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

**CA NO. 520/2024**

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| BETWEEN | **ROBERT TAIMOE TAPAITAU**<br>Appellant |
| AND | **THE CROWN**<br>Respondent |

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| Coram: | Fisher JA, Asher JA and Arnold JA |
| Hearing: | 4 July 2024 (CIT)/ 5 July 2024 (NZ) |
| Counsel: | Mr N George for Appellant<br>Mr P Wicks KC, Ms J Crawford for Respondent |
| Judgment: | 15 July 2024 (CI)/ 16 July 2024 (NZ) |

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**JUDGMENT OF THE COURT OF APPEAL**

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**A. The appeal against sentence is dismissed.**

**B. The sentence of imprisonment for two years and nine months will stand.**

## Introduction

[1] In accordance with a direction given by the President under s 53(3) of the Judicature Act 1980-81 as inserted by s 2 of the Judicature Amendment Act 2011, this appeal was heard in Rarotonga, with the Judges appearing by audio-video link (**AVL)** from the Court of Appeal in Auckland. Both courtrooms were open to the public. Mr Wicks appeared by AVL from Auckland. All other counsel, the Appellant and the Registrar appeared in the courtroom in Rarotonga. We thank the President of the New Zealand Court of Appeal and the staff of both Courts for their assistance in making the necessary arrangements.

[2] On 31 January 2024 the appellant was found guilty and convicted on three charges of

fraudulent use of a document (**the cheque fraud convictions)** and one of conspiracy to defraud (**the conspiracy conviction)**. On 22 March 2024 he was sentenced to imprisonment for two years, nine months. In this Court he appeals against sentence only.

**The background**

[3] The appellant was the Minister for Infrastructure for the Cook Islands. As part of his portfolio, the appellant was responsible for Infrastructure Cook Islands (**ICI**). The appellant's co-offender, Mrs Diane Puna, was the Secretary of ICI. Her husband, and another co-offender of the appellant, was Mr Ngatokotoru Puna. He was the then-Director of another Government department, the National Environment Service (NES). The appellant was also the Minister of that department.

[4] The three cheque fraud convictions related to a trip to New Zealand undertaken by the appellant in July 2019. The appellant arranged with Mrs Puna for his travel costs to be met by ICI on the basis that it was required for ICI business.

[5] The conspiracy conviction arose from the Puna family's stay at Edgewater Resort in Rarotonga during July 2019. Mrs Puna arranged for ICI to pay the cost of $3,035. When the Public Service Commission investigated Mrs Puna was stood down from her duties.

[6] The appellant, Mrs Puna, and Mr Puna, took steps to have Mrs Puna reinstated. They said the Edgewater stay had been an ICI "management retreat". All three said that to the Public Service Commission. The appellant also said it in a letter to the Prime Minister. The explanation was accepted and Mrs Puna was reinstated. She was able to continue with her employment and salary for another 18 months. A different view was ultimately taken when the Police became involved.

[7] After a judge-alone defended trial the Chief Justice found that the appellant did not travel to New Zealand for ICI business and was therefore not entitled to use ICI funds to pay for it. The appellant and Mrs Puna were each found guilty on three charges of fraudulently dealing with a document, namely the three government cheques used to pay for the trip.

[8] On the conspiracy charge the Chief Justice relied primarily on text messages, Facebook

messages and emails between the appellant, Mrs Puna and Mr Puna. He concluded that there was a conspiracy to cover up the fraudulent use of ICI funds to pay for the Puna's Edgewater stay. The appellant, was convicted of conspiring to defraud along with his two co-offenders, Mr and Mrs Puna.

**The sentence**

[9] In sentencing the appellant the Chief Justice treated his abuse of high office as the dominant factor. Also important was the fact that he had encouraged offending by two high-ranking public servants. The Chief Justice placed particular reliance on *R v Kamana*[1] and went on to say:

> That is how corruption spreads, public money becomes misused and dissipated, and the integrity of the public service becomes eroded. And that is why the sentence I impose on you must be deterrent.

[10] The Crown had submitted that the conspiracy conviction should be treated as the lead offending and argued that it warranted a starting point of two years, six months' imprisonment. Standing alone, the cheque fraud convictions would have warranted a sentence of two years imprisonment but, applying the totality principle, the Crown reduced the penalty for those convictions to 12 months' imprisonment. This produced an overall starting point of three years, six months imprisonment.

[11] The Chief Justice adopted the Crown's analysis, except that "just to be sure" he reduced the three years, six months starting point to three years, three months based on the totality principle.

[12] In mitigation the Chief Justice took into account the appellant's extensive contributions as a hard-working Deputy Prime Minister and Minister, the fact that he was well regarded and (in other respects) trusted, and the fact that he had recently lost his mother. As a result of his fall from grace he was now unemployed on Penhryn. These circumstances warranted a reduction of 15% or six months. The end sentence was therefore two years nine months.

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1. *R v Kamana* [2022] CKCA 2.

**The appeal**

[13] The appeal is against sentence only. On appeals of this nature the Court will not interfere unless satisfied the sentence is "manifestly excessive".[2] The appellant must show that the sentence was outside the range available to the sentencing Judge.[3]

[14] In this Court Mr George advanced essentially three grounds of appeal:

(a) The Chief Justice misunderstood the purpose of the appellant's trip to New Zealand.

(b) The sentence imposed was incompatible with this Court's decision in *Police v Bishop.*[4]

(c) The appellant was penalised because he was a Minister of the Crown.

**Ground 1: Purpose of trip to New Zealand**

[15] In this Court Mr George accepted the conspiracy conviction but challenged the factual basis for the three cheque fraud convictions. We come later to the contradiction that entails on an appeal against sentence only.

[16] At trial the appellant did not deny that acting through his secretary and co-accused, Mrs. Diane Puna, he represented that his trip to New Zealand was for Government purposes. His defence was that he went there to meet Matson Line executives; that the purpose of the meeting was to ensure that a long-delayed bitumen truck was shipped immediately; that the CEO of ICI had started preparing for the appellant's trip well before the appellant's uncle had died; and that the appellant's attendance at his uncle's funeral while there was incidental.

[17] After reviewing all the evidence, including the evidence relied on by the defence, the Chief Justice found that the appellant's real purpose in visiting New Zealand was to attend his uncle's funeral. The appellant and Mrs Puna were each found guilty on the three charges of fraudulently dealing with a document, namely the three Government cheques used to pay for

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2 *Paio v Police* CA 14/1995, 29 October 1996; and *R v Marsters* CA 3/12, 30 November 2012 at [43].

3 *Nicholls v Police* CA 5/2002, 11 December 2002 at [5] and [6]; *R v Marsters*, CA 3/12 at [43].

4 *Bishop v Crown* CA 2/16, 6 December 2016.

the trip.

[18] In this Court Mr George submitted that the Chief Justice had overlooked three critical items of evidence. Consequently Mr George sought to have the three cheque fraud charges dismissed.

[19] The first challenge to this submission is that this is an appeal against sentence. It is not an appeal against conviction. On seeing Mr George's submissions on appeal we issued a Minute asking him to clarify the nature of the appeal. Mr George confirmed that it was, and remained, an appeal against sentence only. In those circumstances we must interpret his argument in the best way we can. Presumably the argument has to be that although there was intent to defraud by concealing the illegitimate purpose of attending the funeral, there was also a second, legitimate, purpose for the trip. In principle the second purpose could reduce the culpability and therefore the sentence.

[20] The second challenge for the appellant is to show that on a proper interpretation of the evidence the Chief Justice ought to have entertained a reasonable doubt as to the purpose or purposes of the trip. The effect of his decision was that expediting delivery of the bitumen truck was not the purpose of the trip, or even one of its purposes.

[21] The first item of evidence said to have been overlooked came from the CEO for the appellant's Ministerial support office, Mr Hagai. Mr Hagai had received an email of 3 July 2019 from Sir Michael Jones, a director of Matson Shipping. In the email Sir Michael asked to meet the appellant in Rarotonga on 29 or 30 July 2019. Correspondence followed without alighting on any date or place for such a meeting. On 16 July 2019 the appellant left Rarotonga not knowing whether Sir Michael would be available to meet him in New Zealand. On the same day Mr Hagai emailed Sir Michael asking whether he would be available. In the event he was not. The appellant returned to Rarotonga four days later without meeting Sir Michael.

[22] This evidence does not help the appellant. If the reason for going to New Zealand was to meet Sir Michael, he would scarcely have gone without knowing whether he would be available. The appellant's uncle had died on 13 July 2019. The next day the appellant and Mrs Puna set in train arrangements for him to go. The notion that there was no connection between the two is not plausible. Mr Hagai wrote to Sir Michael on the day of the appellant's departure

from Rarotonga. It has all the hallmarks of an attempt to legitimise a trip to which the appellant was already committed.

[23] The second item of evidence on which Mr George relied came from Mr Chu. At the material time he was the General Manager of Matson Shipping in Auckland. He confirmed that during the appellant's trip there was a lunch at Villa Maria restaurant attended by the appellant, the appellant's wife, another Matson employee, and himself. Included among the topics discussed at the lunch was the need for the Cook Islands to receive a certain bitumen truck as soon as possible.

[24] This evidence does not help the appellant either. If the appellant wanted the Cook Islands Government to pay for the trip it is scarcely surprising that he would create a rationale for that. The lunch was arranged at short notice. It followed an email from Mr Hagai on 16 July 2019, the day of the appellant's departure from Rarotonga.

[25] From a business point of view the lunch was pointless. An earlier hold-up in shipping the truck was due to a delay in preparation of the truck itself, not delay on Matson's part. The lunch did not take place until 18 July 2019. By that time the Cook Islands had already received from Matson a booking confirmation that the truck was due to depart from Auckland on 29 July 2019. Nor was Sir Michael going to be there. And as the Chief Justice pointed out, it was inexplicable why any shipping requirements would require a face-to-face meeting rather than a discussion by AVL.

[26] The third item of evidence came from the Prime Minister. He said that when Ministers visited New Zealand on Government business some flexibility was allowed for private activities if their working schedule allowed it. That is scarcely surprising. But it adds nothing to the only question that matters – what purpose or purposes did the appellant have for making the trip to begin with?

[27] On the three cheque fraud charges the only contested issue was the appellant's state of mind. For this the Chief Justice relied on a large body of circumstantial evidence. In a circumstantial evidence case it is not sufficient for the appellant to select three items of evidence and ignore the rest. We do not think it necessary to traverse the many factors that led the Chief Justice to his overall conclusion. This is, after all, an appeal against sentence. Suffice

to say we respectfully agree with his reasoning and conclusion. The sole purpose of the appellant's trip to New Zealand was to attend his uncle's funeral.

[28] This ground of appeal fails.

**Incompatible with *Police v Bishop***

[29] Mr George submitted that the Court of Appeal's decision in *Bishop v Crown* shows that the sentence was manifestly excessive.[5] He submitted that:

> The Court of Appeal has clearly established the precedent in hearing appeals and the sentencing of former Cabinet Minister in the case of *Teinakore Bishop v Crown* CA 2/16.
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> The monumental difference between the amount of money involved, $419,165 in the case of Bishop and $3,454.00 in the case of the Appellant clearly stands out.
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> The Court of Appeal reduced Mr. Bishop's sentence from 2 years and 4 months to 6 months imprisonment.

[30] The submission faces a series of difficulties:

(a) It is based on incorrect figures. The $419,165 referred to in *Bishop* was a loan, not a sum stolen. The loan was from a third party, not the Government. In the present case the loss to the public was not confined to $3,454. It included salary improperly paid to Mrs Puna during her reinstatement period of approximately 18 months. The unjustified salary would not have occurred but for the conspiracy for which the appellant and others were responsible.

(b) *Bishop* involved a single incident. The present case involved several incidents spread over a period of months.

(c) The personal mitigating factors in *Bishop* were stronger than those found in the present case. They included the difficulty of treating *Bishop's* bipolar condition in prison.

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5 *Bishop v Crown*, above fn 4.

(d) The venture for which *Bishop* arranged the loan would be a major benefit to Cook Islands tourism in general and Aitutaki in particular. There is no equivalent in the present case.

(e) In arranging the loan in *Bishop,* the offender was acting on the legal advice of a solicitor. This appellant was not acting on legal advice.

[31] It was the combined effect of those factors, and particularly the fact that Bishop was acting on legal advice, that persuaded the Court to say in *Bishop*:[6]

> But for that special factor [acting on legal advice] it would have been necessary to impose a much more substantial prison sentence. However the fact that the appellant was acting on legal advice, in combination with the other mitigating factors we have referred to, allows the Court to reduce the prison sentence to one of six months. *It will be apparent that for that reason this case will have little value as a sentencing precedent.* (emphasis added).

[32] Given the express warning that *Bishop* would have little value as a sentencing precedent we were surprised to hear it submitted that it established the precedent for Cabinet Minister sentences. It does not.

[33] Of much greater assistance is this Court's decision in *R v Kamana*.[7] The Chief Justice appropriately relied on that decision for his starting point. Ms Kamana was the NES deputy director in charge of finance during the same period as the events in this case. In the Supreme Court she pleaded guilty to theft from public funds totalling $12,755. In that case the then Chief Justice adopted a starting point equivalent to two years, nine months' imprisonment, rightly noting that this was well supported by authority. After a series of unusual but major discounts he reduced the end sentence to four months. On appeal the Court of Appeal agreed with the starting point but not the extent of the discounts. Notwithstanding the special factors, and the constraints of a prosecution appeal, it increased the end sentence to nine months.

[34] The present case is more serious given the unrelated conspiracy that followed the cheque frauds, the appellant's role as a Minister of the Crown and his encouragement of corruption in two public servants. We agree with the Chief Justice's starting point of three

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6 At [137].

7 *R v Kamana* CA 504/2022, 28 June 2022.

years, three months' imprisonment.

**Penalised because he was a Minister**

[35] Mr George's third ground of appeal was that for sentencing purposes it would be contrary to Article 64 of the Constitution to treat Ministers of the Crown differently from other citizens. This ground of appeal was developed no further but was presumably based on Article 64(1)(b). Article 64(1) materially provides:

> (1) It is hereby recognised and declared that in the Cook Islands there exist, and shall continue to exist, without discrimination by reason of race, national origin, colour, religion, opinion, belief, or sex, the following fundamental human rights and freedoms:
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> …
>
> (b) The right of the individual to equality before the law …

[36] Equality before the law requires that the where the material circumstances are the same the law must treat individuals in the same way. But where the material circumstances differ there is nothing to prevent the law from treating individuals differently.

[37] In the present case the fact that the appellant was a Minister of the Crown is a material difference for sentencing purposes. The same is true of all those holding public office, particularly where the public office is a high-ranking one. The Courts have always held such persons to a higher standard and imposed greater penalties if the standard is breached. The same is true of all others on whom special trust has been conferred such as lawyers and trustees.

[38] For that reason this Court said in *Bishop*:[8]

> Those who take Cabinet rank with its privileges, honour and responsibilities should not abuse this position for personal gain. The public is entitled to have trust and confidence in those in positions of power.

The Court noted that it "must impose a sentence - albeit on an otherwise good living individual - which both condemns the misuse of Ministerial office and deters others from following his

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8 At [121].

example."[9]

[39] Similarly in *Kamana* we said:[10]

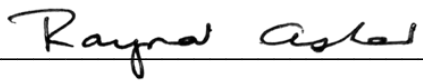
> … it is impossible to overlook the gross breach of trust involved in exploiting such a senior management position [and] the particular responsibility placed on those entrusted with public funds … Without overlooking the role of personal factors, they must take second place to the need for deterrence in cases of this kind.

**Conclusion**

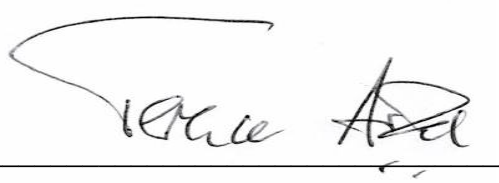
[40] As with any other small country seeking to attract grants and business from others, it is vital that the Cook Islands maintain a reputation as a country that is free from corruption. Where corruption is brought to light, deterrence and condemnation must be given priority over other sentencing considerations.

[41] We respectfully agree with the sentence imposed by the Chief Justice. The appeal is dismissed.

Robert Fisher JA



Raynor Asher JA



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9 At [126].
10 At [35].