

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

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CR 12 of 2018

Crown Law
[Signature]
29/04/19.

BETWEEN: R E X - Prosecution

AND: FINAU HEUIFANGA VEA - Accused

BEFORE THE HON. JUSTICE CATO

Counsel: Mr. T. 'Aho for the Prosecution
Mr. S. Taione for the accused

VERDICT

[1] The accused, Finau Heuifanga Vea, was charged with;

Count one: Embezzlement contrary to section 158 of the Criminal Offences Act;

In the alternative, Count 2: Theft contrary to sections 143(a) and 145(b) of the Criminal Offences Act;

Count three: Falsification of Accounts contrary to section 159 (b) of the Criminal Offences Act

[2] Particulars of count one were that on or about the months of April 2015 to October 2015, at Havelu, whilst employed as loans officer for Five Star Finance she did fraudulently convert to her own use \$115, 497. 80 which she received on behalf of her employer, Five Star Finance.

[3] Particulars of count 2 were that on or about the months of April 2015 to October 2015, she did dishonestly take without any colour of right \$115, 497.80 with intent to

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deprive Five Star Finance permanently of such money for the use of any other person without the consent of Five Star Finance.

- [4] Particulars of count 3 were that on or about the months of April 2015 to October 2015 whilst employed as a loans officer for Five Star Finance, she did wilfully and with intent to defraud, concurred in the making of false entries in the Five Star Finance Loan agreement forms.
- [5] At the conclusion of the evidence, I inquired of Mr Aho whether he intended to amend the particulars in count one on the basis the embezzlement included not only personal use but use to another which had been the way he had addressed the case from the outset and he asked to make the amendment which I granted because I could see no prejudice to the accused.
- [6] Much of the evidence consisted of documentary exhibits which were admitted by consent. Most of these consisted of loan agreements together with ancillary documentation such as cheques, and in some cases repayment schedules were contained within book A, Exhibit A and Book E which consisted of bank statements produced by a bank officer.
- [7] The principal Crown witness was Timote Ueara known as "Koba". He had been a loans officer for several years with the complainant, Five Star Finance. He had worked with the accused for several years and was familiar with her signature and handwriting, which he identified in various material ways. I found him a patient and careful witness and his evidence was not challenged in any way which I found meaningful. His evidence explaining the various loan transactions of which about 42 were in admitted into evidence lasted for several days. I closely followed these transactions which were plainly set out. In all, I was advised by Mr Aho for the prosecution that 34 agreements fell within the period of the indictment representing \$79,750.00 falling short of the sum charged in the indictment in as \$115,497.80. There were a number of other agreements which fell into a similar pattern but they were outside the indicted period and so I have adopted the lesser of the two sums reflecting 34 transactions within the indictment period.
- [8] I do not propose to describe the individual transactions but summarise the effect of the evidence based on the evidence of Koba and the relevant documentation. As I have said, the Crown have evidenced, in my view, beyond any reasonable doubt that

the accused was involved in a clear pattern of deceit in the implementation of the loan agreements during the period of the indictment. It seems likely also that others assisted to implement this fraud. The fraud was relatively simple although for a considerable period of time the accused was able to conceal her dishonesty from her principal no doubt because she was a trusted senior loans officer and had been in employment with the Lender for several years.

[9] The loan agreements were it seems prepared generally by the accused although in this she may have been assisted by what was described as an agent who was employed in this series of transactions by a business in Nuku'alofa, named the Friendly Island Bookstore. The agent would be a focal point for borrowers to approach the lender Five Star for loans. The borrower, the agent, a representative from the company and the accused as the loan officer all signed the agreement. The loans were small around \$1500 to \$2800.00 and were intended to be repaid at regular weekly, fortnightly, or monthly intervals. The agent in this case was a woman by the name of Mele Losi Finau. I was advised that she has left Tonga.

[10] Once the agreement was signed by the various parties it was checked over having been completed in most cases by the accused, and approved by a principal of Five Star. On most of the documentation of relevance, Kobi was able to identify the signature or writing of Mele Losi Finau as agent and the accused. On some of the agreements, the forms are not filled in as to Office use (namely the checked and approved or completed by, provisions) but I am satisfied beyond doubt that these agreements were also prepared by the accused. I am satisfied also after hearing evidence from Kobi that the accused was responsible for the loan agreements, the production of a cheque to meet the Lender's obligation to the borrower, and later it was in practice her responsibility to ensure that repayments were being made.

[11] On each of the agreements at the foot of the page in writing identified by Kobi as belonging to the accused is a notation as to the Bank and number being the cheque number of a cheque issued by the ANZ. These cheques were exhibited. Also on most of the agreements, also in writing identified by Kobi as the accused's, was a notation with numbers identical with the bank number of an account also with ANZ. This account number corresponds in each loan with the direction on the respective cheques that the cheque is to be paid into the account nominated or written on the agreement by the accused. The handwriting on the payment direction in the cheque was also, in every case, identified by Kobi as belonging to the accused.

- [12] To summarise, the accused wrote the number of the cheque that was issued upon the agreement at the foot of the agreement and in most cases included a nomination to a numbered account with the ANZ that corresponded with the direction written on the face of the cheque. In each case, I am satisfied that the cheque intended for the borrower was applied pursuant to the direction of the accused into a bank account with the ANZ that did not belong to the borrower. No evidence was adduced in the case which would suggest that any cheque or its proceeds ever reached the hands of the borrower.
- [13] The cheques were paid into one of three accounts all with the ANZ; one belonging to Meli Losi Finau (the agent) and Viliami Finau, another belonging to Mekinolia Inoke, and a third belonging to one Filisita Vaiangina. I am satisfied that these were genuine accounts after hearing from a bank officer that the bank would have satisfied itself of the authenticity of the account holder when the account was commenced. Indeed one corresponds with the name of the agent, Meli Losi Finau. Most of the cheques, however, were paid not into her account but into the account of Mekinolia Inoke or Filisita Vaiangina. In every case, within a period of about 24 hours the proceeds of the cheques were withdrawn by ATM. There was no evidence as to who made these withdrawals, but it is plain that over these periods the deposits and withdrawals in these accounts related to cheques paid in pursuant to a direction of the accused. I did not hear any evidence from or concerning Inoke or Vaiangina. I do not know who was responsible for the withdrawals but I infer that either these persons withdrew the money or made available their cards and ATM number for the accused to withdraw the proceeds of the cheques.
- [14] In his submissions Mr Taione was critical of the prosecution for not calling Inoke and Vaiangina and he submitted that I could not draw the inference beyond reasonable doubt that his client had been responsible for embezzling money by directing the cheques to third party accounts. He suggested that the money from the cheques may have found its way to the borrowers, and submitted that the borrowers should have been called. He submitted in all cases the loans were approved by the principal and were not the fraudulent product of the accused. He suggested that the agent, Meli Losi Finau, who was identified on the back of each cheque as paying the cheque into the nominated account on each occasion may have given money acquired from the withdrawals to the customers.

[15] I reject these submissions. First, the fact that the loan agreements were approved by the principal is not surprising. The agreements were completed by the accused who was a long term trusted employee and loan officer. Cheques were drawn by Five Star to complete the loans, and were paid by direction of the accused in each case not to the borrower but to a third party. I infer beyond reasonable doubt that the pattern of paying the cheques into third party accounts and the drawdowns shortly after meant that the cheques and proceeds were converted, there being no evidence from which I can infer that any of the borrowers received the loan moneys, and that includes any of the very few cheques paid into the account of the agent Mele Lose Finau. Indeed, she in each case, was identified as being the person who signed the back of the cheque directing that the cheque be paid into not only her account but also the other two nominated third party accounts. She as agent for the borrowers must have known that these cheques were being diverted into accounts that did not belong to the borrowers, and was prima facie irregular.

[16] Partial repayment of some loans were evidenced in various schedules. I am not prepared to infer from the loan repayment schedules that these were genuine repayments and not contrived by the accused as the Crown submitted to give the appearance that the loans were in order. I do not intend to cover all the loan repayment schedules but two, in my view, give legitimate support for the Crown's suggestion they are bogus. One in the name of Mele F Fonua states that the loan for \$2000 was made on the 6th May 2015, and there is no repayment until \$100.00 is paid on the 29th September 2015. Another loan to a Kafoatu Kakala is said to have been made on the 20th May 2015 but no repayment was made and then only \$100 until the 29th September, 2015 and after that nothing more. In my view, default periods of this length should have excited suspicion. I do not accept the submission that repayments of loans as evidenced by loan schedules are evidence from which I can infer either that the proceeds of the cheques were received by the borrowers, or that repayments under the agreements were in fact made.

[16] The pattern of dealing with the cheques and their payments into nominated accounts in my view was highly irregular. Cheques should have been made out to customers or deposited into their account, or cash payments made directly and receipted. There was no evidence in the case that might explain why cheques had been made out to third party accounts and the proceeds withdrawn soon after. I do not infer the accused's guilt from the fact that she did not give evidence but nor can I divine any reason for this prima facie serious pattern of irregularity, other than that it is

consistent with the accused beyond reasonable doubt misappropriating her employer's property namely the cheques by diverting them into third party bank accounts, to enable she and or other account holders to convert the proceeds. It may well be that Mele F Fonua, the agent and the account owners Inoke and Vaiangina are parties to her fraud but it is unnecessary for me to determine whether this is so. I do not agree with Mr Taione that the fact they may well have been implicated also means that the prosecution cannot or should not have proceeded against the accused. I can see no other legitimate inference from the accused's conduct than that she, whilst employed as or acting in the capacity of a clerk or servant, fraudulently (meaning dishonestly) converted to her own use or benefit or to the use or benefit of any other person (Fonua, Inoke or Vaiangina) property namely cheques belonging to her employer which were intended to be applied for the benefit of a borrower, and the proceeds of those cheques.

[17] Of considerable importance also, is the fact that before she was arrested she entered into a written agreement with a principal of Five Star to repay \$115,497.80 which she acknowledged to be a debt owing by her. This debt was guaranteed by a third party. She repaid about \$10,000 before default was made and a complaint followed leading to these proceedings. In my view, this agreement sensibly supports the inference that the accused admitted responsibility for the losses which in my view are attributable to her fraud. Accordingly, beyond any reasonable doubt, I find count one of the indictment embezzlement proven and she is convicted of this offence under section 158 of the Criminal Offences Act.

[18] There is no need for me to render a verdict on count 2.

[19] On count 3, false accounting, I asked Mr Aho what the basis of the prosecution case was and he confirmed that it was the fact that the accused had made what he suggested were false entries on most of the loan agreements when she had recorded that the cheques should be paid into a nominated account which was unrelated to the borrower and that this was done with an intention to defraud. I accept beyond reasonable doubt that, at the relevant time when she was acting in the capacity of a clerk, officer or servant of a private employer, she indorsed on the face of most of the agreements a direction to apply the cheque into an unrelated third party account and this was plainly done, in my view, to enable her and or others to dishonestly obtain the proceeds of the loans, shortly after the cheque was deposited. I find beyond reasonable doubt that these entries were wilful or

deliberately made with the intention of defrauding her principal, Five Star. I, however, do not consider the entries were false because they did accurately reflect what was done with the cheque or cheques; that is the entries accurately reflected where the cheque were to be deposited and in each case they were deposited into the nominated account. Although the accused's motive for making these entries or directions as I have found were dishonest, the entries reflected accurately where the cheques were deposited and thus in my view were not false entries. For this reason, she is acquitted on the third count.

[20] She is remanded in custody for sentence and a probation report is ordered,

NUKU'ALOFA: 26 APRIL 2019

