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

CR 172 & 173 of 2019

BETWEEN:

REX

-v-

'ANA MOALA TU'ITAVUKI and MALAKAI TU'ITAVUKI

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN
Counsel: Mr T. 'Aho for the Crown
Mr S. Tu'utafaiva for the Defendants
Date of sentence: 18 November 2019

Introduction

1. The Defendants have pleaded guilty to one count each of theft, contrary to s.143(a) and s. 145(b) of the *Criminal Offences Act*.
2. The Defendants, by their counsel, have accepted the accuracy of the summary of facts.

The offence

3. The Defendants are married. As at March 2019, they were living with 'Ana's grandmother, Mrs Tangiloto Po'oi of Kolofo'ou, Tongatapu ("the complainant"). The complainant became ill and had to move to Vaini to stay with 'Ana's family so they could look after her.
4. On 17 March 2019, the Defendants went to the complainant's residence and stole a number of Tongan artefacts valued at TOP\$62,000.
5. The Defendants sold several of the artefacts. None have been recovered. The proceeds have apparently been spent on food and clothes.

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The Defendants

6. A pre-sentence report for each Defendant has been prepared by the Probation Office. They provide the following information on each Defendant.

'Ana Tu'itavuki

7. 'Ana is 22 years of age. She is the eldest of five siblings. The family income is derived through a construction company managed by her father. Her mother runs a handicrafts booth at the Talamahu market. She is described as being very active in the village, church and "novo 'a kainga" life.
8. She married Malakai in 2018. Both are currently residing with her parents at Vaini.
9. 'Ana described the complainant as having 'raised her well'.
10. The author of the report described 'Ana as being in tears when expressing remorse for what she has done.
11. She has a good education history. She is currently undertaking courses at the University of South Pacific in business management. She has no health issues.
12. In 2017, she commenced employment at the Laiola duty-free shop with a fortnightly salary of \$324. At some point, she resigned due to this matter. She is now staying at home and looking after the complainant.
13. As soon as the complainant became aware of the disappearance of the artefacts, 'Ana admitted her involvement in their theft. She also told the authorities the identity of the buyer. Her mother was recorded as having observed significant changes in 'Ana's affect and behaviour since she confessed to the theft, such as being distant, quiet and reclusive. She has expressed deep regret for her offending.
14. She has no previous criminal record. She has begged for forgiveness and the complainant has forgiven her.
15. A reference from the Bishop of the Teufiva Ward of the Church of Jesus Christ of Latter Day Saints describes 'Ana as an active member, very hard-working, a

trustworthy person, and fulfilling her calling in the church well by performing duties including ministering to the poor, widows and other family members. The Bishop did not indicate whether he was aware of the current charge when he provided the reference.

Malakai Tu'itavuki

16. Malakai is 23 years of age. He is the eldest of four siblings. His father passed away in 2015. The family source of income was from his father serving as an LDS elder. They moved from village to village during his childhood due to his father's service. He served two years as an LDS missionary in the United States.
17. He has achieved a reasonable education, finishing school in 2013 at form 5 level. He has no health issues. He is currently employed at a hardware store with a fortnightly salary of \$260. He is now the sole breadwinner for his family.
18. He has a previous record of domestic violence at the Magistrates Court, but no other convictions.
19. His upbringing within the LDS church taught qualities such as faithfulness, trustworthiness, integrity and honesty. Notwithstanding, Malakai has accepted responsibility for this offence and expressed remorse for what he has done.
20. A letter of support from the LDS church confirms Malakai as a returning missionary from overseas and a very hard-working and trustworthy person.

The complainant

21. The probation officer spoke with the complainant. She was demonstrably upset by the matter. She said the only reason she went to the police was to recover the artefacts from the buyer. It was not her intention to take the Defendants to court. She said that she had raised 'Ana as if she was her own child.
22. The complainant is some 69 years of age and her health is deteriorating. 'Ana has been looking after her by performing cleaning, laundry and cooking duties.
23. The complainant expressed to the report writer that she wishes to leave fond memories of her granddaughter and hopes that this matter will not destroy their

relationship. The report writer emphasised that "family is the central unit of Tongan life and kinship ties are of paramount importance".

24. While it is not uncommon, particularly in Tonga, for an offender to apologize to, and seek forgiveness from, their victim or their family; and equally, in a good number of those cases, for the victim and/or their family to accept the apology and forgive the offender, in this case, the complainant has gone beyond that.
25. On 7 August 2019, the complainant wrote to the Attorney General's Office seeking, in terms, for the prosecution against the Defendants to be withdrawn. She described the items stolen as family heirlooms that she had kept over the years including fine mats she had woven herself. When she found out the items had been stolen, she was heartbroken as many of them had been passed down to her and were of great sentimental value. At 69 years of age, she is no longer able to weave. Therefore, the items were also irreplaceable.
26. She originally took her complaint to the police to teach the Defendants a lesson - that what happened was a very serious matter - and she wanted the buyer of the artefacts to be prosecuted. She has identified the buyer in her letter as another vendor at the Talamahu market.
27. The laying of the charges has been very difficult for the complainant, emotionally, healthwise and financially. She says it has made her even more ill. She never intended to testify against her own granddaughter.
28. As the Defendants are living with her daughter (Kalisi) and her family, they and the complainant are still financially responsible for the Defendants. The complainant described herself as the main breadwinner of the family through her income from the sale of Tongan mats and handicrafts. She and Kalisi have felt financially responsible for engaging and paying for a lawyer for the Defendants. She was also responsible for their bail.
29. She concluded that "*so essentially, I will suffer twice in this matter – not only has my property been stolen, but now I am also financially responsible for defending my own granddaughter and her husband... at the end of it all, I will bear all the consequences of this case - financial, emotional distress and ill-health – and particularly so, if my granddaughter is convicted.*"

30. Unsurprisingly, on 12 August 2019, the Attorney General responded that due to the seriousness of the offence knowingly committed by the Defendants, the Crown would not withdraw the prosecution. The Attorney General also mentioned the possibility of the Defendants giving evidence against the receiver of the stolen goods.

Submissions

Crown

31. The Crown submits that:
- (a) the following are aggravating features:
 - (i) the Defendants premeditated the events for they knew the whereabouts of the stolen goods and that the complainant would not be home at the time of the theft;
 - (ii) the approximate total value of the stolen goods is substantial;
 - (iii) the Defendant stole the goods from the complainant at her home and her stall at the market;
 - (iv) the stolen goods were never recovered;
 - (v) 'Ana is the complainant's granddaughter, thereby "...stealing from the hand that feeds you"'. .
 - (b) the only mitigating factors are that the Defendants pleaded guilty at the earliest opportunity, they are first-time offenders and the complainant did not want to proceed with the prosecution for she has forgiven them; .
 - (c) the starting point for this charge is 4 years imprisonment;
 - (d) a suspended sentence is appropriate, although the submission does not descend to whether any suspension should be in respect of the whole or only part of the prison sentence otherwise to be imposed.

Defendants

32. Mr Tu'utafaiva submits that:

- (a) the offending "would appear to be at the upper level of the scale of seriousness because the value of the artefacts taken is \$62,000";
- (b) sentences of imprisonment are likely to be imposed, but by reference to the Court of Appeal decision in *Mo 'unga v R* [1998] Tonga LR 154, suspension of the sentences in total or in part is appropriate;
- (c) aggravating features include:
 - (i) the Defendants were residing together with the complainant at the time of the offending. They had to move to Kasili's place in Vaini because the complainant's house has not been repaired since suffering damage from Cyclone Gita last year and the roof of the room that was occupied by the Defendants leaks when it rains. The complainant still wants the Defendants to return when the house is repaired;
 - (ii) the Defendants breached the complainant's trust in them;
 - (iii) the value of the assets of \$62,000;
 - (iv) the artefacts have not been and cannot be replaced.
- (d) mitigating features include:
 - (i) the Defendants co-operated with the police and pleaded guilty at the first opportunity;
 - (ii) they are young, in their early 20s;
 - (iii) they have no record of previous criminal convictions;
 - (iv) the complainant has forgiven the Defendants and did not want them prosecuted; and
 - (v) the complainant has not asked for any compensation.

- (e) it is appropriate for any sentences to be suspended in full on conditions including that the Defendants carry out community work and attend the Salvation Army Life Skills course for the following reasons:
- (i) both Defendants have no previous criminal convictions;
 - (ii) they are likely to take the opportunity offered by the sentence to rehabilitate themselves by attending the Salvation Army Life Skills course as a condition of any suspended sentence;
 - (iii) both co-operated with the police and pleaded guilty at the first opportunity;
 - (iv) whilst the offending is serious, the complainant has forgiven them; and
 - (v) while the stolen artefacts cannot be replaced, the complainant has not asked for any compensation.

Probation officer

33. The probation officer noted that imprisonment was inevitable but recommended that such sentence be fully suspended on conditions of no further reoffending during the suspension term and any other conditions the Court deems appropriate.

Starting point

34. In determining the starting point of any sentence concerning a property related offence, the value of the goods the subject of the charge is traditionally regarded as highly informative of the range within which the relevant offending falls. Of course, it is not the only consideration. Here, the value of the artefacts of \$62,000 is significant.

Comparative sentences

35. Mr Tu'utafaiva's submissions did not contain any references to comparative sentences.

36. The Crown's submissions contained reference to a number of comparative sentences.¹ However, all involved theft resulting from housebreaking. The value of the goods stolen in those cases ranged from \$17,000 odd to \$35,000. The sentences imposed for the theft offences ranged from 12 months (served concurrently with 2.5 years imprisonment for the housebreaking, the last 12 months suspended on conditions) to 2 years imprisonment (served concurrently with a four-year term for housebreaking with the last six months of that sentence suspended on strict conditions).
37. The somewhat unique feature of the present case is the breach of trust committed by the Defendants in stealing from a senior family member.
38. In the absence of any purely theft comparative sentences with that feature, some guidance may be provided by embezzlement cases, which also carry a maximum penalty of seven years imprisonment, where breaches of trust, albeit against an employer, have been considered.
39. For instance, in:
- (a) *Misinale* [1999] TOCA 12, the defendant was found guilty of embezzling a total of \$47,310.23 in the course of his employment as an accountant. On appeal, the sentence of three years imprisonment was affirmed with the last 12 months suspended for 2 years.
 - (b) *Kolomalu* [2012] TOSC 25, the defendant pleaded guilty to one count of embezzlement and one count of theft of a total of \$21,051.20. None of the funds were repaid. The defendant was 28 years old. She fully co-operated with the police, pleading guilty at first instance in her record of interview and she was a first offender. Due to the breach of trust, the systemic nature of it and the sum involved, the head sentence was set at 18 months imprisonment. The Court of Appeal's statement in *Filila Havilii v Rex AC* No. 02/201 was noted that ordinarily it is appropriate for an offence of dishonesty and trust to receive a custodial sentence. That sentence was fully suspended in accordance with the principles in *Tukuafu v Police* [2001]

¹ 'Akilisi Langi, CR 80/2015; Maikolo 'Ealelei, CR 162/2018; Matini Kasitani, CR 94/2018; Tevita Fifita, CR 74/2018; Fatui Vunipola, CR 10-11/18 and Fangalongoa Maea & ors, CR 129-130.2017.

Tonga LR 151, and *R v Mo'unga* [1998] Tonga LR 154, albeit upon conditions including 120 hours community service.

- (c) *Heitonga* [2012] TOSC 26, the defendant pleaded guilty to several counts of theft, forgery and dealing with forged documents, whereby she acquired \$83,574.53 and \$50,899.86. A head sentence was calculated of 4 years and 6 months imprisonment for the theft and forgery offences. After discounting factors, the sentence imposed was two years and six months imprisonment. The last 12 months of the sentence was suspended, as the Court considered the offending too serious to fully suspend the sentence due to the breach of trust, the systematic thefts, the sum involved, and the public interest requiring that a part of the sentence be actually served.
- (d) *Bloomfield* [2013] TOSC 19, the defendant was convicted after trial of one count of embezzlement of \$204,033.09, none of which had been accounted for. The offending involved serious breaches of trust and caused such serious financial difficulty to the employer that the business had to be sold. The starting point was fixed at five years imprisonment. After discounting factors, that was reduced to four years and four months, with the final 12 months being suspended.
- (e) *Tau'alupe* [2017] TOSC 10, a 21 year old was convicted of five counts of embezzlement and three counts of falsification of accounts totaling \$20,025 during his employment at Tonga Development Bank. He co-operated with police and was a first time offender. In that case, Paulsen LCJ considered a number of comparative sentences including:
 - (i) *Minisale* (Court of Appeal CA 13/99, 23 July 1999) where the accused was found guilty after trial of embezzlement of \$47,310.23, and sentenced to three years imprisonment with the last 12 months suspended for two years;
 - (ii) *Tangata'iloa* (Supreme Court CR 99/00, 3 May 2001) who embezzled \$6,627.40 and was sentenced to two years imprisonment with the final six months suspended for one year;

- (iii) *Wall* [2001] Tonga LR 238, involving 11 counts of embezzlement totaling \$181,008, no previous criminal record, cooperative and some property recovered. The defendant was sentenced to four years with the last 12 months suspended for two years.
- (iv) *Cocker* (CR3/13), where the accused pleaded guilty to embezzlement, falsification of accounts and theft of \$99,450 over a two-year period. She was sentenced to three years imprisonment (from a starting point of 4 years and 6 months) with the final year suspended on conditions.
- (v) *Kaufusi* (Court of Appeal. AC14 & 15 of 2014, 31 October 2014) pleaded guilty during his trial to embezzling \$41,301.03 over 48 occasions. He was sentenced to 2 years and 8 months imprisonment with the final 9 months suspended for two years.

His Honour sentenced *Tau'alupe* to 1 year and 6 months imprisonment fully suspended subject to conditions including 12 months' probation and 60 hours of community work. The Crown unsuccessfully appealed the full suspension.

- (f) *Pousini* [2017] TOSC 22, involving one count of embezzlement and one count of money laundering of 14 cheques totaling T\$73,276, of which Miss Pousini took T\$34,400 for herself. The starting point was set at two years and six months. She was a first-time offender, good student and came from a good and supportive family. She was fully co-operative with the police and freely admitted to her offending. She was sentenced to one year and five months. In suspending the sentence in full, Paulsen LCJ said:

"There may be a view that a fully suspended sentence is in some way a 'let off' for an offender who has got away without consequences for their offending. This is a crude perspective. It certainly can never be thought to be the case here where the fact of a conviction will have serious consequences for Miss Pousini regardless of the sentence imposed by the Court. Furthermore, fully suspended sentences are commonly imposed subject to conditions which in themselves constitute demanding sentences and act also as significant restrictions on an offender's liberty. It is also the case that if the conditions are not complied with the

offender may be required to serve their prison sentence. I intend to impose such conditions in this case."

- (g) *Fomua* [2018] TOSC 12, one count of theft and one count of falsification of accounts amounting to \$21,299. A starting point was set of two and a half years. The defendant's previous good character reduced that to two years imprisonment with the final six months being suspended.
40. It is important to bear in mind that sentences passed some years ago, for property related offences of a certain value, may not always provide the same parity guidance in sentencing in respect of the same value of stolen goods today. Some regard must be had to the usual effects of inflation on market values of most types of property over time.
41. Further, having regard to the maximum penalty of seven years imprisonment, some consideration must be given to where on the spectrum of appropriate starting points very high value offences might fall, involving say several hundred thousand dollars or perhaps, one day, even more. With that in mind, the value here, much less than \$100,000, must sit at the low end of the mid-range.
42. Therefore, having regard to:
- (a) the maximum statutory penalty of seven years imprisonment;
 - (b) the significant value of the goods stolen of \$62,000.00;
 - (c) the fact that the offence appears to have been motivated by greed, not need;
 - (d) some degree of premeditation or planning in waiting for the complainant to leave her house and no doubt arrangements made for selling the artefacts;
 - (e) the fact that the goods have not been recovered, with some of them being irreplaceable;
 - (f) the proceeds of their sale not being recovered;
 - (g) the lack of any restitution being made or offered;
 - (h) the above comparative sentences; and

- (i) the need for specific and general deterrence,

I consider the appropriate starting point for the offence alone is imprisonment for three years.

43. However, having regard also, in this case, to the significant breach of filial trust demonstrated by the defendants and the financial and emotional harm they have inflicted on a senior member of their family, I increase the starting point to three years and six months.

Mitigating factors

44. Against that, I take into account the following mitigating factors:

- (a) the Defendants' relative youth;
- (b) their lack of any previous criminal convictions;
- (c) the theft was a one-off occurrence, with something of an opportunistic element to it;
- (d) their immediate admission upon the complainant discovering the artefacts missing, co-operation with police and plea of guilty at the earliest opportunity;
- (e) their previous good work history and character, and contributions to their church activities;
- (f) 'Ana's care for the complainant while Malakai is the sole income earner;
and
- (g) their remorse.

45. For those factors, I discount the starting sentence by one third or 14 months.

46. Further, and commensurate with the unusual feature of this case referred to above, I also take into account the extraordinary forgiveness on the part of the complainant towards her granddaughter and her husband. Given the complainant's stated desire not to have the Defendants charged, absent their pleas, it may well have been difficult for the Crown to secure convictions upon trial. That adds some

extra weight to the Defendants' early and sustained contrition. I therefore discount their sentence by a further four months, resulting in a net sentence of two years imprisonment.

Suspension

47. The final consideration then is whether to suspend part or all of that sentence.
48. In *Mo'unga*, the Court of Appeal echoed what had been stated in the earlier Court of Appeal decision of *Lausi'i and Tauki'uvea v R* [1991] TLR 55, namely, that imprisonment is inappropriate for first offenders for purely property offences unless the offence is of a particularly serious nature or there are unusual circumstances that render imprisonment necessary.
49. As noted above, Mr Tu'utafaiva submits that all of the sentence should be suspended. The Crown simply acknowledges that the Defendants may be 'entitled to a suspended sentence'.
50. As Cato J said in *Fonua*:

"The ability to suspend a sentence of imprisonment on conditions is of great assistance to a sentencing judge in Tonga because it allows a judge to tailor the sentence and may require the offender for example, in appropriate cases, to undertake remedial courses whilst living in the community when completing his or her sentence of imprisonment."
51. The guiding principles on this issue, from *Mo'unga*, are well known. The suspended sentence is intended to have a strong deterrent effect, so that if the offender is incapable of responding to a deterrent, it should not be imposed. Here, in my view, the Defendants are capable of responding to the deterrent. Further, they are young, have previous good records, fully cooperated with the authorities, and are likely to take the opportunity offered by the sentence to rehabilitate themselves.
52. I am mindful, on the other hand, as stated in *Bloomfield*, that the degree of suspension must, however, be tempered by the countervailing public interest that those who commit serious crime should serve appropriate sentences of imprisonment.

53. The Court of Appeal in *Mo'unga* also referred to other considerations including the effect on the victim. While that might usually be a matter where the impacts of the crime on the victim militate against suspension, here, the complainant's forgiving attitude throughout and the effects on her to date of the prosecution of her kin, are such that I have concerns for Mrs Po'oi's wellbeing in the event the Defendants might be required to serve prison time. Whilst clearly not a determinative factor, I do take into account in formulating the overall sentence, the desirability of an outcome which does not continue or exacerbate her suffering to date.
54. Accordingly, I consider it appropriate in all the circumstances to suspend the whole of the sentences. This, it must be stressed, is an unusual case. Rarely is the victim of a property related offence themselves related to the perpetrator. Even more rare is the level of forgiveness that has been exhibited by the victim here.
55. To eschew any perception that the Defendants may have 'gotten off lightly', the suspended sentence will be fortified and balanced by appropriate conditions to ensure the deterrent effect on the Defendants and any within the community who may be unwise enough to consider this type of offending in the future.

Result

56. The Defendants are each sentenced to imprisonment for two years, fully suspended for a period of two years, and on the following conditions:
- (a) they shall not commit any offences punishable by imprisonment during the period of the suspension;
 - (b) they shall be placed on probation during the period of the suspension;
 - (c) they shall report within 48 hours to the offices of the Probation Service at Fasi for registration;
 - (d) they shall each perform 100 hours community work on such days and times as directed by the Probation Service, with such work to include, so far as reasonably practicable, repairs, maintenance or improvements to the complainant's property; and

(e) they shall attend a Salvation Army Life Skills course under the direction of the Probation Service.

57. This result may be viewed as an example of the maximum leniency the court can responsibly allow while still balancing other competing considerations and community expectations in the sentencing process for a significant theft. It should not be interpreted as a precedent for future cases involving substantial sums which offenders might wish to rely upon in support of a plea for full suspension. As stated, this is an unusual case, with extraordinary family factors at play. But for the love and forgiveness shown by the complainant, and the likely further adverse impact on her if the Defendants were sent to prison, they would surely be serving a substantial portion of the head sentence imposed in prison.

58. Should either of the defendants fail to comply with the above conditions, a similar result may obtain.

NUKU'ALOFA
18 November 2019




M.H. Whitten QC
LORD CHIEF JUSTICE