

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

CR 174 of 2018

BETWEEN: 'ETUATE LAVULAVU - Applicant

AND: R E X - Respondent

BEFORE THE HON. ACTING CHIEF JUSTICE CATO

Counsel: Mr. 'E. Lavulavu appeared in person

✓Mrs. L. Folaumoetu'i – Attorney General for the Respondent

RULING ON APPLICATION FOR SEVERANCE

[1] The Applicant is charged on three counts that together with his wife Akosita Lavulavu that he obtained money by false pretences contrary to section 164 of the Criminal Offences Act, and three counts of knowingly dealing with forged documents contrary to section 172 of the Criminal Offences Act.

[2] The Crown case was put by the Attorney- General, Mrs Folaumoetu'i as;

[1] The Complainant is the Ministry of Education and Training (MET).

[2] The Accused persons are Mr 'Etuata Lavulavu and Mrs 'Akosita Lavulavu. 'Etuata Lavulavu is the President of the 'Unuaki 'O Tonga Royal Institute (UTRI), which is a private education provider with its head office situated at Tofoa, with a branch in Vava'u. 'Akosita Lavulavu was the Director of UTRI at the relevant time.

[3] On or about 19 November 2013, 'Akosita Lavulavu on behalf of UTRI applied for financial assistance from the Complainant, under the Complainant's 'Technical Vocational Educational Training'

(TVET) grant, for the number of students enrolled in the First Semester of 2013 commencing 31 March 2013.

- [4] The TVET grant provides financial assistance to non-government technical and vocational education institutes who have been accredited by the Tonga National Qualifications Authority Board (TNQAB).
- [5] The size of the grant that an institute would receive was to be paid in respect of each receipted student who is enrolled for a semester during the calendar year, in accordance with Cabinet Decision No 637 of 19 July 2013.
- [6] The complainant would then give a TVET grant to the institute at a rate of \$600 per fee paying student per semester.
- [7] According to the conditions of the TVET grant in accordance with Cabinet Decision No. 688 of 4 August 2010: 50% of the grant money had to be used for teachers' salaries; the remaining 50% to be allocated to the purposes of improving TVET teaching and learning resources; and undertaking minor renovations to TVET classrooms and workshops up to a total amount of \$50,000.
- [8] According to the TVET grant application form that was signed by 'Akosita Lavulavu on 19 November 2013, 255 students had paid their school fees for the First Semester of 2013 as of 31 March 2013.
- [9] 'Akosita Lavulavu also submitted to the complainant a list of names of these 255 students and receipts to show that their school fees had been paid. However only 243 receipts issued for students were attached to the application form.
- [10] On 26 May 2014, the CEO for the complainant at the time, Emily Pouvalu, approved the application by UTRI for the TVET grant.
- [11] On or about 29 May 2014, the Complainant then deposited \$146,400 into a BSP bank account name UTRI #2, account number

2000911715. The total amount of grant money that was supposed to be paid into the bank account was \$153,000 for 255 students alleged to have enrolled at UTRI in semester 1 of 2013.

- [12] However, according to a previous audit report for the second semester of 2012, there was an overpayment of 11 students (\$6,600) therefore that amount was deducted from the amount paid to UTRI for the first semester of 2013.
- [13] The bank statement for BSP Bank account (UTRI #2) account number 2000911715, shows that \$146,000 was transferred on 29 May 2014 to another BSP account, account name UTRI (FEE PRO), account number 2000778155.
- [14] On the same day \$60,000 was cashed out of the UTRI (FEE PRO) account by cheque signed by both 'Etuate Lavulavu and 'Akosita Lavulavu, and \$50,000 was deposited to a personal BSP Bank account under 'Etuate Lavulavu's name, account number, 2000664108. A further \$20,000 was also withdrawn from the account on the same day and deposited into BSP bank account, account name 'Akosita Lavulavu or Semisi Havili, account number 2000638284.
- [15] By 28 October 2014 a total amount of \$133,685.40 was withdrawn from the UTRI (FEE PRO) account.
- [16] On or about 29 August 2014, 'Akosita Lavulavu on behalf of UTRI applied for the TVET grant from the complainant for the second semester of 2014.
- [17] According to the TVET application form that was signed by 'Akosita Lavulavu, 416 students had paid their school fees and were studying at UTRI on the second semester of 2014 as of 18 November 2014. Attached to the application form was the list of names and receipts for the 416 students alleged to have enrolled for the second semester of 2014.

- [18] On 29 October 2014, the CEO for the complainant at the time, Emily Pouvalu, approved the application by UTRI for the TVET grant.
- [19] On 18 November 2014, the complainant then deposited \$249,580 into a Tonga Development Bank (TDB) account, account name UTRI E S & A Lavulavu, account number 152111-L51.
- [20] That account, which was a loan account, which preserved a debit balance of \$63,072.29. The grant money deposited into the account effectively settled this debit balance.
- [21] The remaining funds of \$186,507.91, was then transferred to a personal TDB account of 'Akosita Lavulavu, account number 152112-S1 which was only opened that day, 18 November 2014.
- [22] From 18 November to 12 December 2014, all, but \$507.71, was either withdrawn or transferred to accounts in other Banks.
- [23] On 19 November 2014, \$56,000 was transferred from the account, \$51,000 of which was transferred into banks accounts held in BSP. The bank statement for the BSP account, Akosita Lavulavu or Semisi Havili, account number 2000638284, shows that \$20,000 was deposited into that account on the same day. The bank statement of BSP account UTRI (FEE PRO), account number 2000778155, shows that \$31,000 was deposited into that account on the same day.
- [24] On 26 November 2014, \$20,000 was withdrawn from 'Akosita Lavulavu's, TDB account, and on the same day \$10,000 was deposited into BSP account, Akosita Lavulavu or Semisi Havili, account number 2000638284.
- [25] On 12 December 2014, \$50,000 was transferred from 'Akosita Lavulavu's, TDB account, to BSP account UTRI (FEE PRO), account number 2000778155. On the same day \$50,000 was withdrawn from the BSP account UTRI (FEE PRO), account number 2000778155, and on the same day \$42,000 was deposited

into BSP account, Akosita Lavulavu or Semisi Havili, account number 2000638284.

- [26] On or about 9 June 2015, 'Akosita Lavulavu on behalf of UTRI applied for the TVET grant from the complainant for the first semester of 2015.
- [27] According to the TVET grant application form that was signed by Akosita Lavulavu on 9 June 2015, 271 students had paid their school fees for the First Semester of 2015 as of 31 March 2015.
- [28] 'Akosita Lavulavu also submitted to the complainant a list of names of these 271 students and receipts to show that their school fees had been paid.
- [29] The application by UTRI was approved by the complainant, and on 29 June 2015, the amount of \$162,600 was deposited into the BSP account UTRI #2, account number 2000911715.
- [30] On 30 June 2015, \$10,000 was withdrawn from the account, and on the same day \$7,800 was deposited into BSP account, Akosita Lavulavu or Semisi Havili, account number 2000638284.
- [31] On 6 July 2015, \$20,000 was withdrawn from the account, and on the same day \$19,000 was deposited into BSP account, Akosita Lavulavu or Semisi Havili, account number 2000638284.
- [32] On 14 July 2015, \$20,000 was withdrawn from the account, and on the same day \$10,000 was deposited into BSP account, Akosita Lavulavu or Semisi Havili, account number 2000638284.
- [33] On 22 July 2015, \$10,000 was withdrawn from the account, and on the same day \$8,000 was deposited into BSP account, Akosita Lavulavu or Semisi Havili, account number 2000638284.
- [34] On 3 August 2015, \$80,000 was withdrawn from the account. However the bank statement for TDB account held by 'Akosita

Lavulavu, account number 152112S1 shows a deposit of \$80,000 from BSP Bank, but is recorded on 31 July 2015, three days prior.

[35] On 14 July 2015, \$10,000 was withdrawn from the account, and on the same day \$6,000 was deposited into BSP account, Akosita Lavulavu or Semisi Havili, account number 2000638284.

[36] A number of withdrawals from different ATM's were made by Akosita Lavulavu from the BSP account, Akosita Lavulavu or Semisi Havili, account number 2000638284. On 16 July 2015, 'Akosita Lavulavu using the EFTPOS machine at Little Italy Pizzeria and paid for an amount of \$1,712.75.

[37] On 8 April 2016, the complainant wrote a savingram to the Office of the Tonga Office of the Auditor General requesting that the TVET grants to UTRI be audited.

[38] An audit report dated 5 October 2016 found –

a) that there were only 6 paying students for the first semester of 2013, therefore UTRI were only entitled to receive \$3,600 under the TVET grant, and not \$146,400;

b) that there were only 9 paying students for the second semester of 2014, therefore UTRI was only entitled to receive \$5,400 under the TVET grant and not \$249,580;

c) that there were only 4 paying students for the first semester of 2015, therefore UTRI was only entitled to receive \$2,400 under the TVET grant and not \$162,600.

[39] In response to the audit report, on 16 May 2017 the Accused, 'Etuate Lavulavu had a meeting with the CEO for the complainant, Claude Tupou, his deputy Manu Akauola and the Auditor General, Sefita Tangi.

- [40] During this meeting, 'Etuata Lavulavu to a certain extent accepted the fact that only 19 students over 3 years paid school fees, which is reflected in the minutes of that meeting recorded by Soane Selui an employee of the complainant.
- [41] The Police Investigation revealed that UTRI staff, and students requested to assist, under the direction of 'Etuata Lavulavu and 'Akosita Lavulavu, went out to the public to recruit students for the Institute, who were required to complete a student application form. Recruiters were informed that they would receive a bonus depending of the number of students they recruited.
- [42] The form of payment accepted by the Institute was in five different forms –
- a) payment in cash;
  - b) agreement to work for the Institute;
  - c) by way of student loan contract agreement;
  - d) commodity exchange; and
  - e) scholarship.
- [43] The most common form of payment utilised by the recruiters for the institute was the use of student loan contract agreements which the students were also required to complete. The forms were than submitted to the administration staff of UTRI, including Mele Muimui Tovi, and Felisita Kivalu, who would check the applications and student loan contracts, than they would issue receipts for \$100, for payment of one semester, or \$200 payment of school fees for the whole academic year.
- [44] According to Mele Muimui Tovi she would check and complete the student applications and student loan contracts, compile a list names of the total students than present the list to 'Etuata Lavulavu for finalisation. 'Etuata Lavulavu would approve the list and direct Mele Muimui Tovi and Felisita Kivalu to issue the receipts in those student's names. That was the process she was directed by 'Etuata Lavulavu to follow, since she came into the employ of UTRI.

- [45] Mele Muimui Tovi admitted that for the majority of the receipts she issued for semester 1 of 2013, semester 2 of 2014, and semester 1 of 2015, she never received any cash payments when issuing those receipts.
- [46] Felisita Kivalu, an employee of UTRI, explains that in 2013 and 2014 she worked together with 'Akosita Lavulavu and other staff of UTRI to prepare the documentation to be submitted to the complainant. She states that she prepared some of the receipts for student fees, and she was directed by 'Etuete Lavulavu, to issue receipts in all the student names as if they had a student loan contract agreement with UTRI.
- [47] She recalls that the process is that they were given a list of names from 'Akosita Lavulavu to issue receipts in all the names on the list. They would then work to complete student application forms in accordance with the list of names provided by 'Akosita Lavulavu, as some of the students were not attending UTRI in 2013 and 2014.
- [48] Some of the student names on the list provided by 'Akosita Lavulavu, were former students of UTRI from 2010 – 2012 so they would retrieve the old student application forms for those students and complete new student application forms and student loan contract agreements for the years 2013 – 2014. Kivalu states that the list was passed to Mele Muimui Tovi who would include other names onto the list before it was given to 'Akosita Lavulavu. After the list was finalised by 'Akosita Lavulavu, then the list was provided to the complainant.
- [49] In a statement taken from 'Etuete Lavulavu, on 23 January 2017, and a statement taken from 'Akosita Lavulavu on 26 January 2017, both Etuete Lavulavu and 'Akosita Lavulavu state that the list of student names and supporting documentation submitted with the TVET grant application forms to the complainant, was prepared by Mele Muimui Tovi and the administration staff.

[50] On 6 February 2017, 'Etuata Lavulavu called a meeting of both current and former staff of UTRI and told them not talk to Police if they were interviewed in relation to the TVET grant applications. 'Etuata Lavulavu informed the staff to refer Police to the counsel for UTRI, Mr 'Ofa Pouono. A further meeting was called on 11 February 2017, where they were informed by 'Etuata Lavulavu that they would track down the persons in the list of students in 2013 and 2014 and to tell them not to talk to Police about UTRI, and to refer Police to counsel for UTRI, Mr 'Ofa Pouono.

[51] Both Accused were subsequently arrested by police and charged with criminal offences.

[3] Mrs Folaumoetu'i submitted that the prosecution case was based upon a joint enterprise by Mr and Mrs Lavulavu and this was evidenced by the fact that both were senior officers of 'Unuaki 'O Tonga Royal Institute (UTRI), at various times both allegedly gave instruction or information to staff members to further inflate applications for returns for the purpose of gaining subsidies, and both at various times had applied the money allegedly derived from the false accounting to their private bank accounts either individually or together. Importantly, two material witnesses who she conceded were accomplices had been given indemnities to give evidence of the allegedly dishonest instructions they received which resulted in a significant sum of money being received from the complainant by UTRI and thereafter much of it being applied to the private accounts either joint or individual of Mr and Mrs Lavulavu.

[4] Mr Lavulavu on this application made it clear that he did not accept these allegations and in his written submissions made criticisms of some of the evidence the Crown relied upon. I explained to Mr Lavulavu, who was unrepresented, that in so far as his criticisms were of evidence that they would be relevant at the trial stage where he and his wife would be able to advance their cases before the jury, but that, at this stage, I was concerned only to consider the application for severance on the evidential basis that the Crown had said its case would be advanced upon and presented. Severance applications can be repeated during the course of a trial and sometimes granted if circumstances emerge at trial that merit this course.

[5] Mrs Folaumoetu'i submitted that this was an ordinary application of joint enterprise and was one where on ordinary and well recognized principles relating to severance the application should not be granted. Mrs. Folaumoetu'i cited Archbold, 2004 ed, at para 1-176-23, and *R v Mohal* 65 Cr App R, 56 in which it was said that only in exceptional circumstances should separate trials be ordered for two or more defendants who were jointly charged with participation in one offence. Mrs Folaumoetu'i also cited the well-known dictum in *R v Lake* 64 Cr App R 172 at 175 concerning not only the importance of saving time and expense, but also the desirability that the same verdict and the same treatment should be returned against those concerned in the same offending and the removal of the risk of inconsistencies in verdicts. Importantly, the Court said;

“... accordingly, it is accepted practice that a joint offence can properly be tried jointly, even though this will involve inadmissible evidence being given before the jury and the possible prejudice which may result from that; the practice requires that the trial Judge should warn the jury that such evidence is not admissible as against a particular defendant or defendants.”

[6] Mr Lavulavu essentially submitted that a joint trial would prejudice him and that he would be adversely affected by the mere fact of their marriage relationship by evidence that was adverse to his wife and not he. He complained that a large number of the witnesses did not give evidence implicating him. On this aspect of the case, I am satisfied that the evidence proposed to be called by the Crown and detailed above does justify a joint trial on ordinary principles. Whilst some of the witnesses may not directly implicate Mr Lavulavu, as Mrs Folaumoetu'i submitted most are relevant to understand the background of the offending and, even were there to be a separate trial, the evidence would have to be adduced in any event so that the jury had a complete understanding of the case. The numbers of witnesses have been culled extensively she explained. In so far as there may be evidence led that only implicates Mrs Lavulavu, a judicial warning to the jury concerning its relevance may be required. Much of the evidence I am satisfied will, however, be relevant to both and I particularly refer to the indemnified accomplices and the auditor's evidence. I would not order severance on the basis of objections of this kind by Mr Lavulavu.

[7] Mr Lavulavu also sought a separate trial on the basis that he had a right to a speedy disposal of the case. On this point, I note that the original trial had been set to commence in early September 2019 but had to be vacated because there had been

complications with the birth of Mr and Mrs Lavulavu's daughter. That had left a large gap in the court list of fixtures, and this gap has been filled up by the Crown since. On the application by Mrs Lavulavu, I inquired of the prosecution before vacating the joint fixture whether they wanted to proceed individually against Mr Lavulavu at that time and the Crown indicated understandably that it did not. A trial date was subsequently fixed for April 2020. A six week period for trial has been allocated because Mr Lavulavu is unrepresented although his wife is represented by Mr Tu'utafaiva. Mr Lavulavu was not asked by me about any desire he might have for a separate trial at the hearing of his wife's application (she not being present at the application for an extension of her bail return date, but he being present) and I did not invite him to do so in the light of the Crown indicating it did not wish to try Mr Lavulavu separately from his wife. An application was made by him, however, later on the 9th August 2019 which I indicated I would hear on the 22nd August, 2019 when setting down a date for the fresh joint trial to commence in April 2020.

- [8] Mr Lavulavu also complained that any delay in his trial would affect him financially and, although this may be a regrettable consequence of this litigation for the Applicant, the Crown also has rights in the manner in which trials should be conducted and one of those is to prosecute a joint trial where the circumstances in principle merit this. By Mrs Lavulavu seeking to remain in New Zealand which Mr Lavulavu did not oppose the Crown was deprived of the ability on the 2nd September, 2019 to try Mr and Mrs Lavulavu jointly and were accordingly entitled to seek a fresh date for a joint trial which has been fixed as early as possible to commence in April 2020. Any delays have come about because of the application of Mrs Lavulavu for an extended stay in New Zealand and it is through no fault of the Crown that a joint trial is postponed. I am, however, concerned to see in Mr Lavulavu's submission on ground 4 his suggestion that his wife could be in New Zealand for the rest of the year or all next year, as a further basis for a speedy trial and severance. I have since been told by Mr Lavulavu that Mrs Lavulavu is to return shortly and then intends to re-apply to return to New Zealand for health reasons. She is required under the extended terms of the variation of her bail to remain in New Zealand to return on the 30th October 2019. The fact that the joint trial has been set for early April 2020 should provide ample time for her to recover fully from any complications arising from the birth of the child. Any further period sought to reside in New Zealand for medical reasons beyond the present will have to be substantiated by medical evidence and Mrs Lavulavu will have to provide a written consent for

those doctors to discuss her position with the prosecution if the prosecution so desires.

[9] Mr Lavulavu also claimed that he wanted to call his wife as a witness at his trial to adduce evidence that they never worked together in any manner with the intention to attempt or commit the alleged offence. He said he was precluded from doing this if there was a joint trial. That is not necessarily so because should Mrs Lavulavu give evidence Mr Lavulavu may cross-examine her on this aspect, at their joint trial. It is premature to consider severance on this basis at this stage, at any rate. I note that, in R v Pieterse and Holloway [1995] 2 Cr App 11, the Court of Appeal did not accept that the trial judge should have aborted the trial on an application by Pieterse for a separate trial after his co-accused had declined to give evidence and he had indicated that he wished to call him as a witness. The Court indicated that the application was speculative. The Court said, ‘Even if he had been called to give evidence, willingly or by compulsion, there is no indication that he would necessarily have supported what Pieterse said in his interviews.’ I do not consider either that this is a ground for severance in this case, at this stage.

[10] I record that I have suggested to Mr Lavulavu that he may consider being represented by counsel. Long trials of this kind can become complex and protracted and difficult for a lay person to conduct properly.

[11] For all these reasons, I reject the application for a separate trial.



C. B. Cato  
JUDGE

NUKU'ALOFA: 29<sup>TH</sup> August 2019