

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

CR NO'S 750-762/16

POLICE

v

ATIROA TOU

Date: 9 March 2017

Counsel: Ms T Koteka for the Crown
Mr W Rasmussen for the Defendant

SENTENCING NOTES OF HUGH WILLIAMS, CJ

[9:26:27]

- [1] Atiroa Tou, at the age of 29 you appear in a Court for the first time having pleaded guilty to ten charges of theft of money from the Ministry of Health and a further three charges of making false entries in the Ministry of Health accounts and defrauding the Ministry of public money.
- [2] The theft charges carry a maximum of 5 years imprisonment on each. The fraud charges carry a maximum of 10 years on each.
- [3] The thefts were committed over about a two month period between 3 June and 12 August 2016 and you stole a total of \$20,900 from the Ministry of Health.
- [4] Before considering your personal position, I note that in the Probation Service report they say, and I quote, "time and time again we have seen offending such as yours come before the Court" whereby the majority of female offending, more than often so, involves a theft of money. It is suggested the reason for this is the pressure female heads of households or mothers have to consistently provide for their families. This is no way an excuse for your actions nor does the Probation Service condone such

behaviour. But the struggle to provide an adequate standard of living on low wages is certainly real.

- [5] It is a distressing feature of these sorts of cases that come before the Court here in the Cook Islands are that most of the offenders are women. Nearly all the previous cases to which Ms Koteka and Mr Rasmussen have referred were women offenders – you are female, there was another female standing in the dock there facing similar charges just yesterday. And the personal histories of most of these offenders portrays the struggle for you, as in most cases, of the women’s part to try and be mothers, partners and the wage earners supporting the family.
- [6] Coming back to your case, you worked for the Ministry of Health for some 3 years but resigned in May 2016. After your resignation you took Ministry of Health cheques, filled them out, endorsed them over to you and cashed them. The sums of those were substantial – the smallest was \$1250 and the largest just over \$2600. And the ten offences, as I mentioned, all occurred within a little more than two monthly period.
- [7] Because of your resignation from the Ministry you are not facing charges of theft as a servant – a more serious offence than simple theft – but you also are facing additional charges of acting with intent to defraud and taking public money which is much more serious than if public money were not involved.
- [8] The fraud charges arise because after you completed the cheques you were able to access the Ministry’s Quickbooks system from one of its dental clinics, get access to the system by knowing the director’s login and passwords and posted the cheques to the system in a moderately sophisticated attempt to camouflage and conceal what you have done.
- [9] The Probation Service has filed the usual helpful, generous – even sympathetic – report pointing out that you have been in a de-facto relationship for about ten years and have two children, one of whom has cerebral palsy. That child is totally dependent on you, and, if you are not there, on your mother. He requires virtually full-time care.
- [10] You yourself have suffered poor health and seizures and went to New Zealand from 2008 for five years for treatment, with your family then left with your mother. But

you profited from your time in New Zealand to obtain a diploma in Business Administration in 2011. So, like the woman who was standing in that dock yesterday, you are an intelligent person and an accomplished person but you chose that on these occasions to use your skills and accomplishments to defraud the Ministry of Health and steal substantial sums of money.

- [11] You returned to Rarotonga in 2013. There was a downturn in your relationship. That appears to have undergone reconciliation. You attempted self-harm. Commendably, when you realised you were getting into such deep water, you consulted Mr Rasmussen and he helped you and helped the Ministry come to terms with what you had done. You went to counselling at Punanga Tauturu. But instead of having, again like the woman who stood in the dock there yesterday, a good job reasonably well-paid you are now in a menial job earning only about \$300 a week.
- [12] You told the Probation Service – and Mr Rasmussen echoed this – that the cause of the offences was that you were not thinking straight at the time. To which the answer is you were not thinking straight on ten occasions. You came to your senses and commendably turned yourself in.
- [13] The Probation Service’s recommendation, which I have to say is generous, as I described the report, is for 3 years probation with 12 months on community service.
- [14] For the Crown, Ms Koteka, submits that the main charges you are facing are the falsifying charges involving theft of public money. Given that the maximum is 10 years instead of 5, I accept that.
- [15] The aggravating features – those which make your offending worse than it might otherwise have been – are your use and knowledge of the Ministry of Health systems to manipulate and access the offices and computer, steal the cheques, and do it a number of times over nearly three months.
- [16] Ms Koteka submits that one case where there were both theft and falsifying charges before the Court and where there was a non-custodial sentence, *Teinangaro*¹, is different from yours because of the small amounts involved. There full reparation

¹ Police v Teinangaro, CR 596-9/14, 28 November 2014, Grice J

repayment had been made before the matter came to Court and the accused was prepared to cooperate concerning evidence.

- [17] Ms Koteka draws my attention to a case of *Vahua*² where for a one charge of theft of \$12,000 an 18 months prison term was imposed. She also referred to *Matapo*³, which is probably the closest in terms of fact. It was a case where there were four thefts as a servant charges, one representative charge of forgery and about \$24,000 stolen of which about \$10,000 had been repaid by the time the matter came to Court. With a starting point of 3 years imprisonment, a term of imprisonment of 18 months was imposed.
- [18] Mr Rasmussen, in very helpful and careful submissions, submits that because of your personal circumstances and the nature of your family background a humanitarian non-custodial sentence should be imposed.
- [19] All these cases Ms Tou broadly fall one side or other of a watershed. The Court of Appeal as long ago as 2002 in a case called *Nicholls*⁴ said that for theft the Court should begin by looking at a jail term of about 3 to 3 ½ years. The critical distinction in most of these cases, as far as sentencing is concerned, is whether the mitigating features – those reducing the appropriate sentence – are sufficient to result in a final sentence which does not involve custody or whether the circumstances are such that jail is the only appropriate outcome.
- [20] I am required to try and fashion a sentence that will hold you accountable for the harm done to the Ministry and to the community, to try and promote a sense of responsibility in your case, provide for the interests of the Ministry by way of reparation, and particularly to denounce the conduct in which you have been involved and to deter others.
- [21] By any account this is serious offending. There were ten thefts and three frauds, in a relatively brief period. Certainly one of the features making this case worse than the run of these sorts of cases that come before the Court is that there is a significant degree of premeditation in this case. You knew the Ministry's systems, you obviously

² Police v Vahua, CR 237,238,240-6/14, 18 March 2016, Potter J

³ Police v Matapo, CR 530-540/15, 1 June 2016, Hugh Williams J

⁴ Nicholls v Police, CA 5/02, 11 December 2002

worked out its weaknesses. You resigned from the Ministry. But you stole the cheques and, with a moderately sophisticated form of offending, you then manipulated the Ministry's computer systems in a cynical way to try to conceal your offending. Also to be borne in mind is that you stole a very large sum of money – nearly \$21,000. Most of these other cases, including the one of the woman in the dock yesterday, are of a very much lesser amount than that.

[22] In mitigation – reducing the possible sentence – is that your theft offending is not actually theft as a servant but that is only because of your resignation. Your experience with the Ministry enabled you to utilise your skills and knowledge of the system, so it is as close to theft as a servant as one could get. You turned yourself in. You finally had enough sense to consult Mr Rasmussen and, with his assistance, cooperate with the Ministry and assist them in making your offending plain. You have no previous convictions as I mentioned. You pleaded guilty to all the counts at a very early stage. You have, again as I mentioned, significant accomplishments in life up until May of last year, accomplishments achieved in the face of very difficult family circumstances.

[23] But here, for whatever reason – financial pressure, family pressure, other pressures – you succumbed to the temptation and utilised the knowledge you had gained in the Ministry to commit very serious offences including fraud as well as the thefts.

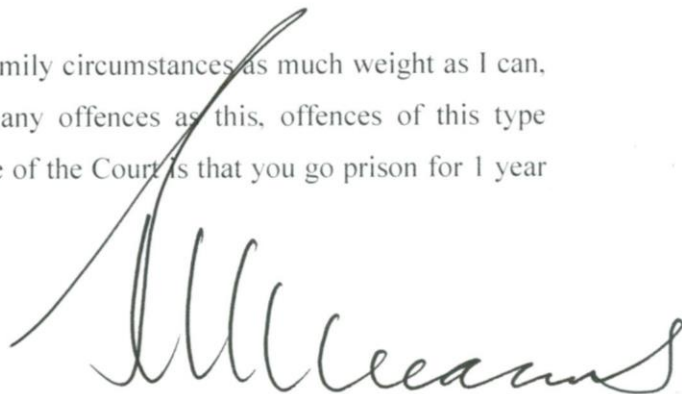
[24] I have been provided with a schedule of a number of other cases of this sort over the years which show a gradual hardening of sentencings as time has gone and the prevalence of this sort of offending becomes apparent.

[25] I mentioned *Nicholls*, where the Court of Appeal said the starting point should be about 3 years imprisonment, but that was just for theft. It did not involve fraud and it was not the theft which was almost theft as a servant. It did not involve government money.

[26] The Court of Appeal in *Quarter*⁵ accepts that an allowance can be made for extreme family circumstances and I certainly accept that and am prepared to reduce the penalty to be imposed on you to a degree.

⁵ *Quarter v R*, CA 3/11, 9 June 2011

- [27] I take a starting point of 3 years or a bit more. The increase in the starting point is for the aggravating features, particularly the number and type of offences: the fact that fraud is involved and not just theft. There is the premeditation and utilisation of the knowledge that you had. So a starting point of 3 ½ years imprisonment would not be excessive.
- [28] There must then be a discount for your cooperation, for your pleas, for not having previously been before the Court. That justifies a reduction of perhaps a quarter, perhaps a third in your circumstances. That would result in a jail term of about 2 years and 3 months.
- [29] I am prepared to reduce that by a further amount to make allowance for your family circumstances, your moves to reform yourself and because of the impact that your offending has brought about for your family and the effect it will have on your children.
- [30] I confess that I feel uneasy about your father's willingness to compromise the fruits of his long working life in order to meet the reparation to the Ministry of Health. Thoroughly commendable though it might be, it would be a most unfortunate consequence for the rest of the family if your offending, your stealing, your fraud, should bring about that result. However I am prepared to reduce the term to make allowance for that possibility.
- [31] However reparation of \$20,900, if you could ever pay is doubtful but is ordered. If your family pays it, I reiterate the remarks I have just made about that, but it is probably a factor that the Parole Board might be able to take into account in due course.
- [32] But at the end of the day, giving your family circumstances as much weight as I can, in my view jail is inevitable for as many offences as this, offences of this type involving so much money. The sentence of the Court is that you go prison for 1 year and 9 months.

A handwritten signature in black ink, appearing to read 'H Williams', written in a cursive style. The signature is positioned above a horizontal line.

Hugh Williams, CJ