

REX
-v-
TONGA SOANE

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mr F. Samani for the Prosecution
Mr V. Mo'ale for the Accused
Date: 1 April 2021

The charges

1. In this matter, after a three day trial in February 2021, the Defendant was found guilty on three counts of uttering counterfeit currency, contrary to s 61 of the *Criminal Offences Act*.

The offending

2. On the evening of 6 December 2019 and early hours of the 7th:
 - (a) The Defendant paid \$50 to the Telekava petrol station for fuel (count 1). The attendant noticed that the note was counterfeit and that the Defendant took it from a bundle of about 30 identical notes.
 - (b) He then purchased beer at the Reload Bar by tendering three \$50 notes (count 2). When challenged by the bar attendant for not using the change she gave him on his earlier purchases, the Defendant went to another bar. Those notes, among others, were later identified as being counterfeit through assessment by the Reserve Bank.

- (c) He then ordered food from the Talahiva Restaurant for which he gave the cashier a \$100 note. She immediately identified it as counterfeit. She confronted the Defendant about it and gave him back the \$100 note. He took the note and left. The Defendant claimed that the fake note must have been given to him from the previous shop he was at. That explanation was rejected at trial.
 - (d) The Defendant then hired a taxi to drive him around Tongatapu. He gave the driver three \$100 notes for the hire (count 3). The manager of the taxi base immediately identified the notes as being counterfeit. She sent the taxi driver to report the matter to the police. That started a broader investigation which culminated in the Defendant being charged.
3. The Defendant later paid each of the complainants the same amounts in genuine currency. He told police he wished to do so because he did not want any debts to anyone. That explanation belied his apparent defence at trial that all the notes he gave on the night in question were genuine.

Crown's submissions

4. The Crown submits the following as aggravating features:
- (a) the Defendant has shown no remorse;
 - (b) he did not co-operate with Police;
 - (c) the denominations involved were \$50 and \$100 notes;
 - (d) the total amount of counterfeit currency was \$500;
 - (e) the two denominations contained identical serial numbers, strongly suggesting that they came from a single source;
 - (f) count two was committed for financial gain; and
 - (g) the offences were planned, thereby demonstrating an intention to break the law.

5. The Crown submits the following as mitigating features:
 - (a) the Defendant is a first time offender; and
 - (b) he has repaid the value of the currency uttered to the complainants.

6. The Crown relies on the following comparable sentences:
 - (a) *R v Ali* CR [2008] Tonga LR 257 – two offenders pleaded guilty variously to possessing counterfeiting material, making a total of \$600 in counterfeit currency and uttering it. They were sentenced to 2 years' imprisonment for the making and 18 months for the uttering, to be served concurrently. One had no previous convictions, for which, the final 6 months of his sentence was suspended for 2 years from release.
 - (b) *R v Howard* (A.F.) (1986) 82 Cr. App. R. 262, CA – the offender, who had no previous convictions pleaded guilty to having custody of counterfeit currency and tendering a fake £20 note. It appeared he had in his possession, at one time or another, about £3,000 worth of such notes. The maximum penalties prescribed by UK legislation at the time included 10 years' imprisonment. A sentence of 2 years' imprisonment was upheld on appeal.

7. In this case, the Crown submits the following formulation as an appropriate sentence:
 - (a) the head offence is count 3;
 - (b) a starting point for that count of 3 years' imprisonment;
 - (c) reduced by 3 months' for mitigating factors, resulting in a sentence of 2 years' and 9 months' imprisonment;
 - (d) 18 months' imprisonment for each of counts 1 and 2, to be served concurrently with the sentence for count 3; and
 - (e) the final 9 months suspended for 9 months from the date of release.

Defendant's submissions

8. Mr Mo'ale submitted that by reason of:
- (a) the Defendant being a first time offender;
 - (b) his previous good character;
 - (c) the restitution paid to the complainants;
 - (d) the Defendant operating a registered non-profit charity centre for the poor and unattended elderly people in Tonga which:
 - (i) is a great asset to the state and community;
 - (ii) is funded partly by the Defendant selling food; and
 - (iii) will be put in a difficult position if the Defendant is required to serve a custodial sentence,
- any sentence imposed should be suspended on conditions including community service.

Presentence report

9. Relevantly, the presentence report recorded the following. The Defendant is 57 years of age. After his schooling, he joined His Majesty's Armed Forces, where he served in Samoa. He married, and had three children, all of whom are now adults. He and his family emigrated to New Zealand. In the early 1990s, the Defendant was convicted of rape and sentenced to 5 years imprisonment. Upon his release, he was deported to Tonga. In 1999, he was convicted of theft, and sentenced to 3 years imprisonment.
10. Following his release, he became involved in the Loving Heart of Good Samaritan Centre, a charity which was originally designed to support hospital patients and prisoners and has more recently been devoted to helping the elderly and disabled. Through a process of attrition, the defendant has ended up being the sole operator and manager of the centre. One of the interviewees was said to be reluctant to recommend the Defendant because of his attitude towards sexual abuse of women

which was described as the reason his wife returned to New Zealand. The Defendant's main source of income is selling food and fruits throughout Tongatapu. He is said to earn an average of \$1,000 per week which he spends mostly on his elderly clients and other operating expenses including the salaries of four employees.

11. In relation to the offending, the probation officer reported that the Defendant accepted the Court's decision but still maintained his innocence. He asks the Court for leniency and mercy mainly because of the needs of the elderly persons who depend on him. The probation officer noted that during his interview, the Defendant said "*he paid all the alleged amount that he owed in the offences*" which indicated to the probation officer that the Defendant knew that what he did in respect of the offences was wrong. The Defendant has not shown any remorse, nor does he regret what he did. The probation officer therefore recommended that any sentence of imprisonment to be imposed be only partly suspended.

Starting points

12. Section 61 provides a maximum sentence of five years imprisonment.
13. In *Ali*, *ibid*, Ford CJ observed:

"[4] Offences of this nature involving counterfeit notes of the Realm are always regarded by the courts very seriously. Except in the most exceptional cases (and this is not one of them) a custodial sentence is called for in all cases involving the production or passing over of forged banknotes.¹

[5] Your particular offending did not go on for very long and it did not result in a very large production of counterfeit notes but, as I have indicated, the only reason for this was because you had been caught fairly early in the piece. Nevertheless, as I have indicated, the offence is the type of crime which the Court must meet with a sentence of imprisonment in order to deter others from seeking to follow your example.

[6] Shopkeepers and other businesspeople find it difficult enough already running honest businesses without having the additional hassle of having to check in relation to each sale of goods whether banknotes are genuine or forgeries. Counterfeiting is recognised as a major problem in many Third World

¹ Similarly stated by Justice Hutcheon in *R. v. Berntsen* (1988) B.C.J. 1180.

countries. We do not want to see it become a problem in the Kingdom. I have seen the counterfeit notes involved in this case. They look fairly genuine and the store proprietor did well to pick them as forgeries."

14. By contrast, in the instant case, the notes uttered by the Defendant, and which were tendered during the trial, were described in the verdict [53] as a 'patently amateurish attempt', which was discovered quickly by all those who examined them.

15. Nonetheless, as Lord Lane observed in *Howard*, *ibid*:

"... the issue of counterfeit notes undermines the whole economy of the country and is likely to result in great loss being sustained by innocent people who find themselves in possession of these notes only to discover that they are worthless. It follows therefore that this type of offence is one which inevitably, in nearly every case, will require a custodial sentence."

16. The requirement for a custodial sentence is driven principally by deterrence, more so than in many other offences. For as McEachern CJ said in *R v Le* (1993), B.C.J. 165, counterfeiting:

"... requires premeditation and planning and is driven entirely by greed."

17. Here, I have no doubt that the Defendant premeditated and planned the offending and was driven entirely by greed. There is no suggestion that any of the counterfeit currency was intended for use in supporting his charitable centre. On the night in question, he used it entirely for his own pleasure including the quite ridiculous indulgence of hiring a taxi to drive him around Tongatapu in the middle of the night. Whilst count 4 in the indictment was ultimately withdrawn by the Crown, due to its inability to locate the taxi driver who was the subject of that count, and who has since emigrated to New Zealand, it is notable that the background narrative to the Crown's case in that regard included the Defendant paying the taxi driver \$300 to drink alcohol with him during the drive.

18. I accept the Crown's submission, informed presumably by comparison of the different amounts involved in each of the proved counts, that count 3 (\$300) should be regarded as the head offence for the purpose of sentencing.
19. Having regard to the seriousness of the offending, the comparable sentences and principles referred to above, the amount involved, the necessary premeditation, the fact that the currency was used to fuel a night out of indulgence at a number of different venues, the hapless attempts by the Defendant to persuade police of his innocence when interviewed by giving accounts which ultimately contradicted themselves (as discussed in the reasons for verdict), and the lack of remorse, I set the starting point for count 3 at two years' imprisonment.

Mitigation

20. I accept, through his own admission to the probation officer, that the Defendant has previous, albeit old, convictions for a serious sexual offence and dishonesty, both of which resulted in significant terms of imprisonment here and in New Zealand. However, if that be the extent of his criminal activities, the Defendant has been out of trouble with the law for almost 20 years. In that time, he has become deeply involved in charitable work. I consider those to be significant matters in mitigation.
21. So too is the fact that the Defendant has paid restitution or compensated each of the complainants. In *Kaufusi v Rex* [2014] TOCA 17,² an appeal involving other dishonesty offences, the Court of Appeal stated:

"[26] It is important that there is a meaningful allowance when recompense of losses is made. It demonstrates a desire to atone and of course lessens the impact of the crime on the victim. If adequate allowance is not routinely made, there is also the concern that the incentive to make reparation will be reduced."

22. Unfortunately, as noted in the reasons for verdict [88], I am not persuaded that the Defendant's compensation of the complainants at the time demonstrated a desire

² Referred to in *R v Ika* [2020] TOSC 89 at [23].

to atone for his crimes, but rather an attempt to exonerate himself by continuing to pretend that he did not know that the notes he originally gave were counterfeit. That again was belied by his position at trial, through his counsel, that all the notes he paid with on the night in question were genuine.

23. On account of his relatively long period free of criminal activity, his charitable works, and his compensation to the complainants, I reduce the starting point on the head count by one third or 8 months, resulting in a sentence of 16 months' imprisonment.
24. By way of parity with the values in counts 1 and 2, the Defendant is sentenced on those counts to 8 months and 12 months' imprisonment respectively. All sentences are to be served concurrently.

Suspension

25. On the considerations discussed in *Mo'unga* [1998] Tonga LR 154 at 157, the Defendant is not young, he did not co-operate with the Police and his previous convictions do not weight in favor of suspension. I see no other factor which diminishes his culpability.
26. The submission on behalf of the Defendant that if he is required to serve a custodial sentence, those who depend on him for care will suffer, is, unfortunately, akin to the 'breadwinner plea'. The Courts have repeatedly explained that such a consideration attracts very little weight and '*is not, and is rarely likely ever to be, on its own, a proper reason for suspending a sentence*'. For a detailed discussion, see *R v Wolfgramm* [2020] TOSC 78 at [46] to [49]. In short, any suffering experienced by the elderly for whom the Defendant has been caring will be a direct result of his decision to commit crime in order to satisfy his own greed.
27. Further, full suspension in a case such as this will not serve the particularly important sentencing objective of specific and general deterrence.
28. However, taking into consideration the Defendant's long period free of criminal activity, and the hope that his dedication to charitable work and those who depend

on him, will be sufficient impetus for him to embrace any opportunity for rehabilitation, I am prepared to suspend the final four months of the sentence, on conditions. Subject to compliance with those conditions, the net result is that the Defendant will be required to serve 12 months' imprisonment.

Result

29. The Defendant is convicted of uttering counterfeit currency and sentenced to:
- (a) 8 months' imprisonment on count 1;
 - (b) 12 months' imprisonment on count 2; and
 - (c) 16 months' imprisonment on count 3.
30. All terms are to be served concurrently.
31. The final four months of the head sentence is to be suspended for a period of 12 months from his release on condition that during the said period of suspension, the Defendant shall:
- (a) be placed on probation;
 - (b) report to the probation office within 48 hours of his release; and
 - (c) undertake such life skills or other courses as his probation officer directs.
32. I order that the counterfeit currency the subject of this proceeding be destroyed.

NUKU'ALOFA
1 April 2021



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC
LORD CHIEF JUSTICE