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

**CR NOS: 103-109/2022**

**POLICE**

v

**LAVINIA FAMEITAU**

Hearing date: 1 September 2022

Counsel: Ms A Maxwell-Scott for Crown
Mr K Ahsin for Defendant

Sentence: 1 September 2022

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**SENTENCING NOTES OF THE HON. JUSTICE C GRICE**

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[1] Ms Fameitau, you face seven charges of theft as a servant[1] under the Cook Islands Crimes Act sections 242(1)(a) and 249(b)(ii). Each of those charges carries a maximum period of imprisonment not exceeding 5 years.

[2] Ms Fameitau admitted stealing, taking money from the University of the South Pacific where she was employed. The amounts taken over the seven charges totalled $34,842.00. The money was taken over the period from December 2020 to December 2021. The plea of guilty is based on the elements of the charge which are accepted and the statement of facts upon which I base this sentencing.

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1 Theft as a servant, s 242(1)(a) and 249(b)(ii) of the Crimes Act 1961. Maximum penalty 5 years' imprisonment.

[3] The statement of facts indicates the thefts were reported by the University of the South Pacific on 23 December 2021. Ms Fameitau had been employed as a Finance Administrator, and she had signed and banked into her personal account seven cheques amounting to the total of the $34,842.00. When questioned by the Police Ms Fameitau admitted the charges and said she had spent the money on food and other goods.

[4] The Crown in its submissions point to the sentencing principles which are appropriate to this case. In particular, to hold the offender accountable, to promote responsibility, an acknowledgement of the harm done, to denounce the conduct involved, and to deter the offender and other persons from committing similar offences.

[5] The Crown referred to the case of *Nicholls v Police*[2], 2002 of the Cook Islands Court of Appeal, which involved theft as a servant of $19,200.00. The offender in that case had no previous convictions and had entered a guilty plea. The Court of Appeal traversed other cases and came to the conclusion that it was not manifestly unjust to impose the sentence that the High Court had imposed of 18 months' imprisonment, after initial indication of 2.5 years' imprisonment.

[6] The Crown also referred to the 2010 decision of *R v Eiao Baniani*[3], where, on charges of theft as a servant, the amount stolen was in the range of $25000–$30,000. In that case the charges had been denied and the defendant had been found guilty after a jury trial. The defendant had expressed remorse. In that case, the Court took the starting point as 3 years; however, reached the end conclusion that, bearing in mind there was an offer to pay reparation an order was made that the defendant to come up for sentence if called upon which a period of 2 years. It made an order for payment of the reparation amount of $27,500.00 to the businesses involved within 12 months. In that case the Judge indicated that if the full amount was not paid within 12 months of the date of sentence, then it would be likely the Crown would request the matter be called back for sentence and the defendant will then be sentenced.

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2 *Nicholls v Police* [2022] CKCA 1:CA 5.2002 (11 December 2022) (Tab 2) (Casey, Barker, Smellie JJ).

3 *R v Eiao Baniani* [2010] CKHC 57; CR520.2010, 521, 2010 (23 July 2010).

[7] I now turn to the approach I must take in sentencing. I follow a general two-step process introduced in a case called *Moses v R*,[4] and in doing so I must take into account the principles of sentencing. The first step is to calculate the starting point incorporating the aggravating and mitigating factors of the offence. At this step, I assess a number of features which add to or reduce the seriousness of the conduct and criminality involved. The overall objective is to adopt a starting point reflecting the culpability inherent in the particular offending.

[8] The second step is to adjust the starting point applying uplifts and discounts that reflect aggravating and mitigating factors personal to the offender, as well as any guilty plea discount to reach an end sentence.

[9] In approaching the sentence I must also take into account the principles of sentencing, these include the gravity of the offending, the seriousness of this offending in comparison to other types of offences, and the general desirability of consistency with appropriate sentencing levels.

[10] I take into account information provided to the Court concerning the effect of offending on the victim, and I must impose the least restrictive outcome that is appropriate in the circumstances. I must take into account the particular circumstances of the offender. That means that the sentence which might otherwise be appropriate might in a particular instance be disproportionately severe. And I must take into account the offender's personal family, whanau, community and cultural background.

[11] I also must take into account, any outcomes of restorative justice processes that have occurred. In in the Cook Islands this is an informal restorative justice process such as has occurred in some respects in this case.

[12] In relation to the purposes of sentencing, in addition to those emphasised by the Crown, but I also must consider assisting in the offender's rehabilitation and reintegration into the community.

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4 *Moses v R* [2020] NZCA 296.

[13] In this case the Probation report paints a detailed picture of the offender. It indicates that Ms Fameitau is a smart and independent woman, she has substantial family support. Importantly, she has a 4 year-old child, to whom she is the main caregiver. Her family is very supportive and have in fact paid off the full amount taken from the University of the South Pacific by the offender.

[14] I now turn to the offending to consider a starting point. The decision cited by the Crown in *Nicholls v Police* suggests that a starting point for this type of offending might be in the nature of 3 years; and in *R v Eiao Baniani* the starting point that the Court looked at there was at least 2.5 years.

[15] A comparison with *Nicholls v Police* would indicate a starting point of somewhere in the region of, 2 to 2.5 years, which includes the aggravating factor of abuse of trust. No mitigating factors in relation to the offending were pointed out; therefore I would take a starting point as 2.5 years.

[16] I now turn to look at the aggravating and mitigating factors in relation to the offender's personal circumstances. She was aged only 17 years at the time of this offending, as confirmed by the Crown. Ms Fameitau has no previous convictions and, as I have indicated earlier, she has a 4 year-old child. Ms Fameitau is in a defacto relationship and she is no longer employed, but is looking after her child. Her partner and mother are the breadwinners.

[17] To Ms Fameitau's credit, she has completed counselling following the offending which, according to the submissions with Mr Ahsin, has seen a change in her attitude and a full acceptance of the seriousness of the offending, and remorse for it. I note there was an early guilty plea and there was never any denial of the offending. There have been apologies and full reparation made.

[18] I must also take into account the victims' views expressed through the University of the South Pacific officers. The Campus Director noted she was disappointed in Ms Fameitau, she had not expected that Ms Fameitau would abuse the trust that had been put into her. It had an impact on the University, the students, and

the staff. Staff had to take over Ms Fameitau's role and do two roles, at least for a period of time.

[19] However, the University management do not consider that imprisonment is appropriate in the case of Ms Fameitau. The representatives of the University, nevertheless, say a message needs to be sent to denounce this type of behaviour.

[20] In my view, the two significant issues which go to mitigation here which have been emphasised by your counsel, Mr Ahsin, and accepted by the Crown, are your extreme youth at 17 years of age when the offending occurred and, in particular, the fact that you have care of a young child. You had your child when you were very young. Nevertheless, you continued your education, achieving University Entrance, you had an enthusiasm for learning, which your counsel now says has returned – after some time where you became closed and not responsive to encouragement after the offending

[21] In an appeal to the Court of Appeal of the Cook Islands in *Quarter v R*[5], against a period of imprisonment imposed on a mother of a new baby. The Court of Appeal noted[6]:

> We have had the advantage of a fuller explanation of the facilities and legislation affecting recent mothers in prison in the Cook Islands. It appears there is no satisfactory provision for mothers and babies in prison, nor is there legislative provision for special parole, early release, or expedited pardon on that account.

[22] For that reason the Court of Appeal said that the *Quarter* case was exceptional because of the young child involved. The Court went on to say that it needed to maintain deterrence in cases of deliberate and proven fraud over an extended period, and a message needed to be sent. In that case the sentence imposed by the High Court on Ms Quarter had been a sentence of 12 months' imprisonment for a sophisticated fraud in which a total of $30,000 had been taken over a period of 18 months.

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5 *Quarter v R* Court of Appeal, Cook Islands CA03/11, 9 June 2011.
6 At [17].

[23] The Court, however, also focused on the humanitarian aspect of accommodating a special interest, in that case of a young infant, and the impact of imprisonment on the child's mother. The Court therefore remitted the matter back to the High Court for re-sentencing. One of the issues involved was that the sentence in the High Court had been imposed on the basis reparation of $30,000 was to be paid, but it in fact had not been paid.

[24] The Court of Appeal said there was nothing in the judgment to be taken as suggesting a mother with a young child would automatically be entitled to reduction in the sentence; nevertheless, each case would depend on its circumstances. In this case the offending was not as sophisticated as was in *Quarter v R*, there is no reference to Ms Quarter's age in the decision but, it is unlikely she was as young as 17.

[25] I take judicial recognition of the fact separating mothers and young children, not just recently born children but young children, can have significant effects on the child. Over recent times the significance of those effects are only just being realised. The other matter that is important and a significant mitigating factor in this case, is Ms Fameitau's youth. In another context the New Zealand High Court has commented on the fact that the age of the offender is very relevant.

[26] In the decision *R v M*[7], the offender, a 17 year-old male, who was facing charges relating to an assault on a victim, who had died as a result of the assault because of a non-diagnosed heart condition, which made him vulnerable to traumatic stress, Winkelman J, as she then was, said:[8]

> I regard your age as very relevant in assessing your culpability. Youth is a relevant factor in sentencing. As I have said, it is relevant because of the particular interest society has in ensuring that young offenders can be rehabilitated to be continuing members of society, but it is also relevant because the law recognises that young people may in some circumstances be less culpable for their offending, this is because young people are less able than adults to make good choices as to their actions and to control impulses.

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7 *R v M* 2014 NZHC1848.
8 At [29].

She went on to say that that was particularly the case in young men, but her comments are aimed, generally, at young people. She said the direct and indirect consequences of convictions are often more serious for youthful first time offenders.

[27] While the comments were in a different context, it equally applies here. You were only 17 and, given your youth at that stage, I consider I am entitled to take that into account as a mitigating feature.

[28] In this case a term of imprisonment would normally have been appropriate to maintain consistency with earlier cases, and particularly the *Nicholls* decision. However, I also bear in mind the decision that I have referred to in *R v Eiao Baniani*, referred to me, which does indicate that there is some room for flexibility had even in a case which ordinarily would call for imprisonment.

[29] In my view, this one of those rare cases where imprisonment is not appropriate. That is primarily because of the fact that you have a young child and you were very young when you had that child and you were also young at the time of the offending. Those are significant factors which have been pointed to by the Crown in supporting a non-custodial sentence in this case.

[30] If I had been considering a custodial sentence, I would have applied discounts for the guilty plea and reparation and remorse, but I would have considered a term of at least 6 months' imprisonment was appropriate in the circumstances.

[31] Nevertheless, because of the mitigating factors relating to your child, and your youth in particular, as well as the fact full reparation has been paid, I consider that it is appropriate to impose a non-custodial sentence. However, I do not consider that that should be a sentence such as *R v Eiao Baniani,* of being required to appear for sentencing if called upon. I is not sufficient to express denunciation for this type of offending and to express the responsibility you must take for the offending.

[32] In my view, a sentence of 2 years' probation is appropriate. That is a long period of probation, and would be coupled with 6 months of that to be served on community service, subject to special conditions that you not leave the Cook Islands

without the approval of the High Court, and you attend counselling or any workshops as directed by the probation service. That in my view, is sufficient in these particular unique circumstances to express the denunciation in relation to this type of offending.

[33] You are sentenced to 2 years' probation, with the first 6 months on community service, and special conditions that you not leave the Cook Islands without the approval of the High Court, and that you attend any training or workshops as directed by the Probation service are imposed in relation to each charge, to be served accumulatively.

[34] I understand the reparation has been paid; therefore, I make no order as to reparation.