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

CR 47 of 2020

REX
-v-
MALIA SELUPE

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mr T. 'Aho for the Prosecution
Mr S. Tu'utafaiva for the Defendant
Date: 9 April 2021

Background

1. The Defendant was charged with five counts of obtaining money by false pretenses, contrary to s 164 of the *Criminal Offences Act*. Upon her arraignment, she pleaded not guilty to all counts. Her trial commenced on 19 November 2020. The trial was adjourned part heard and resumed again on 26 February 2021. At the conclusion of the Crown's case, the Defendant elected to give evidence. At the conclusion of her evidence, Mr Tu'utafaiva conferred with the Defendant, following which, she was re-arraigned and pleaded guilty to all five counts.

The offending

2. At the relevant time, the Defendant operated a car dealer business called "Tavatu'utolu Motors". She held the business out as being able to import motor vehicles from Japan through online bidding and sales.
3. Between May 2016 and August 2017, the Defendant received a total of \$59,950 from four complainants for the purchase of motor vehicles.¹
4. None of the vehicles ordered ever arrived in Tonga. At the time, the Defendant gave the purchasers a raft of different excuses mostly concerning difficulties

¹ \$20,300 from Lisiate Tiki Lonitenisi (count 1); \$16,850 from Loleini Tu'ineau (count 2); \$13,000 from Tiane Fatai (counts 3 and 4); \$9,800 from Paipule Fehoko (count 5).

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with or delays caused by the supposed Japanese supplier. Despite assurances to some of the purchasers that they would receive refunds, none eventuated.

5. When she was interviewed by police, the Defendant chose to remain silent.
6. During the trial, a number of features of the Defendant's modus operandi emerged. Firstly, none of the moneys received by the Defendant were ever deposited, either at all or in full, into either her personal or the business bank accounts. Secondly, the documents relied upon by the Defendant as evidence of her endeavours to procure the vehicles from Japan were either incomplete or for vehicles other than those ordered by the complainants. Thirdly, the evident deficiencies in the Defendant's paperwork for each transaction were sought to be explained by her as having been lost in Cyclone Gita or that, despite her repeated requests, her bank had still not retrieved the documents from archives. Fourthly, there was no, or no satisfactory, evidence adduced to prove any alleged statements by the Japanese supplier to the Defendant as asserted by her. Fifthly, in the face of express terms printed on the purchase documents she did adduce from the Japanese supplier, albeit not for the vehicles ordered by the complainants, to the effect that the given vehicle would not be dispatched until payment in full, the Defendant asserted that she had a different agreement with the supplier which allowed her to pay the balance of the purchase price after the vehicle arrived in Tonga. Again, not one skerrick of documentary evidence to support that assertion was ever produced. Sixthly, it was clear that the Defendant used the money, often in cash, mostly for her own purposes. Her attempted explanations that it had all been spent (along with other amounts received from other customers) on business expenses was never substantiated. Seventhly, even during the first period of the trial, the Defendant maintained that she had had recent contact with the Japanese supplier who assured her that the vehicles were on their way (more than three years after their purported purchase), none of which was documented. Eighthly, upon the resumption of the trial this year, and after confirming yet again that none of the vehicles had arrived in the interim, the Defendant, through her counsel, stated in open court that her husband would surrender 'part of a tax allotment' to raise funds to repay the complainants and would do so within the next two weeks. As her subsequent statements to the probation officer and her

counsel referred to below reveal, that assurance too has not been honoured.

Crown's submissions

7. The Crown submits the following as aggravating features of the offending:
 - (a) the Defendant was in a position of trust which she breached;
 - (b) the offending was calculated and deliberate;
 - (c) the Defendant's actions were highly deceptive and dishonest;
 - (d) she misappropriated a total of \$59,950;
 - (e) there are four complainants;
 - (f) the Defendant may be characterized as a 'con-woman', from whom the public should be protected;
 - (g) she repeatedly lied and preyed on the emotions of the complainants over the past four years by promising that they would receive their vehicles or their money back; and
 - (h) she has shown no remorse.
8. The Crown submits the following as mitigating features:
 - (a) very late guilty plea; and
 - (b) no previous convictions.
9. The Crown relies upon the following comparable sentences:
 - (a) *Mo'unga v Rex* AC 15/1997 – The appellant and co-offender pleaded guilty to one count housebreaking and one count of theft of goods worth \$11,568.96. They were sentenced to 4 years' imprisonment for count one and 2 years' imprisonment for the theft, to be served concurrently. The Court of Appeal stated, relevantly, that "imprisonment for a purely property offence is not appropriate, unless there are unusual circumstances that render imprisonment necessary." The sentence was upheld.
 - (b) *'Anaseini Kolomalū* CR 115/11 – The Defendant pleaded guilty to embezzlement and theft of a total of \$21,051.20. None of the funds were repaid. The accused was 28 years old. She fully co-operated with the

police, pleaded guilty early and was a first time offender. Due to the breach of trust, the systemic nature of the offending and the sum involved, the head sentence was 18 months' imprisonment, fully suspended for a period of 2 years on conditions.

- (c) *Mo'ui Loketi & Ors* CR 06, 08, 09, 10/13 – the Defendant was convicted of embezzlement of \$41,301.03 and forgery. He was sentenced to 2 years and 8 months' imprisonment backdated to the commencement of his remand in custody. The final 9 months' was suspended for 2 years on conditions. The sentence was upheld on appeal.
- (d) *'Anasitasisi To'a* CR 7/13 – the Defendant was charged with embezzlement, falsifications of accounts and theft of a total of \$25,208.03. He was sentenced to 2 years' imprisonment with the last 9 months suspended for 12 months on conditions.
- (e) *Salote Latu* CR 5/13 – the Defendant was charged with embezzlement, falsifications of accounts and theft of \$15,141.69. Cato J sentenced her to 2 years' imprisonment with the final year suspended for 12 months on conditions.
- (f) *Manuele* CR 141/15 – the Defendant pleaded guilty to 6 counts of embezzlement totaling more than \$12,000. A starting point was set of 18 months' imprisonment, reduced by 9 months' for mitigation and the remaining 9 months was fully suspended on conditions.
- (g) *Lesieli Halafihi* CR 31/18 – the Defendant was convicted of serious fraudulent conversion of \$71,500. The maximum sentence for that offence was 10 years. Cato J imposed a starting point of 4 years' imprisonment which was reduced by 9 months for mitigation.
- (h) *Heuifanga Vea* CR 12/2018 – the Defendant was convicted of embezzlement of \$80,000 from her employer. She paid back \$10,000. She was sentenced to 3 years' and 3 months' imprisonment, with the final 9 months suspended on conditions.
- (i) *Stephanie Cocker* CR 3/13 – the Defendant pleaded guilty to

embezzlement, falsification of accounts and theft involving \$99,450. She was a first time offender, married with a child, had a good education and was in a senior position. She was sentenced to 3 years' imprisonment (from a starting point of 4 ½ years). The final year of her sentence was suspended on conditions.

10. Here, the Crown submits that imprisonment is warranted and that any discount for the Defendant's very late guilty plea should be no more than 5.5% of the starting points.² From that, the Crown's submissions on the appropriate sentences may be summarized as follows:

Count	Starting point	Mitigation	Sentence
1	30 mths	1 mth 3 wks	28 mths 1 wk
2	24 mths	6 wks	22 mths 2 wks
3			3 mths (concurrent with count 4)
4	18 mths	1 mth	17 mths
5	14 mths	3 wks	13 mths 1 wk

11. The Crown then submits that taking into consideration the totality of the offending:
- the head sentence is count 1;
 - 18 months of count 1 be applied to the overall sentence; and
 - a further 14 months from count 2 be cumulative to count 1; and
 - a further 12 months from counts 3 and 4 be cumulative to counts 1 and 2; and
 - a further 10 months from count 5 be cumulative to counts 1 to 4,
- resulting in an overall sentence of 54 months or 4 ½ years' imprisonment.
12. On the question of suspension, the Crown submits that due to her lack of previous convictions, the Defendant is entitled to some suspension of her sentence, but no more than the final 6 months.³

Defence submissions

² Compare *R v Emilio To'a* (CR 128 of 2018, 14 June 2019) where the Crown submitted and Paulsen LCJ accepted a reduction of 12.5%, although his Honour described that as a 'generous allowance'.

³ The Crown originally submitted that no part of the sentences should be suspended. It subsequently filed a correction which acknowledged that due to the Defendant's lack of previous convictions, some suspension is warranted.

13. Mr Tu'utafaiva submits that:
- (a) the Crown's starting points are within range and therefore not disputed;
 - (b) however, by reference to the three highest quantum comparable sentences referred to by the Crown, the overall sentence of 4 ½ years is excessive;
 - (c) when imposing the sentences cumulatively, an overall sentence of 3 to 3½ years' imprisonment would be appropriate; and
 - (d) on 31 March 2021, the Defendant indicated that the full amount of \$59,950 would be ready by sentencing, and that he would advise the Court if and when the money is ready. In that latter event, the Crown submits that the Defendant should be entitled to a further reduction of 6 months.
14. On the issue of suspension, Mr Tu'utafaiva points to the Defendant being 33 years of age, married with five children ranging from 10 to almost 2 years of age, that she has no previous convictions and that she is likely to take the opportunity offered by a suspended sentence to rehabilitate herself, as warranting suspension of part of her sentence.

Pre-sentence report

15. In addition to that which has been referred to above, the presentence report provides the following information. The Defendant is the youngest of 6 children. She was raised in a good family. Both her parents have passed away. She completed form 6 at Tonga High School. She has had a good employment history since 2006 until 2016 when she established Tavatu'utolu Motors. She is now unemployed. Her husband is the sole breadwinner for their family while the Defendant is mainly responsible for the care of their children.
16. The probation officer described the Defendant as being of good character in the community and opined that there is no likelihood of her re-offending. In relation to the offending, the Defendant told the probation officer that she is remorseful and that she plans to repay the complainants in full. On that basis, the officer recommends that such restitution, if it occurs, be taken into consideration and that the Defendant be placed on probation during any period of suspension, if

offered by the Court.

Starting points

17. Section 164 provides that every person who by any false pretence obtains for himself or for any other person any money, valuable security or other thing whatever shall be liable to the same punishment as if he had committed theft. Section 145(b) of the Act provides a maximum penalty for theft over \$10,000 of 7 years' imprisonment. Most of the comparable sentences relied upon by the Crown concerned embezzlement for which s.158 also provides a maximum penalty of 7 years' imprisonment
18. In *Mo'unga* [1998] Tonga LR 154 at 156 the Court of Appeal stated:⁴

"... imprisonment for a purely property offence is not appropriate unless there are unusual circumstances that render imprisonment necessary."
19. In *Kolomalu* [2012] TOSC 25, it was observed that:

*"The principles that apply to this kind of offending involve deterrence and denunciation or condemnation of such offending.... It is this factor which in my view means that I have to impose a sentence of imprisonment. There are no cases which set a tariff in this area and they vary greatly, I do not overlook cases which state that ordinarily offenders who steal property and the like should not go to prison if they are first offenders...I consider that the factors of trust, and the amount of money involved and systematic offending take the matter out of this category. Indeed, in *Filila Havilii v Rex AC no 02/201* the Court of Appeal considered that ordinarily it is appropriate for an offence of dishonesty and trust to receive a custodial sentence."*
20. In the present case, the premeditated and systematic nature of the Defendant's operation in taking advantage of the four complainants over a period of 14 months, her breaches of trust, her repeated dishonesty in lying to the complainants after they had handed over their money, the overall quantum of the moneys obtained and the failure, despite repeated promises, to make any restitution are, in my view, circumstances which render imprisonment necessary. Mr Tu'utafaiva did not submit otherwise.
21. By comparison, primarily, with the various amounts the subject of the comparable sentences, I consider the following starting points to be

⁴ Affirmed recently in *Valikoula v R* [2021] TOCA 5.

appropriate:

- (a) Count 1: 24 months;
- (b) Count 2: 20 months;
- (c) Counts 3 and 4 combined: 16 months; and
- (d) Count 5: 12 months.

22. The next issue is whether the sentences are to be served concurrently, or, as the Crown submits, cumulatively in part. Ordinarily, cumulative sentences should only be imposed if the offences are viewed as separate crimes⁵ or are unrelated.⁶
23. As discussed recently in *R v 'Asa* [2020] TOSC 72, the question involves two issues: first, whether the offences were so closely connected that they should be regarded as part of the one course of criminal activity; and secondly, whether in any event, the totality principle requires the sentences to be made, wholly or partially, concurrent.
24. In my view, the Defendant's dealings, over a period of some 14 months, with each unrelated complainant, constitute separate crimes. Prima facie, therefore, the sentences should be served cumulatively. By linear addition, the total of the starting points is 72 months or 6 years imprisonment.
25. The totality principle requires the court to have regard to the totality of the offending, particularly where the offences are a series of related offences.⁷ According to the principle, a court, which has correctly fixed a series of consecutive sentences as the appropriate periods, is obliged at the end of the process to consider whether the aggregate figure represents a proper period of incarceration to be imposed for the total criminality involved: *McDonald v The Queen* (1994) 48 FCR 555 at 563. Further, in cases where the prisoner has not previously been sent to gaol, the accumulation of sentences to be imposed ought not to result, unless there is no alternative, in a total which is a crushing first period of imprisonment. If possible, justice should especially avoid placing such a person where, in Milton's words, "hope [can] never come [t]hat comes to

⁵ *Kolo v Rex* [2006] TOCA 5 at [11].

⁶ *Hokafonu v Rex* [2003] TOCA 3 at [51].

⁷ *Kolo*, *ibid*, at [12], referring to *Polutele v Rex* [1995] Tonga LR 59 and *Hokafonu v Rex* (Court of Appeal, Burchett and Tompkins JJ, 25 July 2003) at para 52.

all".⁸ In a case of that kind, a first incarceration may have a very salutary effect, and the prospect that it may do so should not be left out of account when its length is fixed: *Mill v The Queen* (1988) 166 CLR 59 at 62-63.

26. In this case, 6 years' imprisonment for offences of this kind by a first offender would be a crushing sentence and out of all proportion to the statutory maximum of 7 years. The rationale to the Crown's approach of partial cumulation was not explained in its submissions, although its objective of seeking to give effect to the totality principle was clear enough. However, rather than seek to dissect and add parts of one sentence to another, I prefer to look at the offending as a whole and determine by reference to the statutory maximum, the comparable sentences provided, the total quantum of the moneys obtained and the applicable principles referred to above for sentencing offending of this kind, in particular, the need for a 'deterrent sentence',⁹ to arrive at a global starting point which suitably reflects the Defendant's overall level of criminality. By that process, I consider that the appropriate starting point is 4 years' imprisonment.

Mitigation

27. While the Crown's submissions focused in detail of the appropriate measure of discount to be given for the Defendant's very late guilty plea, they did not include consideration of her lack of previous convictions. As a general proposition, but not any rigid or inflexible rule, the authorities support an approach whereby an early guilty plea and a clean record may attract a discount in mitigation between a quarter (25%) and a third (33.3%) off. Other circumstances peculiar to each case and offender may inform where within that range the discount may be set. Recognition of the acceptance of responsibility and remorse demonstrated by admission to police and/or a plea of guilty at the earliest opportunity is an important aspect of sentencing. The usual resulting discount also serves as an incentive to other offenders to admit their guilt as a first step towards rehabilitation.
28. By contrast, the Defendant here chose to maintain her not guilty plea up to and

⁸ *Paradise Lost*, 1:66-67.

⁹ A term discussed in *Tafea v R* [2010] Tonga LR 166.

throughout a trial until after the completion of her evidence. In doing so, she put the State, the Prosecution and the witnesses to significant expense and inconvenience. Perhaps even more importantly, the Defendant's chosen course only served to prolong the angst of the complainants, many of whom attended court during the trial.

29. In this case, by reason of the Defendant's late guilty plea and good previous record, I deduct 1 year from the global starting point, resulting in a sentence of 3 years' imprisonment.

Suspension

30. Of the considerations on suspension discussed in *Mo'unga* [1998] Tonga LR 154 at 157, and as the Crown noted, the only one in favour is the Defendant's lack of previous convictions. She is not particularly young. She did not cooperate with the authorities. However, I also take into account "the seriousness of the offending, the need for effective deterrence, the effect on the complainants, and the personal circumstances of the offender and those dependent on her".¹⁰ That the Defendant is a mother of five young children, and the effects of her going to prison will likely have on their lives during their formative years, are matters to which I attribute significant weight. It is also a basis for hope that a partially suspended sentence will have a strong deterrent effect on the Defendant and that she will take the opportunity to rehabilitate herself and abstain from any further acts of dishonesty or breaches of the law.
31. Accordingly, I order that the final 12 months of the sentence be suspended for a period of two years on conditions. Subject to compliance with those conditions, and any remissions, the result is that the defendant be required to serve two years' imprisonment.

Result

32. The Defendant is convicted of obtaining money by false pretenses and is sentenced to a total of three years imprisonment.
33. The final 12 months of the sentence is to be suspended for a period of two years from the date of her release on the following conditions, namely that, during the period of suspension, the Defendant is to:

¹⁰ *Vake* [2012] TOCA 7, referring to *Misinale* [1999] TOCA 12.

- (a) not commit any offence punishable by imprisonment;
 - (b) be placed on probation;
 - (c) report to the probation office within 48 hours of her release from prison;
and
 - (d) complete a life skills or such other course/s as her probation officer may direct.
34. Failure to comply with any of those conditions may result in the suspension being rescinded and the Defendant being required to serve the balance of her sentence.

NUKU'ALOFA
9 April 2021



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

M. H. Whitten QC
LORD CHIEF JUSTICE