HIGH COURT OF SOLOMON ISLANDS

Criminal Case No.127 of 2008

IN THE MATTER of an appeal against conviction and sentence in the Central Magistrates' Court

BETWEEN: **CHARLES DAUSABEA** Appellant

AND: **REGINA** Respondent

Date of Hearing: 23 June 2008
Date of Judgment: 4 July 2008

Mr. Charles Ashley for appellant
Ms L. Kleinig for respondent

DECISION ON APPEAL AGAINST CONVICTION AND SENTENCE

Cameron PJ

1 On 21 April 2008, following a defended hearing, the appellant was convicted in the Central Magistrates' Court of one charge of fraudulent conversion (section 278 (1) Penal Code). He was sentenced to 18 months imprisonment and ordered to pay compensation of SBD40,000. He appeals against conviction and sentence.

2 The conversion related to a sum of SBD40,000 which the appellant had solicited from the Government in 2001 as the member of Parliament for East Honiara and the then Chairman of the Government Caucus. It was, according to the letter requesting the funds, "to commence building the new extension to the current Kukum church". In the event the money was not

handed over to the church for that purpose, as the construction of the extension did not take place. The conversion lay in the fact that the money, a cheque for which was paid to the appellant by the Government and deposited into his personal bank account on 27 September 2001, was never repaid.

3 The first ground of appeal is that being a leader, the appellant should have been dealt with not under the Penal Code but under the misconduct provisions of the Leadership Code (Further Provisions) Act 1999.

4 That Act establishes a Leadership Code Commission, and empowers that body to investigate and enforce against leaders a code of conduct expected of them while in office. The enforcement provisions include the power to impose monetary penalties. Also, where a matter is referred to the High Court, they enable the Court to order a person to pay into the Consolidated Fund an amount equivalent to the value of gains wrongly acquired by that person while in office. There is, however, no power to imprison under the Leadership Code.

5 The Leadership Code (Further Provisions) Act 1999 stemmed from the provisions in Chapter VIII of the Constitution 1978, also entitled Leadership Code. These provisions express broadly the standards of conduct required to be exercised by leaders. Section 95 of the Constitution provides that Parliament:

> *"(c) may prescribe specific acts or omissions as constituting misconduct in office;*

(d) may create offences .... and prescribe penalties for such offences;

(e) shall provide for the investigation of cases of alleged or suspected misconduct in office."

It is pursuant to these provisions that the Leadership Code (Further Provisions) Act 1999 was enacted.

6 It is common ground that the appellant was at the time of offending, and indeed still is, a leader, and therefore is subject to the Leadership Code (Further Provisions) Act 1999. Mr. Ashley submits that as such, there was no jurisdiction to charge him for conversion under the Penal Code. Mr. Ashley submits that the matter ought to have been dealt with under section 11(1) of the Leadership Code, providing:

"s.11(1) Any leader who directly or indirectly asks or accepts, on behalf of himself ... any benefit in relation to any action in the course of his official duties under ... or by reason of his official position, is guilty of misconduct in office".

7 In support of that contention, Mr. Ashley relies on the High Court case of *Zama v. Regina [2007] SBHC 113.* That case concerned a Minister of the Crown, who had been charged and convicted in the Magistrates' Court of official corruption contrary to section 91(a) of the Penal Code. The learned Judge said:

"The Leadership Code Commission is set up for the purpose and it must be given the sole responsibility to determine issues relating to breaches of the laws by leaders, and the appropriate mechanism to deal with them".

This passage is relied on by the appellant.

8 The Penal Code is an Act which establishes a code of criminal law. On its face, it applies to all persons within the jurisdiction of the Court. That is, by its terms it does not exclude any person or category of persons save for children under 8 years.

9 It gives express recognition to situations where a person may be punishable under a different law. Section 2(a) of the Penal Code provides:

"2. Except as hereinafter expressly provided nothing in this Code shall affect –

(a) the liability .... of a person for an offence .. against any other law in force in Solomon Islands other than this Code; ..."

Section 2 then contains a proviso as follows:

"Provided that if a person does an act which is punishable under this Code and is also punishable under another Act, Statute or other law of any of the kinds mentioned in this section, he shall not be punished for that act both under that Act, Statute or law and also under this Code."

10 In other words, the Penal Code recognises that a person may be liable both under its own provisions and under another law at the same time, and gives protection to such an individual by specifying that he shall not be punished for the same act both under that other law and the Penal Code. That is, he is only punishable once.

11 There would be no need to confer that protection if the legal position was that the Penal Code did not apply to a person whose wrongful act was punishable under another law. In other words, this is an implicit recognition in the Penal Code that if the commission of an act is caught by its wording then its provisions will apply, except as otherwise provided.

12 Not surprisingly, there is nothing in the wording of the Leadership Code (Further Provisions) Act 1999 which in any way suggests that its provisions displace those of the Penal Code. Indeed, section 40 of the Leadership Code provides no action taken under that Code shall prejudice "judicial proceedings under any other laws".

14 I find that the legislation does not in any way exempt leaders from the provisions of the criminal law. Those provisions apply equally to them. It would be a startling result were it otherwise.

15 The strictures of the Leadership Code (Further Provisions) Act 1999 are in addition to, and not in substitution for, the criminal law, except to the extent that a leader cannot be punished under both for the same act.

16 The case of *Zama v. Regina* (supra) should be limited to its own facts. In that appeal against conviction it was conceded by the Crown, rightly or wrongly, that the Minister of Crown convicted of official corruption was not employed in the public service. Being employed in the public service is an essential element of that particular charge, and thus the conviction was overturned in that appeal. Because of that Crown concession, the relationship between the criminal law and the Leadership Code was not the subject of argument before the learned Judge, and thus the case is not to be taken as authority for any broader proposition.

17 In my view there was no error of law by the learned Magistrate in finding that the provisions of the Penal Code did apply to the appellant. Thus the first ground of the appeal fails.

18 The second ground of appeal against conviction is that the Crown failed to prove an essential ingredient of the offence, namely that it was entitled to the return of the funds from the appellant once it was established that the Church was not proceeding with the construction of the extension and therefore did not require the funds.

19 However, the learned Magistrate was perfectly entitled to conclude from the facts that the funds, not having been applied for the purpose for which they were provided, ought to have been returned to the payer, namely the Government. In other words, that the Government had a lawful right to the return of those funds. This ground of appeal also fails.

20 The third ground is a related one, and is that in all the circumstances this Court ought to allow the appeal for the purpose of directing that further evidence from an appropriate Government official be called. This is in case the position of the Government was that although the funds were not applied to a proposed extension to the church building, it would not have required the return of the funds provided they were used for some other church purpose or purposes. In this respect Mr. Ashley points to the evidence of the appellant at the defended hearing where he stated that he had handed more than equivalent funds over to the Church in a series of donations by way of cash handouts and for which he had no receipts. In light of that, Mr. Ashley contends that the Government position may in fact be that it would not have required the return of the funds.

21 The Crown was not obliged to call any particular evidence from the Government. The agreed facts and the exhibits tendered by consent, and the other evidence adduced, were sufficient for the learned Magistrate to find that the failure to return the funds constituted a conversion. Added to that was his rejection of the evidence of the appellant that he had handed more than equivalent funds to the Church in a series of donations. The learned Magistrate found, as he was entitled to do, that he did not accept that the appellant had handed to the Church anything like funds approaching the level originally paid to him.

22 Further, it was open to the defence at the hearing to call, by way of summons or otherwise, any evidence from Government sources that it saw fit.

23 In the circumstances, I decline to exercise my discretion to direct that further evidence be called. It follows that this ground of appeal also fails.

24 The appeal against sentence was that it was manifestly excessive. It was submitted that a fine and an order for payment of compensation in the amount converted would be the appropriate sentence. The delay in having this 2001 matter investigated and the appellant charged (he was charged in 2007) was, it was submitted, a factor warranting leniency.

25 I am advised by Ms. Kleinig that the offending was not discovered until 2006. While it is regrettable that this matter did not come to light earlier, that is not usual in cases that involve fraud. I do not consider the delay to be a significant factor in the level of the sentence.

26 At the time of the offending the appellant was the member of Parliament for East Honiara. He still is. At the time he was also the chairman of the Government caucus. As such, he was able to access government funds and with that he carried a heavy responsibility to deal scrupulously with those funds. In not doing so he breached the high level of trust others had placed in him. Such breaches by leaders undermine public confidence in the executive and need to be met with significant penalties.

27 I note that the appellant is not a first offender, and cannot be said to be a person of good character.

28 I note that the maximum term for this charge is 7 years imprisonment. I consider the term of 18 months' imprisonment was within the appropriate range for this type of offending and I can find no error in the sentencing process.

29 The sentence of 18 months' imprisonment is confirmed, as is the order to pay $40,000 compensation to the Government within the time frame and on the other terms specified. The appeal is dismissed. The appellant has been on bail from the time he was sentenced in the Magistrates' Court. I order that he commence to serve the 18 months' term from today - that is, the term of imprisonment is to have immediate effect.

BY THE COURT

Hon. Justice IDR Cameron
Puisne Judge