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

CA 504/2022

	BETWEEN	**THE CROWN** Appellant
	AND	**INA KAMANA** Respondent

Coram: White P, Fisher JA, Asher JA

Hearing: 22 June 2022 (CIT), 23 June 2022 (NZT)

Counsel: Ms J Crawford for Appellant
Mr M Short for Respondent

Judgment 28 June 2022 (CIT), 29 June 2022 (NZT)

JUDGMENT OF THE COURT

A. The appeal is allowed.

B. The sentence of four months' imprisonment is quashed.

C. The sentence of one year's probation is quashed.

D. A substitute sentence of nine months' imprisonment is imposed.

Introduction

[1] On 25 February 2022 the respondent pleaded guilty to five charges that between 28 November 2019 and 28 February 2020 she stole from her employer cheques totaling $12,700.35. On 22 April 2022 she was sentenced to four months' imprisonment to be followed by 12 months' probation on stated conditions. The Crown appeals against the sentence on the ground that it was manifestly inadequate.

Factual background

[2] The respondent was the Deputy Director of the National Environment Service (**NES).** The NES is the central government agency charged with protecting, managing and conserving the environment of the Cook Islands.

[3] Within the NES the respondent was in charge of the finance team. The finance team prepared the cheques required to pay for goods and services provided to NES. The respondent had signing authority on the NES bank accounts as did the Director and two other senior managers. Cheques for more than $5,000 required external approval from the Ministry of Finance and Economic Management. Cheques for less than $5,000 could be signed by any two authorised NES officers.

[4] The respondent arranged for the issue of five cheques which she and a senior staff member signed. Each cheque was for a sum less than the $5,000 threshold for external authority. They were all made payable for cash, in one case referring to cash plus the name of the respondent.

[5] The respondent deposited the funds in her personal bank account as follows:

Date	**Amount**
25.11.19	$3,750
07.01.20	$2,640
14.01.20	$1,595
31.01.20	$2,020
28.02.20	$2,750
Total	**$12, 755**

[6] The respondent used the funds for herself and her family. When apprehended she initially gave false explanations. Although she ultimately pleaded guilty to theft as a servant, she continued to maintain to the Probation Officer that the stolen funds were a loan from NES authorised by the NES Director. She has not repaid any part of the funds taken.

High Court proceedings

[7] The five charges were laid on 14 October 2021. The respondent pleaded guilty four months later on 25 February 2022. Mr Short told us that at least in part the delay was due to the need to see whether she had a defence.

[8] At the sentencing the Chief Justice noted that pursuant to ss 242 and 249(b)(ii) of the Crimes Act 1969 the maximum sentence on each of the five charges was five years' imprisonment.

[9] In the High Court the respondent said that she had committed the offences because she was struggling financially. She was the sole provider for her household which included a disabled brother. She did not dispute that she had been on a salary of $49,000 per annum and that the brother contributed part of his benefit to the household.

[10] A significant factor in the respondent's favour was that she had provided lengthy witness statements to the police in support of a criminal prosecution against the NES Director.

[11] The Chief Justice noted that the aggravating factors included the serious breach of trust, the planning and premeditation involved, and the multiple offending over a period of three months. He noted the guilty plea, the fact that this was her first offence, the respondent's exemplary role in the community and church and her remorse.

[12] The Chief Justice adopted a starting point "at the upper end" of a range from two to three years' imprisonment. He weighed the gross breach of trust and theft of public money against her community service and role as a sole income provider for a household which included a disabled brother. He considered that mitigating features justified a reduction of about a third (reducing the term to about "two years imprisonment or slightly less") and that assistance to authorities justified another reduction of about 60 per cent. He concluded:

> On that basis if a 60% reduction is applied to the possible sentence of about two years or less, the outcome is that you should be sentenced to imprisonment for a term of four months. That is possibly a lenient outcome when the arithmetical calculations are undertaken, but recognises in a

limited way your contributions to the community and your personal circumstances.

[13] To the four months' imprisonment the Chief Justice added probation for one year following the respondent's discharge from prison. The probation was to be subject to the conditions that she not leave the Cook Islands without the approval of the High Court; that she attend such workshops or counselling as the Probation Service recommended; that, within such period and by such instalments as might from time to time be directed by a probation officer, she pay by way of damages or compensation for the loss suffered by the National Environment Service the sum of $12,735; that to assist in recovery of that sum, she cooperate with the Probation Service; and that she sign such documents as might be required to facilitate the recovery of that money from any superannuation credit to which she might be entitled or from other sources.

The appeal

[14] The Solicitor General may appeal as of right against the adequacy of a sentence.[1] On appeal the Court can quash the sentence and substitute a more or less severe one or dismiss the appeal.[2]

[15] Although such an appeal is to be by way of rehearing,[3] a sentence will normally be increased only where it is manifestly inadequate or contrary to principle.[4] Any increase will take the new sentence to only the lower end of the available range.[5]

[16] The Chief Justice's starting point had been "closer to the upper end of" two to three years which might be conveniently regarded as 2 years nine months. Such a starting point is well-supported by authorities.[6] The Crown has no issue with the starting point but argues that discounts then made the sentence manifestly inadequate in that:

(a) The reduction of 60 per cent for assistance to authorities was excessive and not in line with precedent.

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1 Judicature Amendment Act 2011, s 67(2).
2 Judicature Amendment Act, s 69(4).
3 Judicature Amendment Act, s 74.
4 *R v Pue* [1974] 2 NZLR 392 (CA); *R v Muavae* [2000] 3 NZLR 483 (CA) at [10].
5 *R v Davidson* [2008] NZCA 484; *R v Clifford* [2011] NZCA 360, [2012] 1 NZLR 23.
6 *R v. Varjan* NZCA 97/03, 26 June 2003; *Nicholls v. Police* [2002] CA 3/11, 9 June 2011.

(b) The further discount for personal mitigating features did not identify them or the quantum that resulted.

(c) The sentencing methodology was flawed, particularly when applying discounts to the starting point.

(d) The end sentence did not reflect the gravity of the offending.

[17] Each will be addressed in turn.

Assistance to authorities

[18] It is well recognised that a defendant's co-operation in apprehending or prosecuting other offenders can justify a substantial discount in the sentence that might otherwise have resulted.[7] The extent of the discount depends on the importance of the information provided, the seriousness of the offences, the value of the evidence to be given, the potential for retribution in custody and the risk to the offender and their family.[8] Where all of those factors are present the maximum discount for a combination of guilty pleas, other mitigating features, and assistance to authorities, has normally been half to two thirds in the United Kingdom, half in New South Wales and 60 per cent in New Zealand.[9]

[19] We see no reason to depart from the New Zealand middle ground of 60 per cent before adjustment for the Cook Islands approach to guilty pleas. Ms Crawford accepted that New Zealand's normal maximum of 60 per cent might be increased to 70 per cent in the Cook Islands. That is a logical consequence of the maximum discount of 33 per cent for a guilty plea here compared with only 25 per cent in New Zealand.

[20] 70 per cent can therefore be regarded as the maximum discount in the Cook Islands. But even where all factors favour the maximum, it is not a discount of 70 per cent for assistance to authorities alone. It is a global discount of 70 per cent for all sources of mitigation, including a guilty plea, along with assistance to authorities.

[21] In this case the Crown acknowledges the respondent's assistance in the prosecution of the former Director of NES. However it says that the credibility of her evidence will suffer

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7 *R* v *Hadfield* CA 337/06 (14 December 2006); *FF v R* [2017] NZCA 294; *Police v Enoka, Tama and Napa* (13 April 2022) CI High Court, CR No 461/2021, 462/2021 and 469/2021.

8 *R* v *Hadfield* CA 337/06 (14 December 2006); *FF v R* [2017] NZCA 294.

9 *R* v *Hadfield*, above, at [26] – [30] followed in *FF v R*, above, at [16].

from the lies she told about her own offending, that her cooperation has not created any risks to her safety, that the Director would have been prosecuted in any event and that the prosecution would not fail without her involvement. For those reasons it contends for a discount of 20 per cent under this heading. Taking into account the other mitigating features it proposes a global discount in the region of 63 per cent.

Personal mitigating features

[22] The Crown submits that the Chief Justice's discount for personal mitigating features did not identify them or the quantum that resulted.

[23] We do not accept the Crown's submission in those terms. The Chief Justice did refer to the respondent's plea of guilty, her contributions to the community and church, her remorse, the fact that she was the sole income earner in a household that included a disabled brother and that it was her first offence. He concluded that before turning to assistance to authorities, the mitigating features warranted a reduction of about a third.

[24] There is more substance in the point that there may have been duplication in the discounts given for contributions to the community and personal circumstances. Strictly speaking the Chief Justice appears to have included those matters in his discount of a third for mitigating factors and then returned to them again as a justification for reducing the figure calculated at the end of the sentencing discussion.

Flawed methodology

[25] In his reasons for decision the Chief Justice proceeded through the following steps:

(a) A starting point towards the top of the range of two to three years (which can be treated as two years nine months).

(b) A discount of about a third for personal mitigating factors to "about two year's imprisonment or slightly less".

(c) A discount of 60 per cent applied to (b) for assistance to authorities.

(d) Imprisonment for four months recognizing contributions to the community and personal circumstances.

[26] The Crown's first submission under this heading is that all discounts need to be applied to the period adopted as the starting point; it is unsound to apply a discount to a period that has already been subjected to a discount earlier in the reasoning process; and the discount for a guilty plea should be applied to the defendant's overall culpability. If the guilty plea discount is not applied until after other discounts have already been made, its impact is diluted. The approach taken by the Chief Justice has sometimes been referred to as a "three-step methodology" as opposed to a "two step methodology". Three-step methodology has been widely used in the past. But we agree that two-step methodology is supported by both logic and authority.[10] It also results in a slightly lower end sentence.[11] The discounts should all be aggregated and only then applied to the starting point (in this case two years nine months).

[27] Secondly the Crown submits that the Chief Justice treated the judicial maximum for assistance to authorities as a discount for the assistance alone instead of the maximum for all sources of discount. We agree.

[28] Thirdly, we accept that there was the potential for double-counting for contributions to the community and personal circumstances referred to earlier.

[29] The allowance for each discounting factor did not necessarily need to be spelled out so long as the total did not exceed the maximum that could be allowed for an assistance to authorities case. However itemizing the critical factors separately produces the following result:

Reason for reduction	**Discount**
Guilty plea	33%
Assistance to authorities	20%
Other aspects (remorse, prior good character etc)	10%
Total discount	63%
Starting point	2 years 9 months (33 months)
Result (33 months discounted by 63%)	**12 months' imprisonment**

10 *R v Moses* [2020] NZCA 29.
11 For an illustration with hypothetical figures see *Moses*, above, at [30].

Probation and reparation

[30] The Chief Justice added probation for a year from discharge from prison on conditions that the respondent not leave the Cook Islands without High Court approval, attend workshops and counselling as directed and repay the $12,735 on terms directed.

[31] If the respondent had repaid the stolen funds she would have been given appropriate credit as another mitigating factor. The same would have been true if it had been possible to guarantee that such a payment would be made. However it would not have been just to sentence her without such a discount and then to impose a scheme designed to secure payment after all.

[32] Given the termination of her employment, the respondent would have real difficulty in making the repayment. In this Court Mr Short suggested that the respondent could sell or sublease half of the land that is presently leased to her. The land is currently used to raise crops for her family. The proposal is that the land would be subdivided, a buyer found, and approval to the sale obtained from the respondent's family and from the Leases Approval Tribunal. But the proposal is no more than that. Despite the intention to repay expressed by the respondent in the past, nothing has come of it so far. We do not think it realistic to base the sentence on the assumption that the stolen funds will be repaid. It is more realistic to assume they will not be.

[33] Workshops and counselling seem unlikely to assist in the respondent's rehabilitation given her age and personal circumstances. The restriction upon her leaving the Cook Islands could not be justified on any basis except as an incentive for repayment. The real point of probation appears to have been to secure repayment. In our view the just course is to assume that the sum will not be repaid and to quash the associated sentence of probation.

End sentence did not reflect gravity

[34] The calculations we referred to earlier represent important steps in the reasoning that underlies a proper sentence. However at the end of that exercise it is important to step back and ask whether the overall sentence reflects the gravity of the offending after taking into account all mitigating factors.

[35] In this case the respondent pleaded guilty, had otherwise been of good character, contributed well to the community and church, provided sole support for a household which included a disabled adult and provided valuable assistance to authorities. However it is

impossible to overlook the gross breach of trust involved in exploiting such a senior management position, the particular responsibility placed on those entrusted with public funds, the premeditation and planning involved and the multiple offending over a period. Without overlooking the role of personal factors, they must take second place to the need for deterrence in cases of this kind.

[36] Had we been approaching the case afresh we would have imposed a sentence of 12 months' imprisonment. On a prosecutor's appeal any increase should normally take the new sentence to only the lower end of the available range.[12] We regard nine months' imprisonment as the least that could properly be imposed in all the circumstances.

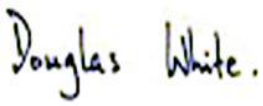
Result

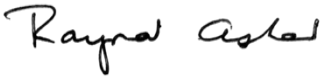
[37] The appeal is allowed.

[38] The sentence of four months' imprisonment is quashed.

[39] The sentence of one year's probation is quashed.

[40] A substitute sentence of nine months' imprisonment is imposed.





Douglas White, P **Robert Fisher, JA** **Raynor Asher, JA**

[12] *R v Davidson*, above; *R v Clifford*, above.