing should not lay down a requirement or anything in the nature of a rule. The failure to sentence in accordance with a guideline is not itself a ground of appeal. Guidelines are not rules of universal application. They may be departed from when the justice of a particular case requires such departure."

His Honour also (at para. 42) cited Brennan J (as he then was) in *Binni v The Queen* (1994) 68 ALJR 859 at 859 :

> "By their decisions, the Court of Criminal Appeal hoped to 'remind sentencing judges of the great importance of maintaining adequate standards of punishment in sentencing for armed robbery'. That being the object of the Court of Criminal Appeal, this Court should not grant special leave to review the range of sentences which the Court of Criminal Appeal has set.
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> However, the Court of Criminal Appeal is bound to apply general principles of sentencing to any case in which the Crown seeks to have a range of sentencing established or confirmed so that the actual sentence in any case properly reflects its unique circumstances."

Similarly, in *R v Engert* (1995) 84 A Crim R 67 at 68, Gleeson CJ said :

> "It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise."

In the light of these authoritative statements, *R v Cunningham* can never be taken as a warrant for failure to consider whether a sentence should be suspended in whole or in part. It was an error of principle to do so. Consideration of the personal factors and of how they should be reflected in the Court's decision is at the core of the sentencing judge's

task. As has been well said, he must pass sentence, not only on an offence, but on the individual offender (see *R v Henry* at para. 7). In *R v Cunningham* itself, the Court of Appeal reduced a young man's sentence for a serious crime by 25% on account of personal factors, particularly "previous good character" and "co-oper[ation] with the police from the start". Both these factors apply here, and the previous good character of each appellant has been demonstrated over a longer period.

In the circumstances, it is necessary for us to determine the appropriate sentences. We have been greatly assisted by the submissions of counsel, and the concession made by counsel for the Crown. These cases are plainly appropriate for suspension to be considered upon the principles laid down in *Mo'unga v Rex* [1998] Tonga LR 154, having regard to the Appellants' previous good records, their co-operation with the police, and the likelihood they will take the opportunity offered by a suspended sentence to rehabilitate themselves. We quash the sentences of two and a half years, and substitute sentences of two years. Some four months has been already served, but the whole balance is to be suspended for two years.

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Burchett J

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Salmon J

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Moore J