

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

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CR 75 of 2018

26/06/19  
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BETWEEN:

REX

- Prosecutor

AND:

MALIA KOLOKILOLOMA FANUA

- Accused

BEFORE HON. JUSTICE NIU

Counsel : Ms. H. Aleamotu'a for prosecution (Crown).  
Mr. S. Tu'utafaiva for defence (Accused).

Trial : 30 & 31 May, 4 June 2019.

Submissions : Mr. Tu'utafaiva on 12 June 2019, Ms. Aleamotu'a on 17  
June 2019

Verdict : 26 June 2019

VERDICT

**Charges**

[1] The accused is charged by the Crown with 4 counts of forgery under S.170(1)(a) and 2(a) and (4) of the Criminal Offences Act, and 2 counts of knowingly dealing with a forged document under S.172 of the same Act, as follows :

- Count 1: That on 26 January 2017 she made a false document by altering her exam results for her subject, Legislation (no. LW112 at the University of the South Pacific) from “C” to “B+” on her Notification of Exam Results for Semester II in 2016 with the intention that Tonga Police would act on it as if it was a genuine document.
- Count 2: That on 26 January 2017 she made a false document by altering her exam results for her subject, Courts & Dispute Resolution (no. LW113 at the University of the South Pacific) from “C” to “A” on her Notification of Exam Results for Semester II in 2016 with the intention that Tonga Police would act on it as if it was a genuine document.
- Count 5: That on 26 January 2017, she used the forged Notification of Exams for Semester 2 of 2016 as if it was genuine by submitting it to support her Promissory Note application for further funding from Tonga Police, knowing that that exam result was a forgery.
- Count 3: That on 11 July 2017, she made a false document by altering her exam results for her subject, Legal Ethics (LW306 at the University of the South Pacific) from “C” to “B+” in her Notification of Exam Results for Semester 1 in 2017 with the intention that the Tonga Police would act on it as if it was a genuine document.
- Count 4: That on 11 July 2017, she made a false document by altering her exam results for her subject, Tourism in Less Developed Countries, (TS310 at the University of the South Pacific) from “C” to “B” in her Notification of Exam Results for Semester 1 in 2017 with the intention that the Tonga Police would act on it as if it was a genuine document.
- Count 6: That on 11 July 2017, she used the forged Notification of Exam Results for Semester 1 of 2017 as if it was genuine by submitting it to support her Promissory Note application for further funding from Tonga Police, knowing that that exam result was a forgery.

**Plea and election**

[2] She pleaded not guilty to all 6 counts and elected trial by Judge alone.

**The Law charged**

[3] The charges against the accused in counts 1, 2, 3 and 4 is forgery contrary to S.172(1) and 29a) and (4) of the Criminal Offences Act which provides as follows:

*Section 170 of the Criminal Offences Act provides, as relevant, as follows:*

*“170. (1) Forgery is the making of a false document with intent to defraud or deceive any person whether ascertained or unascertained.*

*(2) Making of a false document includes –*

*(a) the making of any material alteration in a genuine document whether by adding a false date, attestation, seal or other matter that is material.*

*....*

*(4) Forgery is complete if the false document is so made and is such as to show it was intended to be acted on as genuine even though it may be incomplete or may not purport to be such a document as would be valid in law.”*

[4] The Crown has the burden of proving, by admissible evidence, beyond a reasonable doubt, that –

- (a) the document produced as Exhibit D in this trial, that is, the exam results of the accused for the semester II of 2016 at USP, and the document produced as Exhibit A3, that is, the exam results of the accused for the semester 1 of 2017 at USP, were both false documents under S.170(2)(a) as above quoted,
- (b) the accused made both those two false documents,
- (c) the accused intended to deceive the Tonga Police with those two false documents that the exam results stated therein were the true results she had received for those exams, because they were not, and

(d) the accused intended to produce them to the Tonga Police for that purpose.

[5] The charges against the accused in counts 5 and 6 is using a document knowing it to be forged contrary to S.172 of the Criminal Offences Act. That section provides as follows:

*“172. Every person who knowing a document to be forged uses, deals with or acts upon it or attempts to use deal with or act upon it or causes or attempts to cause any person to use, deal with or act upon it as if it were genuine shall be liable to imprisonment for any period not exceeding 5 years and it is immaterial whether such document was forged in Tonga or elsewhere.”*

[6] In respect of the two charges under that provision, the Crown has the burden of proving, by admissible evidence, beyond reasonable doubt, that –

- (a) the two exam results produced as Exhibits D and A3 were forged documents,
- (b) the accused knew that they were forged documents,
- (c) the accused submitted those forged documents to the Tonga Police, and
- (d) the accused intended that the Tonga Police would act upon it as if they were genuine documents.

### **The evidence**

[7] The evidence given at the trial were only the evidence of the 5 witnesses for the Crown because the accused gave no evidence and called no witness to give evidence on her behalf.

[8] The evidence showed that Australia and New Zealand gave aid to Tonga Police for furthering of studies of members of the Tonga Police by the members attending and completing subjects at the University of the South Pacific (USP) Campus at ‘Atele in Tongatapu. To obtain the fund, the member signed a promissory note to repay the fund to Tonga Police if he/she failed to pass or complete the subjects and attached an invoice from USP for the costs of the subject or subjects for which funding was being sought. If he/she had already taken a subject or subjects

in the previous semester, he/she must attach his/her results in that subject or those subjects in that semester to the promissory note as well.

- [9] The members of the Tonga Police (and other persons in Tonga) attend at the USP campus at 'Atele and upon registration for the courses and subjects they undertake, they each received a student ID number with which they then each entered a secret code, which only him or her knew, into the computer system of the USP, by which only he or she could access his or her exam results, so that only him or her, and the USP, could access those results. The exams were sat by the students in Tonga, they were then sent to Fiji for marking and after about 4 – 5 weeks, the results or marks were then entered by the USP staff in Fiji into the computer system and the students could then access their individual results with their secret code and have them printed out here in Tonga.
- [10] The accused has been taking a Bachelor of Arts (majoring in Pacific Policies) course at the USP campus in Tonga, as well as other policing courses since 2005 and was receiving funding from the Australia and New Zealand aid programme for attending and undertaking those courses up to and including the first semester of 2017.
- [11] The USP ran two semesters in each year, one for the first half and one for the second half, of each year.
- [12] In the second semester of 2016, the accused took 4 subjects and in the first semester of 2017, she took 2 subjects both for which she had received funding from the aid programme. In July 2017, she applied to have further funding for the second semester of 2017 for 2 subjects, namely Criminal Law & Procedure and Property Law, and attached an invoice from USP for \$1,013.50 for those two subjects and also her exam results for her 2 subjects in the first semester of 2017, to her promissory note as was required.
- [13] On checking those 3 documents on 17 July 2017 the witness, Hina Tufulele, who was the Project Officer for the aid programme in the Tonga Police at the time, noticed that the marks that the accused had for her two subjects, that of "B+" for Legal Ethics and "B" for Tourism in Less Dev. Countries, appeared to be too heavily or boldly typed in. She thought she should check it out with the USP campus. She telephoned and spoke with the relevant officer there, 'Ana Ve'ehala

Fe'iloaki (who has also given evidence) and she emailed to her and attached to that email the exam result which the accused had attached to her promissory note. She produced the exam results which the accused had attached to her promissory note as Exhibit A3.

[14] 'Ana Ve'ehala Fe'iloaki, on receiving the emailed Exhibit A3 straight away accessed the USP computer record of the marks which the accused had received for every subject which she had taken at the USP campus since 2005 up to and including her results for her exams in the first semester of 2017. She had that record printed out and produced it as Exhibit E. According to that record, the accused did not have a "B+" but did have a "C" for Legal Ethics instead, and the accused did not have a "B" but did have a "C" for Tourism in Less Developed Countries instead. She said that she then contacted and told Hina Tufulele of it.

[15] Hina Tufulele consulted her superior officer and she was directed to check back into previous exam results which the accused had submitted with previous applications, and she did. She found and compared the exam results for semester 2 of 2016 which the accused had attached to her promissory note of 26 January 2017 with the results Exhibit E and discovered that the exam result submitted by the accused was also different. Whereas the result submitted by the accused had a "B+" for Legislation and an "A" for Courts and Dispute Resolution, Exhibit E showed that the accused only had a "C" for both subjects instead. She then informed 'Ana Ve'ehala Fe'iloaki of it and 'Ana informed USP in Fiji of it and USP in Fiji accessed and printed out the exam results of the accused for the second semester of 2016 on 17 July 2017 and emailed it to 'Ana in USP Tonga Campus. She has produced that exam result as Exhibit D. It confirmed that the accused only had a "C" for both subjects.

[16] The witness, Police officer, Sokopeti Faletau, said in her evidence that it was the accused herself who had brought her promissory note (with the attached invoice and exam results which were produced as Exhibit A1, A2 & A3 respectively) which had been signed by the accused on 11 July 2017 to her and that she signed it on 14 July 2017 and gave it back to the accused.

[17] The witness Police officer, Melenaite 'Olie, said in her evidence that the accused herself brought the promissory note of 26 January 2017 and that after she signed it

on same day she gave it back to the accused. She said that there were no other document attached to the promissory note. She produced that promissory note as Exhibit G.

- [18] The witness, police officer, 'Ilaisaane Vaka, said in her evidence that in 2017, she was working together with the accused in the office of the prosecution division of the Tonga Police and they had various equipment including a photocopier in the copier room in their office. She said that towards the end of work one day, in 2017, the accused asked her if she had a key to the office. She said that only the Officer in Charge, Inspector Saimone Fifita, and herself had a key to their office. She told the accused that she had a key and the accused asked if she could have it and she also asked if they had any scissors and glue and she told her no. She said she gave the key to the accused. She said that when she came to work the next morning she saw that the door to the copier room was open and there were about 5 copies of the accused exam results lying on the table in the copier room and she picked up 2 of them and put them on her (the witnesses') desk but they subsequently disappeared from there. She said she did not talk to the accused about it. She could not recall when or what month it was that this happened but she said, when I asked her, that after that day, the accused continued to work there in their office for about a month and then she heard that a letter came and the accused left on the same day.

#### **The exhibits**

- [19] All the documents which were produced as exhibits are the following:
1. Promissory note (signed by the accused 11/07/17) – Exhibit A1.
  2. USP Invoice dated 11/07/2017 with payment due date 18/08/2017 but which was stated with the month and date reversed as “7/11/2017” and “8/18/2017” respectively – Exhibit A2.
  3. USP Notification of Exam Results dated 06/07/2017 – Exhibit A3.
  4. Email from Hina Tufulele to 'Ana Ve'ehala dated July 17, 2017 – Exhibit B.
  5. USP Notification of Exam Results dated 10/01/2017 – Exhibit C.
  6. USP Notification of Exam Results dated 17/07/2017 – Exhibit D.

7. USP Transcript of Academic record (Unofficial) dated October 3, 2017 – Exhibit E.
8. Memorandum from Commissioner of Police to the Accused dated 3/2/2017 – Exhibit F.
9. Promissory note signed by the accused 26/01/2017 – Exhibit G.

**The defence**

[20] Mr. Tu'utafaiva had objected to the admission of the document no. 7 (Exhibit E) – the USP Transcript of Academic Record (Unofficial) dated October 3, 2017 – at the time it was produced at the trial and it was agreed that the ruling upon it would be made after the closing submissions have been made.

[21] In his submissions, Mr. Tu'utafaiva has submitted that Exhibit E and Exhibit D be both excluded because –

- (a) he submitted that the matters required by sections 54C, 54D, 54E and 54F of the Evidence Act had not been proved by any evidence, and
- (b) he submitted that there was no evidence to prove how Exhibit D came into existence.

**Exhibit D**

[22] I will deal first with Exhibit D. That is the USP Notification of Exam Results (dated 17/07/2017) which shows that the Accused had a “C” for both of her subjects (1) Legislation and (2) Courts & Dispute Resolution, instead of “B+” and “A” respectively as shown in Exhibit A3 which she had attached to her promissory note of 26/01/17 (Exhibit G). That is the result of her exams in the semester II of 2016.

[23] In her evidence, 'Ana Ve'ehala (Fe'iloaki) stated that on 17/7/17, Hina (Tufulele) rang her about the accused's results which the accused had given to her (Hina's) office. She said she asked Hina to write to her and to send her the result that she had been given. On receiving it from Hina, she checked in their records and found that they were not the same. She said she then checked with Fiji and Fiji then sent her the original of the accused's results which showed they were different.

[24] When Mr. Tu'utafaiva cross-examined her, 'Ana Ve'ehala stated that Exhibit D's date "17/7/2017" was the date on which that result was printed out from the computer. That was the same date that Hina had contacted 'Ana Ve'ehala and the same date that 'Ana Ve'ehala checked with Fiji and the same date that Fiji sent to her, 'Ana Ve'ehala, the original of the accused's result which showed a different result.

[25] I am therefore satisfied that Exhibit D was the original results which Fiji had printed out on the printout date "17/7/2017", and which the witness, 'Ana Ve'ehala Fe'iloaki identified and referred to when cross-examined by Mr. Tu'utafaiva.

#### **Electronic record evidence**

[26] As to Mr. Tu'utafaiva's other submission concerning the requirements of sections 54C to 54F, I need only refer to the above stated evidence that --

- (a) the electronic record kept and used by the USP was such that nobody, except an authorised person, could access the exam results of the students, and that only the student whose results are concerned could access those results with a secret code only he/she alone has.
- (b) every student has a separate identification number by which all his or her results are classified and kept and which cannot be accessed by anyone except by him or her by using his or her secret code.
- (c) the staff in Tonga (such as 'Ana Ve'ehala) may only access the transcript of academic record (unofficial) as in Exhibit E, but that the staff in Fiji alone could access the Notification of Exam Results as in Exhibit D.

[27] I am satisfied that, as required by S.54C, by that evidence, the prosecution has proved the authenticity of the electronic record of the exam results of USP in the present case. S.54C provides follows:

#### ***"54C Authentication***

*The person seeking to introduce an electronic record in any legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be."*

I am also satisfied of the integrity of the electronic records system by which the USP exam results were kept as required by S.54D which provides as follows:

***“54D Best evidence rule***

*(1) In any legal proceeding, where the best evidence rule is applicable in respect of electronic record, the rule is satisfied on proof of the integrity of the electronic records system in or by which the data was recorded or stored.*

*(2) In any legal proceeding, where an electronic record in the form of printout has been manifestly or consistently acted on, relied on, or used as the record of the information recorded or stored on the print out, the printout is the record for the purposes of the best evidence rule.”*

I am satisfied that the form of printout has been manifestly and consistently acted on, relied upon and used as the record of the information recorded and stored on the printout of the USP exam results, such as is required by S.54D(2).

[28] I am also satisfied that there has been no evidence to the contrary to rebut the integrity of the electronic records system of the USP in the present case – such as is required by section 54(a) and (c), which provide as follows:

***“54 E Presumption of integrity***

*In the absence of evidence to the contrary, the integrity of the electronic records system in which an electronic record is recorded or stored is presumed in any legal proceeding –*

*(a) where evidence is adduced that supports a finding that at all the materials the computer system or other similar device was operating properly, or if not, that in any respect in which it was not operating properly or out of operation, the integrity of the record was not affected by such circumstances, and there are no other reasonable grounds to doubt the integrity of the record;*

*(b) (not relevant in the present case)*

*(c) Where it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a*

*party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record.”*

[29] As to S.54F, it simply allows evidence to be given of usage and practice which the USP has adopted with regard to the electronic record of exam results of students which it was using in the present case. That section is as follows:

*“54F Standards*

*For the purpose of determination under any rule of law whether an electronic record is admissible, evidence may be presented in respect of any standard, procedure, usage or practice on how electronic records are to be recorded or preserved having regard to the type of business that used, recorded or preserved the electronic record and the nature and purpose of the electronic record.”*

[30] Accordingly, I do not agree with the point raised Mr. Tu’utafaiva in his said submission.

**No evidence of alteration?**

[31] Mr. Tu’utafaiva submitted, in para. 6 of his submissions, that there is no evidence that the Notification of Exam Results (Exhibit C) was altered by the accused by altering her mark in LW112 (Legislation) from “C” to “B+” such as is alleged by the prosecution and charged as count 1 in the indictment.

[32] Mr. Tu’utafaiva has made the same submission in respect of count 2 because that count relates to the same Exhibits C and D as well.

[33] He has also made the same submission in respect of Counts 3 and 4 because he says that those counts relate to Exhibit E as the evidence of alteration but that Exhibit E is not in the same form as Exhibit A3 (Notification of Exam Results).

[34] In respect of counts 5 and 6 (knowingly using a forged document), he submitted that as these counts depend upon counts 1 and 2, and 3 and 4, respectively, being proved to be altered by the accused, they would suffer the same fate as those counts.

**The alteration**

[35] I have already stated that I am satisfied with the evidence of ‘Ana Ve’ehala as to the authenticity and the integrity of the electronic records of the USP of the exam

results of the students. There was no evidence and there is no evidence that those electronic records of the USP have been tampered with or altered in any way. ‘Ana Ve’ehala gave evidence that the only way that an exam result may be altered is by way of application by the student concerned for recount or reconsideration. If a change needed to be made as a result of such a recount or reconsideration, it had to be approved by the Vice Chancellor of the USP and then the change is made to the students result and the student is duly notified. She said that the accused did not make any such application in this case and I accept that no change was made to her exam results.

[36] So that the exam results which ‘Ana Ve’ehala printed out as the transcript of academic record (Exhibit E) was an authentic record of all the results of the exams which the accused had undertaken at the USP from 2005 up to and including the semester 1 of 2017. According to that authentic record, the accused had –

- (a) for the semester 2 of 2016, a “C” for Legislation (LW112) and a “C” for Courts and Dispute Resolution (LW113), and
- (b) for the semester 1 of 2017, a “C” for Legal Ethics (LW306) and a “C” for Tourism in Less Dev. Countries (LW310).

[37] That record is proved to be correct when Exhibit D (Notification of Exam Results for Semester II 2016 was printed out, subsequently (to the print out of that record Exhibit E) on 17/7/2017 in Fiji and then sent to Tonga. That Exhibit D showed that the accused had a “C” for both subjects, just as the Exhibit E showed. That proves the integrity and authenticity of the Transcript of Academic Record (Unofficial) (Exhibit E).

[38] Because the Notification of Exam Results Exhibit C, which the accused attached to her promissory note Exhibit G of 26/1/17, had a B+ for Legislation and A for Courts and Dispute Resolution instead of C as shown in Exhibit E, it is plain that the actual printout, which is shown to have been done on 10/01/2017, has been altered.

[39] The same thing has to be said for the Notification of Exam Results Exhibit A3 of printout which is shown to have been done on 06/07/2017. That printout has also been altered.

[40] And I find that the only person who had the motive to make that alteration, and the opportunity to make it, such as the witness 'Ilaisaane Vaka has given evidence, is the accused. The letter of commendation and praise given by the head of Tonga Police – The Commissioner of Police, Stephen Caldwell, dated 3 February 2017, because of the altered printout which the accused had attached to her promissory note of 26/1/17, showing B+ for Legislation and A for Courts & Dispute Resolution, was, in my view, sufficient reason for the accused to alter her results for the first semester of 2017 when she applied for funding of her subjects for the semester II of 2017 on 17/7/2017.

[41] I have come to that conclusion for the following reason:

No one, but the accused, had had the printouts of the 10/01/2017 (Exhibit C) and of the 6/07/2017 (Exhibit A3) done. She alone had the secret code to print them out on those 2 days. She had a reason to print them out on those 2 days, namely, to attach them to her application or request for funding of the subjects she wanted to take in the current semester. Upon printing them out, she would have seen clearly that her results were Cs for her 2 of 4 subjects in the semester 2 in 2016 and her 2 subjects in the semester 1 in 2017. There cannot be any doubt of that because of the integrity of the USP records and of the printout thereof. She must therefore have been aware that those Cs have been changed to become B+ and A instead when she attached and submitted the incorrect and altered printouts to Tonga Police. And no one but the accused would have made those changes, because she would not risk having another person do it for her because that other person would pose a threat to her, seeing she is a police officer herself who must not act in such unlawful way. I am therefore sure that I have no reasonable doubt that the accused herself made the alteration to both printouts.

[42] I am therefore satisfied, on the evidence, beyond a reasonable doubt, that the accused, with the intent to deceive the Tonga Police, made a false document by making a material alteration by altering the result C to the result B+ in respect the subject Legislation and by altering the result C to the result A in respect of the subject Courts & Dispute Resolution in the genuine USP Notification of Exam Results printout which has been produced as Exhibit C. I therefore find the accused guilty of the charges in counts 1 and 2.

[43] I am also satisfied, on the evidence, beyond a reasonable doubt, that the accused, with the intent to deceive the Tonga Police, made a false document by making a material alteration by altering the result C to the result B+ in respect of the subject Legal Ethics and by altering the result C to the result B in respect of the subject Tourism in Less Dev. Countries in the genuine USP Notification of Exam Results printout which has been produced as Exhibit A3. I therefore find the accused guilty of the charges in counts 3 and 4.

[44] I am also satisfied on the evidence, beyond a reasonable doubt, that the accused knowing that the two said genuine printouts have been forged by the said alterations which she had made to them, used them by submitting them to support her promissory note application for further funding from Tonga Police knowing that those exam results were forgeries. I therefore find the accused guilty of the charges in counts 5 and 6.

NUKU'ALOFA: 26 June 2019.



A handwritten signature in blue ink, appearing to read "L. M. Niu", is written over the seal.

L. M. Niu  
J U D G E