MOLESI (ANITA) & TUFUGA (VAIPUESE) v POLICE

Court of Appeal Apia
Morling, Ward & Muhammad JJ
11 November, 13 November 1992

CRIMINAL LAW - sentencing on charges of theft as a servant and forgery.

HELD: Sentence of 2 years imprisonment was reduced to 1 year probation.

LEGISLATION:

- Crimes Act; S 86

Toailoa for Molesi
Va'ai for Tufuga
Edwards for Respondent

Cur adv vult

These are separate appeals against sentence but as they are for similar offences and raise similar issues, the Court has heard them together. Both Appellants are female and pleaded guilty to offences committed whilst working for the Pacific Commercial Bank in Asau, Savaii.

Molesi was a teller and withdrew money from the Asau Primary School Account on seven occasions by forging the signature of the authorised signatory. The total sum stolen was $670 and it is accepted that she repaid the full sum before the loss had been discovered. She pleaded guilty to seven charges each of forgery and theft by a servant and was sentenced to two years imprisonment on each count concurrent.

Tufuga stole $600 whilst working in the same Branch. The loss was discovered and she was questioned about it by the manager. She denied it initially but later admitted it and subsequently repaid the money. She pleaded guilty to one charge of theft by servant and was sentenced to 9 months imprisonment.

Both appeal against sentence on the basis that imprisonment is not appropriate in view of their circumstances and especially as they are first offenders. It is also urged on their behalf that

non custodial sentences have almost invariably been imposed in cases of this nature previously. Counsel for the respondent maintains the need for custodial sentences but does not support the considerable disparity between the sentences in these two appeals.

Tufuga had been recently married and had taken on the responsibility of looking after her new husband's two children by a previous marriage. In Molesi's case, the Court was wrongly told she was single. In fact, she is married and was pregnant at the time of the trial. However, even allowing for the effect of that misinformation and that she had committed a number of offences over a period of a few weeks, we find it hard to understand the difference in penalty. We also consider the manner in which repayment occurred in Molesi's case was very strong mitigation in comparison with Tufuga's case. We shall consider each case as meriting a similar penalty.

What then is the proper penalty for this type of offence? Such cases generally share, as do these, many similar features. The Defendant has usually not offended before and so the offence is out of character. She is extremely unlikely to commit any other offence in the future. The consequences have already been severe in terms of shame in their community and family, of loss of work and of prospects of future employment. The Defendant generally admits the offence and very often has paid the money back. All are strong mitigating factors. In island communities the offence frequently stems from demands by the family on a member who has paid employment. This is an important, if double edged, consideration. It may explain the conduct but, as counsel for the Respondent points out, is such a prevalent problem that the Courts need clearly to demonstrate it is unacceptable.

The learned Acting Chief Justice in sentencing both cases referred to the abuse of a position of trust and the importance of the deterrent element in the sentence.

It is trite law that breach of trust is a serious aggravating factor in crime and is always involved in thefts by employees. Section 86 of the Crimes Act recognises this by including thefts by servants in the second most serious category. Business can only function if employees can be trusted. The nature of employment is such that opportunities for theft increase as trust increases.

Courts in many jurisdictions consider the penalty in such cases includes a significant element of deterrence and should usually be a sentence of immediate imprisonment even for first offenders for the simple reason that the vast majority of such cases are first offences. The learned judge was correct to state the

position in that way and we share concern at the prevalence of these thefts. It is recognised that increasing incidence of a particular offence may require the imposition of more severe penalties.

We feel, as the learned judge felt, the time has come for the seriousness of such offences to be marked by more condign sentences. It must be made clear that anyone who steals from their employer should realise that, even if the money is repaid, the Court will always consider immediate imprisonment.

However, counsel has pointed out that these cases have not generally attracted custodial sentences over the last few years and we consider the sentences in these appeals, therefore, reflect too sudden a change from the level of sentences in the recent past. Our powers of sentence are very limited and the sentence we shall order is not, in our view, the most appropriate but we make it clear it is done in these cases only for the reasons stated. This case must be taken as a clear warning that the position has changed and the usual sentence for these offences will, hereafter, be prison.

We allow the appeal in each case, quash the sentence and order probation for one year. In the case of Molesi that order is made for each offence but the period is, of course, concurrent.