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*DPP
Crown Law*

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

CR 316 of 2020

BETWEEN: R E X

-Prosecution

AND: LOLINA 'OFA

-Accused

SENTENCE

BEFORE : JUSTICE LANGI

Counsel : Mrs. 'Eliesa for the Crown Prosecution
The Accused In Person

Date of Sentence: 29 January, 2021

1. On 17 December 2020 the Defendant pleaded guilty to the following offences:
 - a. 1 count of theft contrary to section 143 (b) and 145 (b) of the Criminal Offences Act;
 - b. 3 counts of forgery contrary to section 170 (1) (a), (2) (b), 3 (a) and (4) of the Criminal Offences Act;
 - c. 3 counts of knowingly dealing with forged documents, contrary to section 172 of the Criminal Offences Act.
2. The Defendant is 24 years of age. She was customarily adopted by her maternal uncle and his wife since she was 11 years old.
3. The Defendants' adoptive parents looked after a business belonging to her adoptive mothers' brother, Sonatane Hafoka, who lives in Australia. The business is known as "Lyfe Apparel and Signage" and the main office for the business is located inside the residence where the Defendant and her adoptive parents lived.
4. The business has an account with the BSP bank and the cheque book is kept inside the business office.

5. On different occasions between the month of September 2019 to April 2020, the Defendant took the cheque book and filled in the details and the amounts to be withdrawn then forged Mr. Hafoka's signature. She would then go to the BSP bank and submit the cheques and cashed out the amounts she had written on them and deposit the money into her own bank account. A total of 43 cheques were cashed by the Defendant amounting to \$18,189.60.
6. During this time, the owner of the business was still in Australia. He noticed the irregularities in the account and subsequently contacted the BSP bank. He was informed by the Bank that it was the Defendant who had cashed the cheques and had deposited the money into her account.
7. Mr. Hafoka lodged a complaint with the Police. When the Defendant was arrested and charged she made a full confession and told the police that she had used the money for her own personal needs.
8. By the time the Defendant was arraigned, her natural parents had already started to make payments to the bank and had arranged with the bank that they will pay \$500 every month until the total of the money stolen was paid in full. The bank had reimbursed Mr. Hafoka of the money taken by the Defendant and they agreed to the arrangement for the Defendant and her parents to pay back the money to the bank.
9. The Crown submits that the aggravating factors in this case are as follows:
 - a. The Defendant's actions were premeditated;
 - b. The Defendant was in a position of trust and had breached that trust;
 - c. Mr. Hafoka or the Complainant suffered financial loss of \$18,189.60;
 - d. The offending occurred because of the Defendant's wish to gain financial benefit for herself;
10. The Crown submits the following as mitigating factors:
 - a. The Defendant is a first-time offender;
 - b. She co-operated with the Police in their investigation;
 - c. She pleaded guilty at the earliest available opportunity. Before she was arraigned she had approached the Attorney General's Office to inform them that she will plead guilty to the charges;
 - d. The Defendant is remorseful and accepts the consequences of her actions;
 - e. The family is currently repaying the BSP for the amount of money she took.
11. The Crown submitted three comparable sentences to assist me in deciding the sentence in this case:
 - a. *Rex v Ilona Maria Ika* CR 187/2020 Unreported – The Defendant in this case was 27 years old and worked at the ANZ bank. On 9 different occasions she withdrew a total of \$18,000 from

a client's bank account. She was charged with theft. She pleaded guilty on arraignment, was a first-time offender and had made full restitution of the money she stole. Lord Chief Justice Whitten set a starting point of 2 years imprisonment. For the mitigating factors 12 months was deducted from the starting point. His Honour was of the view that the Defendant was a good candidate for rehabilitation and therefore suspended 6 months. The Defendant was to serve the remaining six months.

- b. *Rex v Semisi Fakava* CR 179/2020 Unreported – The Defendant was charged with two counts of forgery and 2 counts of knowingly dealing with forged documents and 1 count of obtaining by false pretence. The Defendant had forged cheques amounting to approximately \$700. The cheques belonged to his parents. The mitigating factors were his early guilty plea and had taken steps to repay the money he stole. The Defendant also registered and entered the Sia'atoutai Theological College in an attempt to turn his life around. In those circumstances, Cato J sentenced the Defendant on a bond of good behaviour under section 198 of the Criminal Offences Act, for a period of 15 months on conditions.
- c. *Rex v Sailosi Vea Finau* CR 146/2019 Unreported) – The Defendant was 29 years of age and pleaded guilty to one count of theft. In separate occasions, he had withdrawn a total of \$11,044 from his adopted father's bank account with the Tonga Development Bank. He had no previous convictions and was sentenced by Cato J to 18 months imprisonment, fully suspended on conditions.

- 12. The Crown submits that in light of the comparable sentences above, an appropriate starting point in this case is 2 years imprisonment which should be reduced by 6 months for the mitigating factors of early guilty plea, cooperation with the police and lack of previous conviction.
- 13. The Crown also submits that some suspension should be given in accordance with the principles set out in *Mo'unga v R* [1998] TLR 154 as the Defendant is still relatively young, is a first offender and there is a high chance that she can be rehabilitated.
- 14. From the pre-sentence report, the Defendant had lived with her natural parents at Ha'apai up until she was 11 years old. She then travelled to Tonga to live with her mother's brother at Tokomololo. It was then that her uncle and his wife customarily adopted her. She helped her adoptive parents take care of the Complainant's business which was operated from their home at Tokomololo.

15. The Defendant was fairly educated, having reached Form six at the Liahona High School. She is an active member of the Mormon church where she is tasked with being the choir conductor and youth leader.
16. She was trusted by her adopted parents to deliver cheques to customers and to make deposits and withdrawals from the bank. She would also pick up goods sent from the Complainant in Australia for the operation of the business.
17. The Defendant told the probation officer that the offending commenced when she began dating her boyfriend. She would then forge the cheques and cashed the money to cater for her boyfriend's expenses and also for her own needs. She told the officer that in her mind she knew what she was doing was wrong but believed that if her uncle found out he would forgive her because he is her 'fa'etangata' (uncle).
18. However, when her adopted uncle found out about what she did, he broke off all ties with the Defendant and demanded that his sister and her husband remove the Defendant from his house. As a result, the Defendant had to leave the house and went to live with her biological sister who also lived at Tokomololo.
19. She told the probation officer that she has now gone through the process of the court and has not only brought shame upon herself and her family but her actions have also ruined the relationship she had with her adopted family.
20. The probation officer called and talked to the Complainant who is still in Australia and he informed the officer that he has forgiven the Defendant and that they have made amends. He believes that she is genuinely remorseful and he is happy that the Defendant and her biological parents are paying the money back to the bank.
21. The Defendant is currently unemployed and relies solely on her natural parents.
22. The probation officer stated that the Defendant is considered to be a low risk offender and has expressed remorse for her actions. She was young and naïve but is now more mature and responsible and has learnt her lesson.
23. The probation officer recommended a fully suspended sentence on conditions that the Defendant undertake community service and to be placed on probation during the term of suspension.
24. Attached to the pre-sentence report were three references, from the town officer of Tokomololo, the District Officer of Vaini, the church Bishop and also a letter from the Defendants natural parents who

are in Ha'apai. All the letters except the letter from her parents, state that the Defendant is a reliable and trustworthy young lady and is active in community and church activities.

25. The letter from her parents' state that the child had grown up as a happy and active person. They had not seen their child for over 16 years since she left to live with her uncle. However, the natural parents state that after the incident, the child was returned to them. They compare the return of their child to that of the return of the prodigal son and all they could do was to counsel her and to make her feel loved despite what she did. They believe that the Defendant is truly remorseful for her actions. They ask for the courts leniency in respect of their child.
26. An email from the BSP bank to Crown counsel was forwarded to the court to confirm that the Defendant has repaid a total of \$3000 to the bank. As stated above, her natural parents will continue paying \$500 every month until the balance is cleared.
27. In my view, the circumstances of this case are similar to the circumstances in *Finau* (supra). The Defendant in that case had taken a total of \$11,044 from his adopted father's bank account on separate occasions. He was sentenced to 18 months imprisonment but fully suspended on conditions. The only distinctions between *Finau* and this case is that the amount of money taken in this case is slightly higher (\$18,189.60).
28. The *Ika* case above is also relevant as it too involved taking money from a bank account without authorisation over a period of time. The amount of money stolen amounted to a total of \$18000 which is similar to the amount taken by the Defendant in this case. The mitigating factors in *Ika* included her early guilty plea, full reparation, remorse and lack of convictions. The starting point of 2 years imprisonment was reduced by 50% for the mitigating factors resulting in a sentence of only 12 months. Despite the mitigating factors however, the Lord Chief Justice Whitten was of the view that a full suspension was not appropriate as it would not provide an effective deterrent to others in similar positions of trust who may be tempted to breach that trust and steal from those to whom that trust is owed. As a result, he ordered a partial suspension of six months on conditions and the Defendant was to serve the remaining six months imprisonment.
29. In light of the authorities submitted, I agree with the Crown that an appropriate starting point in this case is 2 years imprisonment for the count of theft which is the head sentence in this case. The Crown had submitted that the forgery should be the head sentence but I see no difference as the maximum penalty for both is 7 years imprisonment.
30. For the mitigating factors of early guilty plea, having no previous convictions and showing remorse I reduce the starting point by six months.

31. On account of having paid \$3000 to the bank and making the effort to continue repayments until the debt is cleared, I reduce the sentence by a further three months. The balance is therefore 1 year and 3 months imprisonment for Count 1.
32. On the three counts of forgery the Defendant is sentenced to 12 months imprisonment for each count and all concurrent to Count 1;
33. On the three counts of knowingly dealing with a forged document the Defendant is sentenced to 6 months imprisonment on each count and all concurrent to Count 1;
34. I turn now to the question of whether to suspend the sentence in part or in full. I have considered the principles set forth in the case of *Mo'unga v Rex* [1998] TLR 154 and I believe that the circumstances in this case favour a full suspension.
35. I note that in *Ika* his Honour had only partially suspended the sentence for theft of a similar amount of money. However, an important distinction with the circumstances in *Ika* is in my view, the level or degree of trust that was on both Defendants. The breach of trust in *Ika* was much more serious because she was employed by the bank and had an obligation to clients of the bank to keep their money safe. In the current case, the Defendant was not employed by the bank neither was she employed by her adopted uncle but rather she was trusted by her adopted parents who did not think that she would unlawfully withdraw money from the business account. She had access to the cheque only because she lived at the residence where the business office was situated.
36. Additionally, in *Ika*, the Defendant continued to deny the charges when put to her firstly by the bank and later by the police and argued that it was actually the customer who had come to the bank to ask for her help to withdraw the money. The fact that she kept denying the charges indicated a lack of remorse.
37. In the current case, the Defendant had confessed to what she had done when she was confronted by the police. She had personally gone to the Attorney General's Office before her matter was even called in court to inform counsels that she intends to plead guilty to all the charges;
38. Additionally, I note from the Defendants explanation to the probation officer, in her mind she was just using her "fa'etangata's money" and she believed that he will forgive her if he found out. This is particularly important when considering the Tongan culture and the rank or status of the mother's brother in the traditional Tongan family. The mother's brother or "fa'etangata" is inferior to his sister and her children and the saying goes that your "fa'etangata" is the only person you can do whatever

you wish with and take whatever you want from. Nowadays only some families still practice this and accept it whilst others reject it. I believe the Defendant had mistakenly believed that this idea of taking whatever you want from your fa'etangata would be applicable in her case but unfortunately the Complainant did not share her logic. I believe it was made more difficult in this case because the adopted 'fa'etangata' or uncle of the Defendant was not related to her by blood.

39. Although this does not in any way excuse the Defendants behaviour, but it does in my view, reduce to some extent, the seriousness of what she had done compared to the authorities discussed above. As such, I suspend the sentence in whole upon conditions set out below.
40. Accordingly, I convicted the Defendant and sentence her as follows:
 - a. Count 1 – 15 months imprisonment;
 - b. Count 2 – 12 months imprisonment;
 - c. Count 3 – 12 months imprisonment;
 - d. Count 4 – 12 months imprisonment;
 - e. Count 5 – 6 months imprisonment;
 - f. Count 6 – 6 months imprisonment;
 - g. Count 7 – 6 months imprisonment;
41. Counts 2 -7 are to be served concurrent to Count 1;
42. The sentence is fully suspended for 1 year on the following conditions:
 - a. The Defendant is not to commit any offence punishable by imprisonment for the period of her suspension;
 - b. The Defendant is placed on probation for the period of his suspension;
 - c. The Defendant is to undertake and complete the Salvation Army Life Skills program;
 - d. The Defendant is to complete 80 hours of community service under the direction of the Probation office and to report to the Probation office by Monday 1 February 2021.

NUKU'ALOFA: 29 January 2021

