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IN THE SUPREME COURT OF TONGA **CR 71 of 2016**
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN: **R E X** **- Prosecution**

AND: **MELEATE MAPAPALANGI** **- Defendant**

BEFORE THE HON. ACTING CHIEF JUSTICE CATO

Counsel: Mr 'Aho for the Crown

Mr Tu'utafaiva for the Defendant

VERDICT AND REASONS

[1] The accused, Meleate Mapapalangi, originally stood indicted on 15 counts of obtaining moneys by false pretences from Kaufo'ou 'Amato. The first 8 counts alleged as particulars that she had asked her for various sums of money as a loan on the condition that she would pay back the money, and Kaufo'ou Amato relied on that condition which had resulted in the accused receiving the money. In all, the Crown alleged under the first 8 counts that she obtained $52, 814.00 in this way.

[2] Also in this indictment, were a further 7 counts alleging that she had obtained moneys by false pretence from Kaufo'ou 'Amato when she pretended to be 'Luseane' of ANZ Bank and instructed Kaufo'ou 'Amato over the phone to give her the money so that it could be used to pay process fees at the ANZ bank, in order for

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the bank to repay in full the money Kaufo'ou 'Amato had given her. It was alleged that Kaufo'ou 'Amato relied on the prospect of getting repaid in full so she gave the money. That related to a sum of a further combined total of $71, 715.00.

[3] She had pleaded not guilty to these charges.

[4] After the trial commenced, Mr 'Aho consolidated all the counts into one rolled up count of obtaining $124,529.00 by false pretences from Kaufo'ou 'Amato when she asked her for loans, on the condition that she will pay her back the money, and Kaufo'ou 'Amato relied on that condition which resulted in her giving the said money. The accused was not asked to plead to the amended indictment which was by consent.

[5] During the course of the evidence but not before the central witness, Mrs Amato, had given her evidence, I drew to the attention of Mr 'Aho that, as framed, the indictment counts 1 – 8 seemed to me to have no prospect of success because the false pretence was not a representation of existing fact as the common law requires but in fact a promise or undertaking to repay in the future. I pointed out that there was high authority to this effect. *Greene v R* (1949) 70 CLR 353; *R v Dent* [1955] 2 All ER 806 CCA per Devlin J at 807-808. In some jurisdictions, New Zealand being one, the law has been amended so that a representation includes a promise to do a future act, but that has not been the case in Tonga where what may constitute a false pretence is not defined. Plainly, legislative reform is necessary in this area so that a false pretence may include a representation of intention to do a future act.

[6] Mr 'Aho after considering the issue overnight, accepted this was the case and proposed that he proceed on the indictment that had originally been presented and upon which the accused had

been arraigned confined only to the 'Luseane' counts. I saw no impediment to proceeding in this way, because the amended rolled up indictment through inadvertence had not been the subject of re-arraignment, and, in any event, there would have, to my mind, been no prejudice in allowing a further amendment in effect reinstating the Luseane charges, at that stage of the tria. In the event, Mr Tu'utafaiva made no objection to the trial proceeding on the Luseane charges in the original indictment with the other counts involving a promise to repay being effectively the subject of an acquittal.

[7] The trial proceeded on the Luseane charges only. Although the trial proceeded over a number of days with an adjournment in between, the evidence was within a narrow compass. The complainant and principal witness, Mrs Amato, gave evidence that she had borrowed moneys from friends and fellow members of her Church which were included in exhibit one of a book of exhibits, and that this was with the intention of lending it to the accused with whom, she said, she had formed a relationship like a sister. As well, she admitted she had stolen or embezzled money from a charitable organization associated with her church of which she was a manager and senior representative. In all, it was claimed, in exhibit one, that she had obtained $103, 903 including $35,477.00 from the charitable source. I had sentenced her shortly before she had given evidence for embezzlement to which she had pleaded guilty of the charitable moneys and she had been sentenced to a term of imprisonment. There had been no inducement offered to her by the Crown in consideration of her giving evidence against the accused.

[8] Mrs 'Amato, gave evidence that the accused had befriended her and asked her initially for money to assist a sick relative and to purchase airline tickets for family which she had done. Her evidence concerning the airline tickets was unclear and she was

unclear also about how much she had lent the accused for this purpose. It seems she understood that part at least of the tickets were to be refunded. Thereafter, she had advanced the accused very significant sums money which had been paid into the accused's bank between 28th August 2014 and the 11th March 2015 totalling $52, 814.00. Dates and amounts which had been taken from her diary and substantiated with bank deposit slips as Exhibit 6 were produced in evidence. These amounts formed counts 1- 8 of the indictment and for reasons given these counts were dismissed because the alleged promise to repay was not in law a representation that could constitute a false pretence.

[9] During the course of cross-examination of the witness, Mr Tu'utafaiva suggested these moneys had been paid into the accused's bank account because the complainant wanted a cover or to hide the borrowings which the complainant denied was the case. There was no evidence given by the accused to support this and so there is no basis for Mr Tu'utafaiva's submission that I should act upon this suggesting. I consider that the evidence established a large number of significant deposits and I accept the complainant when she said the accused befriended her and obtained these significant advances on the basis she would pay them back.

[10] The accused did, however, admit to paying for certain household items out of moneys she had borrowed or stolen although the impression she gave was that these were not significant. I will turn to this issue later in relation to the Luseane counts.

[11] The accused gave evidence also in regard to exhibit three that she had paid a further $71,715.00 as processing fees in order to obtain repayment of the money advanced principally it seems for air tickets that were to be refunded. This formed the basis of the Luseane counts constituting 9 – 15. Her evidence at best I

found was confusing, but after lengthy examination in chief and cross-examination she said essentially, as I understood her, that in relation to a refund of the airline tickets a person by the name of Sina had rung her on several occasions to ask for further moneys to be deposited to secure a refund to the accused which she referred to as processing fees. At trial, she mentioned the Sina requests and payments made to airline as those she had noted in her diary the false pretence relating to Luseane, and payments made at the request of Sina fell outside the pretence alleged. Mr Aho was taking by surprise because the witness had not apparently mentioned the involvement of Sina during interviews with Police, but only at trial. Mr Aho did not suggest that Sina was also fictitious or that at that late stage of the trial the complainant being the final Crown witness, he could suggest a further amendment, and rightly in my view did not do so. Mrs Amato was questioned about her diary entries from which she had drawn up exhibit 3 and she said that payments recorded as to the airline related to payments to Sina for processing, and those made out to bank were for Luseane also processing fees. In some cases, according to Mrs Amato, Sina had she said spoken to her about processing and reference had also been made by Sina to Luseane at the bank.

[12] The sums mentioned as paid to the airline in her diary over this period on my calculation appears to be about $35,875.00 and those to the bank or to ANZ bank amounted to only about $15,383.00. That left a sum of about $20,457.00 when deduction the airline (Sina) deposits and the BNZ (Luseane deposits) from the amount $71,715.00 being the total sum of cash alleged to be paid to the accused between 12th March 2015 and the 25th September 2015, the purpose of those payments to the accused allegedly being unclear.

[13] In my view, considering the false pretence in counts 9-15 alleged only the amounts referred to as payments to ANZ bank the amount falling within the indictment relates only to about $15,383.00, that is nothing like the $71,715.00 claimed as obtained by Luseane, in those counts. There may have been some relationship to airline payments to Sina for processing and Luseane, but the false pretence is couched strictly in terms of Luseane's demands.

[14] Mr Tu'utafaiva I considered made a very valid point when he cross-examined Mrs Amato suggesting the money paid to the bank was in fact applied in reduction to her arrears with the ANZ bank in regard to her home loan. Mrs Amato said that she was responsible for paying off the loan under the arrangement she had with her husband. As at the 29th June 2015 according to her diary, her loan was in arrears by $5,700.00 with an outstanding balance of $33,600.34. Mr Tu'utafaiva pointed out that payments were made to the bank between the 9th July and the 17th July 2015 totalling $5,780. There were 10 further payments after this he said. The witness denied as was suggested to her by Mr Tu'utafaiva that she had paid off her home loan from these moneys although she admitted using some money that had been stolen for household expenses. I am left concerned about this matter. The issue of whether she had spent some of this money on paying off her home loan as in my view was reasonably put to her could have been readily resolved by producing her house loan account with the ANZ bank. The bank did not call up the loan, Mrs Amato said, because an accommodation had been arranged and her daughter had taken over the loan. I remained unsure of the reliability of Mrs Amato's evidence on this point which was a central aspect of the case as it had evolved.

[15] I remind myself that the complainant Mrs Amato is a self-admitted thief and was a senior person in a church charity from

which she stole. I must take care before acting on her evidence which is largely unsupported. Whilst I consider it is very possible, if not probable, that pressure was placed upon her over an extensive period of time by the accused to loan her money and that one of the deceptions for achieving more money was to represent to her through Sina and Luseane who could quite possibly have been impersonations by the accused, that those moneys were required for processing of her refund, the case as prosecuted depends for success entirely on proof that moneys were obtained by the accused beyond reasonable doubt and also beyond reasonable doubt that this was according to the terms of the false pretence alleged.

[16] I have already stated that the original counts 1-8 cannot be made out and the Crown did not persist with them. Of the Luseane counts, it seems that many of the payments were made other than by way of any impersonation of Luseane. Sina rather than Luseane was involved, it seems, in many of the alleged deposits said to have been made to the accused arising in schedule or exhibit 3. The ANZ bank payments falling within the terms of the indictment were very much more limited and said by the witness to be as a consequence of Luseane's request with the direct payments made to the accused. On the evidence, as it appears in her diary I have calculated that $15,383.00 only was paid to a bank or ANZ. However, as I have already explained, I am left with a doubt that some at least if not all of those payments to the ANZ bank may have been made by Mrs Amato to extinguish the loan arrears, and maintain the loan payments. Taking into account also that Mrs Amato was a self confessed thief from a charity of which she was a senior representative, in the absence of evidence showing these payments were not made to reduce her bank loan, I decline also to find the accused guilty of the Luseane money.

[17] I would also note that Mr Tu'utafaiva drew my attention to the substantial disparity between the amounts stolen or borrowed in exhibit one the amounts said to be applied to the accused in exhibits two and three. He submitted that there was plainly a disparity causing even more concern about the reliability of Mrs Amato's evidence and I agree.

[18] I was also concerned about her continuing to give large sums of money she says to the accused for processing costs when the original plane ticket loans could not have been very high. She says effectively she felt trapped into doing so knowing that if she did not advance more money then any prospect she had of getting repaid would be unsuccessful. That may be so, but she was a mature woman and senior in the charity, and I have some difficulty in accepting that she was so obtuse as to believe that such large sums of money were required to process airline refunds. All in all I found difficulty in treating her as a witness in whom I could rely.

[19] There was one point that did arise in the hearing of which I will make some mention. In order to advance the case of impersonation, the Crown adduced evidence by a police officer that he had rung the number given to him by Mrs 'Amato and said to be taken from a phone record she had of Luseaneringing her. The occupant of the house had said his daughter, the accused, lived there but there but there was no Luseane at the address. There was other evidence given in the case that the ANZ bank did not employ a person by the name of Luseane. The Crown relied on the evidence of the phone call as admissible under exception 89 (a) which allows hearsay this where the statement forms part of the fact or transaction which is being investigated by the Court, alternatively as res gesta citing *Ratten v R* [1972] AC 378. It is difficult to ascertain the extent of section 89 (a) which on its face could be said to be so wide as to

allow much hearsay evidence. That cannot have been the intention of Parliament. Rather, I interpret this to apply not to hearsay conversation of a narrative kind emerging as here from an inquiry by a police officer of a third party, but a verbal assertion or utterance closely connected with an act that is relevant as part of the fact or transaction before the court. An example might be seen in the bookmaking cases where the substance of telephone calls relating to bets made on a repeated basis might lead to an inference that the callers were dealing with a bookmaking operation. *R v Bens* (1989) 168 CLR 110 is another example. There, the Crown had appealed the exclusion of evidence from the driver of a car passing along a bridge in Queensland where the driver, who had passed over the bridge on the night when a murder was said to have occurred, said that he spoke to two women who were facing over the edge of the bridge at about its centre; that he had asked them if everything was all right and that one turned to him as said her mother was feeling sick. The Crown's case was that Benz and her mother were complicit in the murder of the mother's boy friend and the deceased, although possibly still alive at the time, had been thrown over the bridge into the water below where he had been found with stab wounds to his body and throat. This evidence had been excluded by the Queensland Court of Criminal Appeal as hearsay and convictions for murder had been quashed, with the mother being granted a retrial and her daughter being acquitted. The High Court of Australia appeared to differ in approach with some of the Judges admitting the evidence on the basis it was res gesta, whilst others preferred the view it was original evidence, that is evidence admissible as closely associated with a fact in issue in this case the identity and relationship of the two women on the bridge. In the event, there was a disagreement on whether leave should be granted, in the circumstances and, by a majority, it was declined. Ratten was a different case. The evidence was a spontaneous call from a

fearful woman about the time of an incident involving her murder. The answer of the receiver of the policeman's call in this case is no more than a hearsay response to a request for information. As such, this Court cannot under section 89 of the Act admit the evidence or rely on such evidence. The maker of the statement should have been called.

[20] That said, I do not agree with Mr Tu'utafaiva that the Crown could not make out impersonation. If I were to accept the evidence of the complainant that Luseane had phoned her as a representative of the ANZ bank on several occasions and it was accepted she had not worked there, then an available inference was that the person who she says the money was paid to, namely the accused, on each occasion she had in fact inferentially impersonated Luseane. On the view I have taken of this evidence, however, I do not need to make this finding.

Verdict

[21] For the reasons I have given, verdicts of not guilty are entered on each count and the accused is discharged.

SUPREME COURT TONGA

C. B. Cato

DATED: 7 OCTOBER 2016 **ACTING CHIEF JUSTICE**