

**IN THE HIGH COURT OF THE COOK ISLANDS  
HELD AT RAROTONGA  
(CRIMINAL DIVISION)**

**CR NO. 52/2011**

**QUEEN**


**v**

**MARYANN PIRAKE**

Hearing: 26 May 2011

Counsel: Ms C Evans for Crown  
Mr C Little for Accused

Judgment:

30th June 2011 

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**JUDGMENT AND VERDICT OF HUGH WILLIAMS J**

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- A. The accused Ms Pirake is acquitted of the one count she faced of theft as a servant, namely that on 27 October 2010 she, as a servant of the Cook Islands Police, stole \$80 in cash, the property of the Cook Islands Government.**

## **Introduction**

[1] The accused, Ms Pirake, was charged with one count of theft as a servant, namely that on 27 October 2010 she, as a servant of the Cook Islands Police, stole \$80 in cash, the property of the Cook Islands Government. That charge was brought under ss 242(1)(a) and (b)(ii) of the Crimes Act 1969.

[2] Ms Pirake chose to be tried by a Judge alone rather than a jury.

[3] It was common ground that the elements of the charge of theft as a servant are that something capable of being stolen has been intentionally and dishonestly taken with the intention of depriving the owner of the property permanently of it, with the additional overlay in this case that the prosecution was required to prove Ms Pirake was a servant of the Cook Islands Police. It may be of importance to this prosecution to note that theft is committed when an offender moves the thing being stolen or causes it to move or be moved with the intent of permanently depriving the owner.<sup>1</sup>

[4] That Ms Pirake was a servant of the Cook Islands Police on 27 October 2010 was admitted. Her defence was that she never took any money belonging to the Cook Islands Government whilst employed by the Cook Islands Police or that, to put it more precisely, the Crown was unable to prove she had taken any money, still less that she took it with intention to deprive the Cook Islands Government permanently of it.

## **Facts and Evidence**

[5] Prior to and on the day of the alleged offence Ms Pirake worked for the Driver's Licence Bureau operated by the Cook Islands Police.

[6] She was suspended from that job on this matter coming to light and remains on suspension.

[7] The Driver's Licence Bureau is in the Central Police Station in Avarua just off the public foyer. What happens with applications where there is no difficulty is that an applicant

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<sup>1</sup> Section 242(4).

arrives at the Central Police Station, picks up an application form – the available forms differ slightly according to whether the applicant is a visitor or a resident – and fills it in. The forms are available immediately outside the office during business hours but the stock is kept inside the office when the Bureau is not open.

[8] The applicant then approaches the cashier at the till in the Bureau who checks the correctness of the application form, adds details of the applicant's existing licence at the foot of the face of the form, and obtains payment of the application fee from the applicant. One year licences for all forms of transport cost \$20, five year licences \$60, and 10 year licences \$100. Only the two latter are receipted as well as appearing on the till tape; receipts for \$20 payments are only issued on request. Of some importance, the Bureau operates only on cash: it has no credit card, EFTPOS or similar facility.

[9] Once the form is completed and the application fee paid in cash, the cashier puts the cash in the till and hands the form to the computer operator seated immediately adjacent to the till. The computer operator then enters the details into the computer, photographs the applicant, and operates the computer so as to produce a licence, entering its number, which because of errors may not be consecutive, and other details on the reverse of the application.

[10] Not all applications proceed as smoothly as described. Applicants quite commonly think they can pay for their licence by credit card and, when told such is not the case, need to go away to obtain sufficient cash to meet the fee. There can be errors in the filling out of the form which prevent the licence being granted immediately. The International Date Line often means dates are inaccurate. In addition, not all applicants lodge their licence application on the day they uplift the form from the Bureau. In cases such as those the dates of the application and the issue of the licence may not correlate, so collecting all application forms bearing a particular date may not reconcile with the number of licences granted on that date. Then, if the cashier takes the view the applicant does not qualify for a Cook Islands driver's licence without a theory or practical test or both, processing the licence application is deferred until the applicant has successfully passed either or both those examinations. Each costs \$5 and the cost must be paid in cash to the cashier once the applicant is advised of the necessity for such tests, though the tests are taken after the applicant first arrives at the Bureau, sometimes on the same day, sometimes on a subsequent day. Applicants whose driving experience is in countries where traffic drives on the right-hand side of the road are

frequently those required to take practical or theory tests or both. Other matters which can delay the smooth application for and grant of a licence include errors in the application form or an inability when the application is first presented to provide details of the applicant's current licence.

[11] For reasons which will appear, it is important to note that the Bureau's income is credited to two different accounts. All the Bureau's revenue from driver's licence applications or renewals, plus fees for minor offences, is Revenue on Behalf of the Crown ("ROBOC"), but payments for theory or practical tests are Trading Revenue.

[12] There are normally two staff in the Bureau though a third can be required in busy times. They take turns in operating the cash register and the computer.

[13] There were two methods utilised when duties were swapped during the day for lunch or other purposes and at the end of the day. These are known as *X off* and *Z off*. *X offs* are undertaken when a cashier ceases working on the till, say at lunchtime or similar. The officer *Xs off* to reconcile their account at that stage, taking account of the \$100 float with which the Bureau starts each day (it being comprised of notes and coin of whatever denomination is on hand). When somebody performs an *X off* the till tape bears an "X" at the top left-hand corner, the total in the till is counted and reconciled with the entries on the till tape, and the operator then initials the till tape as evidence of the reconciliation. A *Z off* is a similar reconciliation but undertaken at the end of the day.

[14] As put by one of the main Police witnesses, Mrs Brown (notes of evidence pages 7-8):

*X off*, that shows the balance of the day. The *Z off*, when you reconcile your account at the end of the day or at the end of your shift, you have to press *Z off* in order for you to clear off all your balances from the *X off*; it will come to zero because you must start at the zero balance the next working day.

[15] *Z off* is also the process undertaken when an operator reaches the end of the shift, as opposed to an *X off* for a temporary absence to be resumed later that day.

[16] At the end of the day a reconciliation of the ROBOC funds is also undertaken. Consideration of the form used on that occasion will be the subject of discussion later in this judgment. A separate reconciliation form – not produced – is used for Trading Revenue.

[17] Also, in setting the factual scene it is to be noted that on the last working day before the date of the alleged offence, 27 October 2010,<sup>2</sup> the Police Finance Manager, Ms Thompson-Eliu, had issued a memorandum to all the Driver's Licence Bureau staff saying that from that day there were to be two *X offs*, one at 12 noon and one at the end of the day:

Whoever is on the till first is to *X off* and collect all cash (except the float) and all applications relating to your till entries.

[18] On 27 October 2010 Ms Pirake was rostered to operate the till from the Bureau's opening. She arrived at work a little after 8:00 am and put the \$100 float in the till. Between her arrival and 8:36 am she served four customers each of whom paid \$20 in cash for a one year licence.

[19] She was, however, somewhat distracted that morning. Not only did she need to refill the family's gas bottle but, more importantly, she was troubled by her son's illness, his treatment in New Zealand and his visa difficulties. She described her predicament in the following way (notes of evidence page 167, line 10 to page 169, line9):

... I've got a sick son in New Zealand who was referred to New Zealand on medical, and he travelled on a emergency passport which is only valid for one month, and he left in the first week of September. And he needed to get the emergency passport back to the Cook Islands office because it was issued from here for him to get a five year or a proper New Zealand passport at no cost. And because I came back – when did I come back – I came back on the 23<sup>rd</sup> of October, I had been away two weeks prior to take my sick son's family, the partner and the baby to New Zealand, and while I was there, that's when we discovered that we needed a passport to help them obtain their Sickness Benefit to support them while they were over there; it's a requirement by the welfare and income, or WINZ in short. They required his passport to support his application so he can collect the Sickness Benefit. That's why I needed to leave the office in the morning, because Tuesday I came back to work, my first day back at work after being overseas was a Monday, and I wasn't able to do that. Tuesday was a public holiday, because the offices were closed, and Wednesday, as you can see between, from the opening of the office until that time I left we only had four customers, so I thought that would be the best time for me to go and run my errands and then come back and carry on for the rest of the day and not having to worry about this application, because I needed to know what was the delay in my son's passport.

[20] Because she wished to attend to those problems, Ms Pirake *X'd off* at 8:36 am. She initialled the till tape which showed the receipts of \$80 for four driver's licence applications

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<sup>2</sup> 26 October 2010 was a public holiday in the Cook Islands.

and no other transactions. In addition to initialling the tape Ms Pirake said (notes of evidence page 136, lines 6 to 22):

Then I counted the money in the till. I counted the \$100 float, I showed it to June who was sitting right next to me, and put it back in the till. Then I counted the \$80. What I did is, I counted all the money and separated, took it out of the till before I started counting the \$100 float then I put it in the till. Then I counted out the leftover money, which was \$80, I showed it to June, folded it up, and then put it into a plastic coin bag and I put it in the till underneath, there's a coin compartment in the till, I put the \$80, the bag of \$80 underneath the coin compartment but inside the till. Then I closed the till, I went to my desk – sorry, before I did that, before I closed the till, then I signed off and on the *X off* tape, then I went to my desk, picked up my key and my wallet, my purse, then I went to run my errands.

[21] Ms Brown, although accepting Ms Pirake got a plastic bag containing the float from the safe to commence the day's operations, firmly denied Ms Pirake's description of the events which preceded her *X'ing off* and leaving the Bureau. Ms Brown was adamant nothing of what Ms Pirake described in evidence occurred.

[22] It should be noted at this point there was a suggestion in evidence of "bad blood" between the two women. Shortly before the events with which this prosecution is concerned, Ms Brown had been the Acting Finance Manager and thus Ms Pirake's superior, but she was demoted to the Driver's Licence Bureau where Ms Pirake in effect became her superior.

[23] Although it appeared in evidence there was no great "love lost" between the pair – a factor which may reflect on credibility – an incident such as just described would be unlikely to be of such moment as to lead to Ms Brown wholly concocting her evidence about Ms Pirake's version of events.

[24] Ms Brown said she told Ms Pirake she could not *X off* at 8:36 am but only at lunchtime, reminding her of Ms Thompson-Eliu's memorandum.

[25] Despite that, Ms Pirake left the Bureau, Ms Brown took her place at the till and Ms Tangatutai replaced her on the computer.

[26] However, immediately on serving the Bureau's fifth customer for the morning, Ms Brown became suspicious because she was handed \$20 in cash but when she counted the cash in the till before putting in her \$20 it only totalled \$100, that is the amount of the float. Ms Brown put her customer's \$20 note to one side, closed the till and asked the customer to

wait. She asked Ms Tangatatutai to ring Ms Thompson-Eliu to come down urgently. That occurred a little before 9:00 am.

[27] Ms Thompson-Eliu checked the till contents. They totalled \$100 with the \$20 note set aside. She checked that only four \$20 licence applications had been received that morning before the customer who was still awaiting the processing of his application. Ms Thompson-Eliu and Ms Brown then searched for the missing \$80 (notes of evidence page 96):

... underneath the till, all over the bench, even in the receipt books maybe it was left in the receipt book, but all we found was an empty Westpac coin bag that was in the top drawer of the till.

Ms Thompson-Eliu then *X'd off* at 8:46 am for \$100 and initialled the till tape.

[28] While Ms Thompson-Eliu and Ms Brown were discussing what happened, Ms Pirake returned to the Bureau. Perhaps surprisingly, neither spoke to her about the discrepancy, though Ms Thompson-Eliu returned to her office and spoke to her Superintendent.

[29] The business of the Bureau proceeded with Ms Pirake still on the till. At 11:47 am Ms Brown asked Ms Tangatatutai to take over the till during the former's lunch break. Ms Tangatatutai, who was aware of the suggested discrepancy, noted on a piece of paper how much cash she received from the customers she served when she was on the till until 13:01. She *X'd off*, counted her cash and reconciled it with the application forms she had processed. She cross-checked her reconciliation with Ms Brown and both initialled the note. Ms Pirake went back on the till until close of business.

[30] When the Bureau closed that afternoon the preliminary ROBOC reconciliation showed a deficiency of \$80. Those present, including Ms Thompson-Eliu, checked the applications and the cash but were unable to pinpoint the supposed error in that day's *Z off*.

[31] At the close of the Bureau's business for the day the till operator is meant to reconcile the ROBOC and trading revenue and open up a cash reconciliation sheet. The computer operator then counts the application forms for the day and multiplies that figure by \$20 to ensure they match the amount of money collected that day. A copy of the reconciliation form for 27 October 2001 is annexed to this judgment.

[32] The box on the upper left-hand side lists the receipt numbers issued for practical and theory tests, minor offence fines and, if requested, one year licence fees in varying combinations, with the last receipt, 106895 - \$2,920.00 – being the total of the one year licence fees paid arrived at by counting the forms and multiplying the result. (notes of evidence, page 36).

[33] The box on the upper right-hand side headed “Breakdown of Receipts by Type and Till Reading” separately lists the ROBOC receipts for driver’s licences and the trading revenue for minor offence fines, with the licence fee breakdown inserted below the “TOTAL TILL READING”. It is important to record that the breakdown of receipts by Type and Till Reading entries are derived by counting the number of application forms processed that day by the computer operator, and given by her to the till operator to be entered (notes of evidence, page 37). It is for the till operator to count the notes in the till and fill in the box in the centre of the firm headed “BREAKDOWN OF CASH RECEIVED BY DENOMINATIONS”. It is to be noted that the total cash is recorded as \$3,640.00, but the total derived from the application count and the trading revenue is \$3,640 with the form bearing the notation at the foot “Discrepancy of \$40 cannot be accounted for”.

[34] After the events of 27 October 2010 the Driver’s Licence Bureau immediately laid a complaint about Ms Pirake with the Criminal Investigation Branch, but the officer delegated to undertake the inquiry put the matter to one side because of pressure of other business and it was only when the Commissioner inquired concerning the progress of the case that he interviewed Ms Pirake. That was on 21 January 2011.

[35] The statement is a lengthy one, perhaps because it relates to “missing cash to a total of \$200”, and covers the period from 17 September 2010 to 27 October 2010. For the most part, the statement’s contents are descriptive and uncontentious. In relating the events of 27 October 2010 when the reconciliation was “\$80 under” she acknowledged receiving four \$20 notes for the four customers she served earlier that morning and said:

- Q. Can you explain what happened to the \$80 cash from the 4 customers that you left in the till?
- A. I counted the \$80 showed it to June, folded it up put it in the plastic coin bag and put it back into the till under the slot of the coins.
- Q. Is there any reason why you did this?
- A. I have to separate my \$80 cash from the \$100 float until I come back.



- Q. According to the Finance Manager, Ngariki Eliu (Mama) and June Brown they have checked inside and outside the till and also counted all the cash in the till after you left and there was only \$100 in the till and could not find any other cash in the till. What do you say of this?
- A. I dispute what they're saying, because I wouldn't have been able to go and leave the office if my money didn't balance to the *X off*. As mentioned earlier on my statement at *X off* I counted the \$80, showed it to June, put it into the plastic bag and put it back into the till. When I came back Mama Eliu was sitting at the till and none of them asked me where the \$80 was.
- Q. Did you take the \$80 cash from the till before or after you *X'd off* from the till?
- A. No I didn't.
- Q. What do you think happened to the \$80 cash?
- A. When I came back into the office after Mama had left the \$80 was still in the till.
- Q. If you say that the \$80 was still in the till can you explain why there's still a \$40 discrepancy at the end of the day?
- A. Firstly, when I came back I don't recall June doing an *X off* as per the till tape all I can recall is Mama was sitting at the till. I went to my desk left my purse and key on the table and then I came back to the till. I didn't physically see the 5<sup>th</sup> \$20 transaction on the till tape by June because there was no *X off* which is the normal procedure to *X off* the till and count the cash to match the total on the till tape because we did not do one. That my explanation for one \$20 shortage. Secondly, there was a gentleman which I can't recall his name which I was to collect \$20 for his driver's license but I failed to collect it because when he came he said to me that he has changed his mind he wanted a 5 year license instead of 1 year. So I collected \$40 only being the balance of 1 x 5 year and wrote out a receipt for \$60 as that was the new procedure now that a receipt has to be issued for a 5 year or 10 year license.
- Q. Did you explain about this cash shortage to Mama?
- A. No, because I didn't remember all this events at the time.
- Q. Explain to me about this new system you're talking about?
- A. First, we collect \$5 for the testing only then if they pass then we collect the fee for the driver license. This was introduced while I was in New Zealand. I'm referring to above which I failed to collect his \$20, because he originally asked for a 1 year license on his application.
- Q. Was there a memorandum about this new change you're talking about?
- A. I am not aware of.
- Q. Do you have anything else to say in regards to the missing \$80 cash?
- A. My concern was that when Mama and June found the discrepancy that morning why didn't they ask me straight away so that I could have shown them the \$80 in the till – now it's their word against mine. I could have shown them the \$80 in the till straight away. As I am only aware of the shortage for \$80 now. Also I asked Mama to look into this and tell me what's the outcome but then she never got back to me ever since.

[36] The above description summarises, in short compass, the evidence concerning the events of 27 October 2010. There was, however, a deal of additional evidence relating to the system operated by the Driver's Licence Bureau and suggested loop holes in its reconciliation process. For reasons which will appear it is unnecessary to summarise the whole of that evidence at this stage. Indeed, only relatively brief note needs to be made of that aspect of the case.

### **Discussion and decision**

[37] There are, in essence, two questions to be resolved to decide whether the Crown has proved beyond reasonable doubt that Ms Pirake is guilty of theft as a servant by stealing \$80 cash from the Cook Islands Police Driver's Licence Bureau. These are, first, whether she took \$80 in cash, the application fees paid by the first four customers she served on 27 October 2010, when she left the Bureau at 8:36 am and, if so, whether that satisfies the other elements of the charge. Secondly, consideration needs to be given to whether at the end of 27 October 2010 there was a sum of money, \$80 or another amount, which is proved to have been stolen from the Bureau, and by Ms Pirake. That could relate to credibility also, but, in addition, bears on whether there was any money taken on 27 October 2010.

[38] Dealing with the first of those questions, Ms Pirake's version of the events which she says occurred immediately prior to her leaving the Bureau at 8:36 am that morning was earlier recounted as was Ms Brown's denial of what occurred, coupled with the evidence from Ms Brown and Ms Thompson-Eliu as to the efforts they made to locate the missing \$80.

[39] Having carefully considered the evidence on that question, the Court is not prepared to accept that the course of events related by Ms Pirake occurred. The reasons for reaching that view follow.

[40] First, it was an unusual thing for Ms Pirake to do to leave the Bureau without permission or prior notification after only a little over half-an-hour's work and at a time when she was not authorised to leave by the required *X off* procedures and the memorandum Ms Thompson-Eliu had issued only the previous working day. Concerned she may have been about her son's visa and medical problems, but she was still adopting a course of action

which was in breach of the rules so her justification of her actions by her description of what occurred at 8:36 am requires to be viewed with a certain reserve.

[41] Secondly, while it is not difficult to accept that Ms Pirake, once she had decided to leave the Bureau in this unconventional fashion, counted the money in the till as she would have done at her normal *X off* (or *Z off*). It is quite another to accept she took the \$80, showed it to Ms Brown, and put it into a plastic coin bag which she deposited under the coin tray in the till. That makes no sense. Even if she was leaving the Bureau at an unusual time and for unusual circumstances, there was no need for her to separate out the \$80 when, if the till proceeds balanced, the \$80 could have remained in the till as part of the proceeds to be used by Ms Brown as the substitute till operator, particularly when Ms Pirake did not complete the formal *X off* procedure and was returning shortly afterwards. There was certainly no need for her to take the unusual step of making a show of separating out the \$80, packaging it separately and depositing it separately in the till if the till operation was simply to continue, but with another operator, for the brief period Ms Pirake was absent.

[42] Thirdly, there was no need for Ms Pirake to secrete the \$80 in its coin bag in the till. It could have remained in its natural place in the cash tray.

[43] Fourthly, and of particular importance, even if the Court has reason to be cautious about accepting Ms Brown's evidence on the topic because of the suggested "bad blood" between Ms Pirake and herself, there was no reason to doubt Ms Thompson-Eliu's evidence. She was a straightforward, persuasive witness whose description of her confirmation that \$80 was missing only a few minutes after Ms Pirake left and the search she and Ms Brown made for the missing \$80 was a convincing one.

[44] Why Ms Thompson-Eliu and Ms Brown did not tax Ms Pirake about the missing \$80 on her return is something of a puzzle but, putting that aside, the Court accepts that there was no showing of the separate \$80 and its placement in a separate coin bag in a separate place as related by Ms Pirake and that, when the till contents and surrounding area were checked within a few minutes, \$80 was missing.

[45] The only possibilities suggested in evidence being that the \$80 remained in the till as Ms Pirake asserted or that she took it with her, the Court accordingly concludes that

Ms Pirake intentionally took \$80 from the till of the Cook Islands Police Driver's Licence Bureau with her when she left the premises at 8:36 am on 27 October 2010, and she knew she had no entitlement to the money.

[46] The remaining question on this aspect of the case is, therefore, whether, when Ms Pirake took the \$80, she was intending to deprive the Police of the money permanently.

[47] Her personal concerns bear on her intent when she took the money from the till and left the Bureau with it, but her description of her personal concerns nowhere suggests she was not well aware of her actions.

[48] Ms Evans relied on this aspect of the case on *R. v. Morunga*.<sup>3</sup> In that case Mr Morunga, an employee of a gaming machine outlet, began gambling each night after closing using coins from the machine's cash boxes. He returned most of the coins and returned any "winnings" he occasionally made. Sometimes, however, he removed the money and used it for personal expenses. The latter action was clearly theft, but the question before the New Zealand Court of Appeal was whether a person in Mr Morunga's position who took coins from a gambling machine but put them back while gambling on the machine - either "losing" or "winning" - could be guilty of theft as a servant. Could such a person be said to have intended to deprive his employer permanently of the coins? The New Zealand Court of Appeal held:<sup>4</sup>

[15] It necessarily follows from the requirement of s 220(1)(a) that there must be an intent to permanently deprive the owner of the property, that appropriating the property of another with the intent of depriving the owner only temporarily of it is not stealing (see the extended discussion in Garrow and Turkington's *Criminal Law*, Wellington, Butterworths, 1991, S220.6 and the *Criminal Law Revision Committee, Eighth Report: Theft and Related Offences* (1966 Cmnd. 2977) paras 56-58). As Smith, *The Law of Theft*, 8th ed, para 2-125 puts it, "English law, in general, recognises *no furtum usus* — the stealing of the use or enjoyment of a chattel or other property".

[16] It is not clear when during an evening and in relation to what sums Mr Morunga decided to take money away from the premises. But it was not suggested by the Crown that there is an evidential foundation for finding, and for a required finding at that, that whenever Mr Morunga took money from the machines his intent was to take it away for his own use and only to play with it in the meantime. Again, referring to the Crown argument on the appeal and the Judge's reasoning, it is, we think, artificial and inconsistent with the Judge's assessment of Mr Morunga's evidence to

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<sup>3</sup> *R. v. Morunga* (2000) 17 CRNZ 396.

<sup>4</sup> At paras [15] to [17].

say that the appellant took the coins to deal with as his own, to dispose of as he saw fit. Except for coins taken home, he immediately returned the coins he had taken to his employer's gaming machines. In his video statement he acknowledged that nine times out of ten he lost, and that on average he could get through \$200 or \$250 at least in an hour. The only reasonable inference is that, at least in the great majority of instances, his intention when he removed coins was to play the machines.

[17] Further, the notion that by treating the coins as his own the appellant had the requisite intent involves substituting a different test for the clear words of the section. An intent to permanently deprive imposes a different and temporal test whereas it seems the Judge saw the control of the coins and the arrogation of the right to decide how much of the money was left in the machines as the determinative factor. We are satisfied that the Judge erred in holding on that reasoning that the Crown had established that every time Mr Morunga took a coin he intended to deprive the Trust permanently of that item of property.

[49] Also of interest is the following passage from *Garrow & Turkington*:<sup>5</sup>

There is no theft under this section where the defendant genuinely intends to return an item to the owner the following day although they may be guilty of not dealing with property in accordance with the owner's requirements under s 220(2) or obtaining any benefit by deception under s 240(1)(a).

[50] It should also be noted that Ms Evans did not argue that Ms Pirake was depriving the Police permanently of the \$80 during the period she was absent from the Bureau doing her errands. That was the position in *Pick*,<sup>6</sup> discussed in *Morunga*. Assuming Ms Pirake brought the \$80 back with her on her return, having it with her for the few minutes occupied during her errands, could not amount to proof of an intention to deprive the Police permanently of the cash.

[51] The Court's conclusions, focusing entirely on the events of 27 October 2010 up until Ms Pirake returned from her errands at about 9:00 am, is that she took the \$80 from the till as already found but that the evidence does not prove beyond reasonable doubt that she took the cash with the intention of depriving the Police permanently of it. As the authorities cited make clear, temporary deprivation is insufficient to amount to theft.

[52] The next question is accordingly whether, when the balance of the evidence is taken into account, the whole of the evidence demonstrates that a theft occurred, that the theft was of \$80, that it was perpetrated by Ms Pirake and that it was carried out with the intention of depriving the Cook Islands Government through the Cook Islands Police of \$80 permanently.

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<sup>5</sup> *Garrow & Turkington's Criminal Law*, para CR1219.5, p 19,506.

<sup>6</sup> *Pick* [1992] CRIM LR238.

[53] The Court's view, after having considered all the evidence, is that the Crown has not proved all four of those questions beyond reasonable doubt.

[54] Among the reasons for reaching a conclusion are:

- a) although, perhaps oddly, it was never put to Ms Pirake that she had ample opportunity to return the \$80 to the till after she returned to the Bureau a little after 9:00 am, and did so, she was on the till for most of the rest of the business day and could easily have returned the money at some stage. It is, therefore, possible that she took the \$80 at 8:36 am, possibly distracted by her personal concerns, and perhaps accordingly without the intent to keep the money permanently and, later regretting her actions, returned it to the till. In terms of *Morunga* an intention of depriving the owner only temporarily of funds is not theft of those funds.
- b) If the reconciliation form prepared after the *X off* at the end of 27 October 2010 was intended to assist the Crown in proving that a theft of \$80 occurred, it is notable the discrepancy in the form was of \$40.
- c) The evidence showed there was a discussion at the end of the business day about the \$40 discrepancy shown in the ROBOC reconciliation form. It was Ms Pirake, as the till operator, who raised the question of the discrepancy, something which may have been unlikely if her theft caused it. If a theft had occurred, she would have known she was the most likely suspect.
- d) The evidence showed a significant number of ways in which the reconciliation forms appeared at the end of a business may not reconcile with the cash received. Some of those possibilities were earlier described. Some others, arising out of commonplace situations, were described by Ms Pirake in her statement. It is notable that daily discrepancies were relatively common in the Bureau. The evidence (page 107) showed that over the approximate ten-week period immediately preceding 27 October 2010 there had been about five days where inexplicable discrepancies appeared at the end of the day;

- e) Apart from the frequency of discrepancies and the number of ways they might arise, it is important to note that the figure appearing in the ROBOC reconciliation form for “driver’s licence” is calculated not by the till operator counting the cash received during the day but by counting the application forms processed during that period. It follows that even a minor counting error both in numbers or in the type of licences issued could easily translate, having regard to the scope of the daily business, into differences of the sort, \$40 or \$80, being discussed in this case;
- f) The evidence also showed there was a second reconciliation form prepared daily, being that for the Trading Revenue. That was not produced but, although much smaller numbers are involved, errors might have crept in on 27 October 2010 in that form;
- g) The large receipt figure appearing in the left-hand side of the ROBOC reconciliation form, \$2,920.00, was arrived by, Ms Brown said (page 59), by counting up the 146 1 year licence applications processed that day and multiplying the number by \$20. She wrote the receipt after someone else, the till operator, counted the money in the till;
- h) Following on from that, the \$3,600.00 figure appearing on the right-hand side of the ROBOC reconciliation form includes the four licence applications, that is to say the \$80, Ms Pirake is said to have stolen. There may have been nothing missing, there may have been \$40 missing as the noted discrepancy shows, or there may have been \$80 missing. As Ms Pirake put it (page 143):

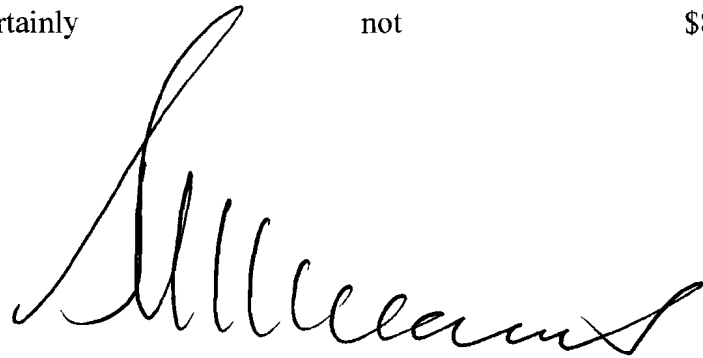
... based on the reconciliation ... the receipt that has been written out says \$3640 but the actual cash that has been handed over and punched in, put into the till tape, doesn’t match. There’s a discrepancy of \$40 but at the end of the day the till tape, the money that’s been punched onto the till tape matches the actual cash in the till.

## **Result**

[55] Standing back and looking at the evidence overall in terms of the burden and standard of proof, the Court’s conclusions are that the Crown has proved beyond reasonable doubt that Ms Pirake, as a servant of the Cook Islands Police, took the \$80 proceeds of the first four

1 year driver's licence applications which she had processed when she left the Bureau at 8:36 am on 27 October 2010, but that the Crown has not proved to the required standard that she intended to deprive the Cook Islands Government permanently of the funds. Although the circumstances of her taking the money lead to the conclusion that she is "probably Guilty or even that she is very likely guilty" (*Wanhalla*), it could not be said the Court is sure of her guilt. She is, therefore entitled to be found "Not Guilty".

[56] That conclusion is supported by the vagaries of the driver's licensing system and, in particular, by the errors and infelicities inherent in the process, particularly in the preparation of the reconciliation forms (where only half the amount said to have been stolen by Ms Pirake was the day's end discrepancy). The evidence does not prove to the required standard that any sum was taken from the Driver's Licence Bureau that day, certainly not \$80.

A handwritten signature in black ink, appearing to read 'Hugh Williams J', written in a cursive style.

**Hugh Williams J**



D.L.2

Cook Islands Police  
 Ph: (682) 22 499 Fax: (682) 21 499  
 PO Box 101, Rarotonga

Revenue on Behalf of Crown (ROBOC)  
 DRIVER'S LICENSE RECONCILIATION FORM

OFFICERS ON DUTY: Maryann  
June Brown  
Valne Tangatabular

NAME: Maryann  
 Signature: [Signature]  
 Date: 27/10/10

DATE: 27/10/2010  
 (The day of operation)

Receipt Record and Cash on hand (List all receipts in sequence order)	Recd from	Recd to	Total Value per rec t
	106868	106868	60.00
	106869	106869	-
	106870	106870	60.00
	106871	106873	-
	106874	106877	240.00
	106878	106882	-
	106883	106884	140.00
	106885	106889	-
	106890	106893	60.00
	106891	106891	100.00
	106892	106892	-
	106893	106893	90.00
	106894	106894	-
	106895	106895	2,920.00

Breakdown of Receipts by Type and Till Reading			
Driver's License			3,560.00
Instant Fees - MOHS			40.00
Motor Vehicle Register			
Warrant of Fitness Books			
Sea Allowance Reimburse			
Other ROBOC Revenue			
<b>TOTAL TILL READING:</b>			<b>3,600.00</b>
Application Count	Rate	Quantity	Total
1 year	20.00	148	3,820.00
5 years	90.00	8	480.00
10 years	160.00	3	200.00

Number of Receipts: 12 TOTAL APPLICATION: 3,600.00  
 Total Cash: 3,640.00 Variance

BREAKDOWN OF CASH RECEIVED BY DENOMINATIONS:				CL Office: please initial		Finance Check
CASH:	Denomination	Quantity	Amount	Checked	Variance	Findings - Explanation
	Notes					
	100.00	3	300.00			
	50.00	41	2,050.00			
	20.00	62	1,240.00			
	10.00	-	-			
	5.00	2	10.00			
	2.00	-	-			
	1.00	-	-			
	Coins					
	0.50	-	-			
	0.20	-	-			
	0.10	-	-			
			3,600.00			

TOTAL: (a) 3,600.00  
 Explanation for variance:  
 Local Cheques: ANZ (a)  
 WBC (b)  
 BCI (c)  
 Other: (c)  
 TOTAL CASH RECEIVED: (a+b+c) 3,600.00  
 TILL TAPE READING: 3,600.00  
 REIMBURSEMENT: - As per explanation below  
 VARIANCE: (over/under) -

EXPLANATION FOR VARIANCE:  
 Discrepancy of \$40 cannot be accounted for.

(Finance Use Only):  
 TOTAL BANKED: \_\_\_\_\_ Date Banked: \_\_\_\_\_  
 Checked Recon & Banking: \_\_\_\_\_ (Finance Division) Date: \_\_\_\_\_  
 Certified by: \_\_\_\_\_ (Finance Division) Date: \_\_\_\_\_