IN THE COURT OF APPEAL OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

APPEAL NO. AC 9 of 2011
[CR 153 of 2010]

BETWEEN : SHIPPING CORPORATION OF POLYNESIA LIMITED
- Appellant

AND : REX - Respondent

Coram : Scott P
Burchett J
Salmon J
Moore J

Counsel : *Mr Fa'otusia* for Appellant
Mr Sisifa for the Respondent

Date of hearing : 19 September 2011.

Date of judgment : 30 September 2011.

JUDGMENT OF THE COURT

[1] In late 2009 the MV Princess Ashika sank with the loss of many lives. The vessel was owned by the Shipping Corporation of Polynesia Limited. In due course along with a number of individuals the company was charged with offences arising from the sinking. In the case of the Shipping Corporation the charges were manslaughter by negligence and five charges of sending an unseaworthy ship to sea. The company was tried by a judge and jury and was found guilty on all charges. The company was fined 1 million pa'anga on the manslaughter charge and 200,000 pa'anga on each of the five charges of sending an unseaworthy ship to sea. The company has appealed against these sentences. The appeal was lodged out of time but leave has been granted by Chief Justice Scott acting in his capacity as President of the Court of Appeal.

[2] The grounds of appeal may be summarized as follows:

(i) The judge failed to consider section 26 (1) of the Criminal Offences Act and the fine on count one was excessive.

(ii) The judge should have considered the financial position of the company and its lack of ability to play the fine of $1,000,000.

(iii) As to the counts relating to sending an unseaworthy ship to sea, it is claimed that the fines imposed were in excess of those permitted by the legislation. Counsel acknowledged at the hearing that the Shipping Act had been amended and the relevant maximum fine increased.

(iv) The judge ordered that out of the fines imposed certain sums were to be paid to the Tonga Maritime Polytechnic Institute and to the Tonga Women's Crisis Centre for what are undoubtedly worthy causes. It is claimed that the judge had no power to order these payments.

(v) It is claimed that the judge failed to take into consideration the differences economically between Tonga and the UK when using as guidance a UK decision regarding corporate manslaughter.

(vi) The fines were unjust considering the financial position of the appellant.

[3] The judge rightly described the facts of the sinking of the Princess Ashika as "horrific". He said, and again we agree, that in the public interest the court must send a strong message to other companies and individuals that they must not behave as the defendant company did in this case. He said that a very heavy fine was appropriate in

order to deter others and to effectively punish the defendant company and its CEO.

[4] Mr. Fa'otusia for the appellant company emphasized the points raised in his Notice of Appeal and submitted that the appellant did everything it was obliged to do by law. He told us that the book value of the company's assets was only 61,000 pa'anga and later produced company accounts which confirmed this. He said that the company was no longer trading and was winding down. He submitted that the judge should have fixed a fine for the total offending and then divided that fine between the charges. As to the amounts that the judge ordered to be paid as compensation he noted that s 25 of the Criminal Offences Act allows compensation to be paid to injured individuals and that such payments were ordered in addition to any fine imposed. He submitted there was no jurisdiction to order compensation to be paid out of a fine.

[5] Mr. Sisifa for the Crown said that he was not aware of any provision enabling a court to order that a portion of a fine should be paid to any person or body and that the judge had no power to order the payments in the way he did to the Polytechnic Institute and to the Women's Crisis Centre. The jurisdiction to order compensation applies only to individuals affected by the crime. Mr Sisifa

acknowledged that the financial state of the company was a relevant factor in determining the amount of a fine but it is only one of the factors to be taken into account. He noted that the judge in fact was given the accounts so that he was aware of the financial state of the company. He submitted that the fines imposed were appropriate in the circumstances of the case.

Consideration

[6] The first ground of appeal referred to section 26 (1) of the Criminal Offences Act. That section provides for the imprisonment of a person who does not pay a fine. We cannot see that that section has any relevance in this case. A corporation cannot of course be imprisoned. The second ground of appeal claimed that the judge should have considered the financial position of the company and its lack of ability to pay the fines imposed. In fact we understand that accounts were made available to the judge after the sentencing hearing had been completed, and indeed this is apparent from the sentencing notes. It is not however clear from those notes what use the judge made of the accounts. The accounts have been made available to us and will be referred to later in this judgment. We will also deal later with the claim

that the fines were unjust considering the financial position of the appellant.

[7] It is clear from a recent amendment to the Act that the fines imposed in relation to the counts of sending an unseaworthy ship to sea were in fact less than the maximum permitted. It is clear from section 25 of the Criminal Offences Act that the court may make orders for compensation but only to persons injured or suffering loss as a result of the offence and only in addition to, or in substitution for, any other punishment. The payments ordered to be made to the Tonga Maritime Polytechnic Institute and to the Tonga Women's Crisis Centre would not be permitted by this section, and we are not aware of any other provision in the Act which would enable an order to be made that a portion of a fine be paid to individuals or organizations, or indeed other than to the Crown. Nor does the Court have the power to direct that the Crown allocate a portion of fines imposed in a particular manner. Obviously the purposes of the judge's orders in this respect were very worthy but they have no statutory or other jurisdictional basis so that the appeal relating to those payments will have to be allowed.

[8] The final ground of appeal was the claim that the judge failed to take into consideration the differences economically between Tonga and

the UK when using as guidance a UK decision regarding corporate manslaughter. We can find nothing in the judge's decision that justifies this ground. The judge makes no reference to UK decisions regarding corporate manslaughter. We will however refer to the level of fines imposed in the UK and we are conscious of the great difference between the economies of the two countries.

[7] We have concluded that the judge's sentence requires review first in order to consider the relevance of the company's accounts and secondly to consider whether the offences are so closely related that the judge was in error to impose separate and substantial fines for each of the charges.

[8] As to the first of these issues there is no doubt that the financial position of the company is a relevant factor to take into account in sentencing. In the UK the Criminal Justice Act 2003 s 164 provides for the financial circumstances of a defendant to either increase or decrease the amount of the fine so that a wealthy defendant may pay a larger fine than a poor one. There is no such statutory provision in Tonga but the principle has been generally adopted. Obviously the means of the offender are relevant to the impact that a fine will have. The 5th edition of Banks on Sentence at p 556 notes, referring to the Magistrates Court sentencing guidelines in the UK, that defendants in

cases of corporate manslaughter and health and safety offences are frequently companies with huge annual turnovers and the aim should be for any fine to have an equal impact on rich and poor. Financial penalties must relate to the company's means. A decision of the Federal Court in Australia is of relevance in this matter. In *ACCC v Dataline* 244 ALR 300 the Court considered a penalty imposed on a company in liquidation. The Court made it clear that the financial state of the company was just one of the factors to be taken into account. At para 20 the Court said:

> "Additionally, a court may impose a penalty on a company in liquidation if to do so would clearly and unambiguously signify to, for example, companies or traders in a discrete industry that a penalty of a particular magnitude was appropriate (and was of a magnitude which might be imposed in the future) if others in the industry sector engaged in the same or similar conduct."

It is clear from the accounts of the company which were made available to us that the assets of the company are very limited and we were advised from the bar that the company was in the process of being wound down. However this is a case where in our view the consequences of ignoring significant defects in the seaworthiness of a vessel need to be made clear. The judge was right in saying that a strong message must be sent to other companies and individuals.

[9] It is a principle of sentencing that the court must consider, in a case where a defendant has been convicted of a number of offences,

whether those offences were part of the one course of conduct. As Lord Diplock said in *Director of Public Prosecutions v Merryman* [1973] AC 584 at 607 "where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise", they should be regarded as one activity or one offence. Where this is the case and the sentence is one of imprisonment the court will impose concurrent sentences. Where fines are imposed it is necessary to apply the same principle in determining the appropriate fine or fines. We consider this is just such a case. The manslaughter charge and the charges of sending an unseaworthy ship to sea are connected with each other in time and common purpose and we consider it is reasonable to treat all the acts as one offence for the purposes of sentencing.

[10] This leaves for consideration the question of the appropriate fine. At page 556 of Banks on Sentence it is said that in the UK, the offence of corporate manslaughter, because it requires gross breach at a senior level, will ordinarily involve a level of seriousness significantly greater than a health and safety offence. The appropriate fine in the

UK will seldom be less than 500,000 pounds and may be measured in the millions of pounds. We must consider the difference between the economies of the two countries. There is no doubt that this offending was extremely serious and deserves a very significant penalty. We have decided that it is appropriate to impose a fine of 1 million pa'anga on the manslaughter charge but, because of our conclusion that this is a case where the course of conduct requires that the total offending be treated as being the equivalent of one offence, we will impose nominal fines only on the remaining charges.

[11] The fine imposed on the manslaughter charge in the Supreme Court is upheld. The penalties imposed on counts 2, 3, 4, 5 and 6 are vacated and are replaced with fines of 100 pa'anga on each charge. The fines are to be paid within 30 days of the date of this decision. The orders requiring payments to the Tonga Maritime Polytechnic Institute and the Tonga Women's Crisis Centre are vacated.

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Scott P

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Burchett J

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Salmon J

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Moore J

COURT OF APPEAL TONGA