IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 44/2020
[2020] NZSC 96

BETWEEN	STEPHEN JAMES HENARE Applicant
AND	THE QUEEN Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: J N Bioletti for Applicant
B F Fenton for Respondent

Judgment: 16 September 2020

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Four days into a jury trial in the High Court, the applicant, Mr Henare, pleaded guilty to five representative charges of theft by a person in a special relationship, and one charge of wilfully attempting to pervert the course of justice. Muir J sentenced Mr Henare to a term of five years and two months' imprisonment.

[2] Mr Henare applies for leave to appeal the Court of Appeal's dismissal of his appeal against sentence. His sole intended ground of appeal is that the effect of whakamā (a form of cultural shame for Māori) should have been recognised as a personal mitigating factor in his sentencing.

Background

[3] Mr Henare and his sister, Ms Dixon, were trustees of the Pārengarenga 3G Trust at the time of the offending. The Trust was established in 1987 by order of the Māori Land Court as a land utilisation trust under s 438 of the Māori Affairs Act 1953.[1] The Trust owns approximately 511 ha of Māori freehold land located on the Aupouri Peninsula south of Pārengarenga harbour. The land is utilised primarily as a plantation forestry block on behalf of its 402 beneficial owners. When the Trust was created, the Māori Land Court appointed the Māori Trustee as responsible Trustee. In 2008, anticipating the end of the first crop rotation since the Trust's establishment and the departure of the Māori Trustee, the owners planned to take back control. They held an election and seven new trustees were chosen to take over from the Māori Trustee. They included Mr Henare, Ms Dixon and two of their close family members. Following protracted litigation in the Māori Land Court, led by Mr Henare, the appointments were affirmed by order of that Court in June 2012.

[4] In August 2012, the Māori Trustee transferred to the Trust accumulated funds held on account in the sum of $1,096,819.34. The funds were paid into five accounts set up by Mr Henare and Ms Dixon in the name of the Trust. A further $54,480 was added to the accounts in August 2013 after the sale of the Trust's carbon credits.

[5] Between 8 August 2012 and 31 July 2013, Mr Henare either initiated or approved 125 unauthorised payments from the Trust accounts, totalling $1,083,893.30; some to his personal or family trust accounts, and some to Ms Dixon's personal or family trust accounts. One payment was made to the Legacy Bear Company Ltd, in which Mr Henare's interests had subscribed for shares. The payments to Mr Henare and Ms Dixon were applied to living expenses and to fund Mr Henare's gambling addiction.

[6] During this period, another trustee, dissatisfied with the performance of the Trust, applied to remove Mr Henare and others. The Māori Land Court heard the application in January 2013. Mr Henare gave evidence in opposition. He lied to the Court advising that there was just under $1 million in the Trust accounts. The Court

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1 Now Part 12 of Te Ture Whenua Māori Act 1993.

declined to remove Mr Henare. In fact, there was only around $400,000 in the accounts at the time. This was the basis of the perversion of justice charge.

[7] By 4 August 2014, when the Māori Land Court finally removed all responsible trustees, only $13.41 remained in the Trust accounts.

Lower court judgments

[8] In the High Court, Muir J sentenced Mr Henare to five years and two months' imprisonment.[2] The Judge set an overall starting point of six years.[3] He then allowed a three-month discount for Mr Henare's rehabilitative efforts,[4] and a further seven months for guilty plea.[5] The Judge did not consider Mr Henare sufficiently remorseful, nor his other activities on behalf of the Trust sufficiently relevant, to warrant any further discount.[6]

[9] On appeal to the Court of Appeal, Mr Henare made four arguments, only one of which is still pursued in this application. That was that the sentencing Judge should have recognised the impact of Mr Henare's state of whakamā. The Court of Appeal dismissed the appeal.[7] It acknowledged that courts may be able to explore the possibility of treating whakamā as a unique mitigating factor in "an appropriate future case".[8] But it did not consider it had sufficient guidance on what whakamā actually entailed in the context of this case and what recognition could be properly given in Mr Henare's circumstances.[9]

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2 The sentence was made up of concurrent sentences ranging from four years and four months to two years for the theft charges and a cumulative sentence of 10 months for attempting to pervert the course of justice: *R v Henare* [2019] NZHC 2126 [Sentencing notes] at [54]–[55].
3 At [37]–[38].
4 At [42].
5 At [48].
6 At [42]–[44].
7 *Henare v R* [2020] NZCA 188 (Collins, Duffy and Edwards JJ).
8 At [26].
9 At [26].

Applicant's submissions

[10] Mr Henare submits that the Court of Appeal was wrong to say it did not have guidance on what whakamā entails in this case. The High Court was provided a s 27 report,[10] which contained the following passage:

> Aside from his children, Stephen has expressed a disconnection with his wider whanau. The opinion of the writer is, from speaking to whanau, reviewing public opinion and speaking to Stephen- his sentence has already begun in many ways. Stephen's daughter offered the following statement *"I will tell you something. This is the thing that is hurting me. If my father passed I wouldn't know where to take him. I wouldn't know who to call. He has been outcast and it has been put publicly. It is not just about him, it is about us. How do we even go there? Our mana has been stripped, our tikanga value is gone. For all I know, if he passed away tomorrow. Where are our people? Where are the processes to rebuild? How do we turn it back? We as a whanau, we are broken."*

[11] Mr Henare submits that this "has impacted on all the bloodline connections past present and future and to the land itself". Mr Henare also says that submissions were made in the High Court, although there is no discussion of whakamā in the sentencing notes.

[12] Mr Henare then refers to an article by Māori broadcaster, educator and commentator, Mr Tainui Stephens, who is also from the Aupouri Peninsular. The article explains the concept of whakamā.[11] Various passages are quoted, of which the following is representative:

> Whakamā is not guilt for something you *did*, but humiliation for who you *are*. It's a deep hit to the core of your being. You are inferior, disgraced, disadvantaged: and you know it. It has an acute memory.

Analysis

[13] We accept that the relevance and potential effect of whakamā in sentencing is a matter of general or public importance,[12] but we are not satisfied the issue properly arises on the facts of this case. The Crown does not argue whakamā is irrelevant in sentencing. Rather, it argues that while Muir J did not mention whakamā by name, he

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10 Sentencing Act 2002, s 27.

11 Tainui Stephens "Whakamā: Fighting the taniwha of shame" (13 July 2020) The Spinoff <thespinoff.co.nz>.

12 Senior Courts Act 2016, s 74(2)(a).

was attentive to the content of the s 27 report (where that issue is addressed) when he composed Mr Henare's sentence. The Crown is undoubtedly correct in that respect. Further, Muir J also referred to the "humiliation" felt by current and former trustees and the wider community of owners as a result of Mr Henare's offending.[13] So whakamā was clearly in the Judge's contemplation. But the logic in the suggestion that Mr Henare should receive a discount because of the whakamā his offending caused to others is not immediately obvious.

[14] Even more to the point however is that there is little evidence that Mr Henare himself is afflicted with whakamā. As the Department of Corrections' report records:

> Despite his guilty plea, apart from maintaining that he has fulfilled his obligations in his role and did not steal the funds from the PG3 Trust, Mr Henare did not provide other explanations for his actions. He further stressed that the impact of his current court proceeding on him has been significant, which has caused damages [sic] to his relationship and limited his opportunity to gain employment. He is hoping that this can be concluded and that he can move forward with his life. Given his presentation at the interview, his insight into his offending is considered limited.

[15] Muir J rejected the submission that Mr Henare should receive a discount for remorse. Rather, the Judge formed the view that Mr Henare harboured a sense of entitlement to the funds he had stolen as he felt this was due recompense for property he claimed had been "illegally taken from his grandmother and others".[14] In the circumstances, Mr Henare is unable to demonstrate any evidential basis for the submission, upon which his proposed appeal is founded, that he is in "a state of whakamā".

[16] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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13 Sentencing notes, above n 2, at [13] and [14].
14 At [41]–[42].