

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

CR NOS: 483, 696/2020

POLICE

v

NGARIKI E-TINI THOMPSON-ELIU

Hearing date: 2 September 2022

Counsel: Ms A Maxwell-Scott for Crown
Mr N George for Defendant

Sentence: 2 September 2022

SENTENCING NOTES OF THE HON. JUSTICE C GRICE

[1] Mrs Thompson-Elui is charged with theft as a servant¹, which carries a maximum penalty of imprisonment of 5 years.

[2] Mrs Thompson-Elui also faces two charges jointly with Ella Napara of conspiracy to defraud. Each of these charges carries a maximum period of imprisonment of 5 years.

Background

[3] Mrs Thompson-Elui was employed by the Cook Islands Police Service as the Finance Manager for the Service. Two other offenders being sentenced today,

¹ Under s 242(2) and 249(b)(ii) of the Crimes Act 1969.

Ms Miria Tuakana, also worked in the Police Service in the Driving Licence Section, and Mr Daniel Thompson, in Human Resources. All three worked closely alongside one another in the Police Station in Avarua.

[4] Mrs Thompson-Elui's responsibilities included management of financial affairs of the Cook Islands Police Service, including processing expenditure requests and submitting them to the Commissioner of Police. She submitted reconciliation reports which accounted for Police expenses every month, and would submit reconciliation reports to the Ministry of Finance and Economic Development. Her co-defendant in the conspiracy charges was employed as an intermediate Finance Officer.

[5] Mrs Thompson-Elui had access to the online banking system for the Cook Islands Police, and she was entitled through her access ID to make online banking transactions using the Police account.

[6] From October 2016 to March 2017, Mrs Thompson-Elui stole Police money by transferring the money from the Police bank account into her personal bank account. She spent the stolen funds on personal expenses.

[7] In addition, Mrs Thompson-Eliu would transfer money from the Police account to a bank account in the name of a third party, before transferring the money from that third party to her account.

[8] Mrs Thompson-Elui would account for the transactions by dishonestly claiming that the funds were legitimate Police expenses. Using this modus operandi she stole \$240,000 over the period of the offending.

[9] The first conspiracy to defend charge is based on the fact that Mrs Thompson-Elui and Ms Napara conspired to defraud the Cook Islands Police Service of \$800. In a series of text messages on 7 August 2018, Mrs Thompson-Elui liaised with Ms Napara to the effect that Mrs Thompson-Elui would take \$800 from the Police funds for Ms Napara who was seeking to "borrow some money from work".

[10] The second conspiracy to defraud charge against Mrs Thompson-Elui and Ms Napara relates to \$600, and took place on 2 October 2018. Ms Napara asked to borrow \$600 and Mrs Thompson-Elui asked another defendant, Daniel Thompson, to take \$600 from the Police funds to give Ms Napara.

[11] Ms Napara has pleaded guilty and has been convicted.

[12] The Crown submits that a starting point of at least 4 years' imprisonment is appropriate. It points to the sentencing principles and, in particular, says the offending displays:

- (a) A serious breach of trust. The defendant held a position of trust and the offending enabled her to encourage and enable others to commit similar offending.
- (b) Planning and pre-meditation – the transactions occurred over a long period and involved a substantial amount of money. Not only did Mrs Thompson-Elui transfer the funds online but she kept the transactions under the dollar threshold to ensure that her transactions would not trigger the bank's requirement for approval by a second account signatory. In addition, she prepared monthly reconciliation statements for submission to the Ministry of Finance and Economic Development and reported the transactions using false attributions to appear as if the money had been used on legitimate Police expenditure. This meant the offending went unnoticed for a long period of time.

[13] As I said, the offending went on for four years before Mrs Thompson-Elui was eventually caught.

[14] The Crown notes this was a significant theft in Cook Islands terms, and harmed the Police Service. The consequences of the offending have been far-reaching. The loss of the funds has gravely impacted the Police's ability to deliver their services.

[15] The Crown accepts that a guilty plea was entered as a result of discussions between the Crown and the defendant, and that that should be taken into account in favour of the defendant. However, the defendant had initially entered guilty pleas in April 2021, albeit on a slightly different basis, and subsequently just before the matter was due for trial following further negotiations between the Crown and the Defence, the guilty pleas were again entered. The Crown says, in relation to this defendant, the charges are very similar to those originally charged.

[16] The Crown points to a number of New Zealand decisions concerning theft as a servant. Care must be taken with comparisons with New Zealand decisions as there is a lower maximum term of imprisonment in the Cook Islands comparative offence of theft as a servant of 5 years' imprisonment, compared to the 7 years maximum in New Zealand.

[17] The Crown notes there is no guideline judgment for dishonesty offending. It refers to the decision of the New Zealand Court of Appeal in *R v Varjan*.² In that decision the Court of Appeal noted:

- (a) There is no established benchmark for dishonesty offending as the circumstances of culpability and background vary widely.
- (b) Culpability is to be assessed by reference to the circumstances and such factors as the nature of the offending, the magnitude, sophistication and the time and circumstance, as well as the number of the victims.
- (c) Also relevant is the motivation for the offending, the amounts involved, the losses, the period over which the offending occurred, and the seriousness of the breaches of trust involved, as well as the impact on victim.³

² *R v Varjan* CA 97/03, 26 June 2003.

³ *R v Varjan* at [22].

[18] The Court in *Varjan* said that culpability in a particular case had to be compared with other cases. Matters such as reparation, cooperation with investigators, plea, remorse, and personal circumstances must be assessed in each case.⁴

[19] The Court of Appeal said that the authorities indicated in cases of major defalcations and the need to protect the community, imprisonment is appropriate.⁵

[20] The Crown also pointed out that the safety of the community was an important factor in this case, as was deterrence of others from this type of offending.

[21] Mr George for the defendant accepted the sentencing was to proceed on the basis of the statement of facts filed by the Crown.

[22] Mr George makes the point that Mrs Thompson-Elui was a finance specialist and in her role as the Finance Manager for the Police Service was bringing order to a chaotic financial system. Mr George noted that she had been in that role for over 10 years, and suggested that the culture of the organisation fostered dishonesty. He noted the defendant had access to substantial funds and mixed her private funds ultimately with those of the Police.

[23] Mr George, for Mrs Thompson-Elui, emphasised the defendant has no previous convictions and is deeply remorseful. She is aged 45 and has five adult children and grandchildren.

[24] Counsel for the defendant handed up a number of testimonials in support of Mrs Thompson-Elui from members of the community, the church, and family. It is clear from the testimonials that Mrs Thompson-Elui is a respected member of the community, she contributes substantially to the community and church. She is a caring family person, very capable, and a hard worker according to the testimonials which were no fewer than nine.

⁴ *R v Varjan* at [23].

⁵ *R v Varjan* at [25].

[25] Mr George on behalf of the defendant accepts that a term of imprisonment is inevitable. He has also negotiated with the Crown for a reparation amount to be paid of \$25,000, and described how this would be effected following any term of imprisonment.

[26] In sentencing I follow the general two-step approach introduced in the New Zealand decision of *Moses v R*.⁶ In doing so, I must take into account the principles of sentencing as well as the purposes of sentencing.

[27] 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, and that is recorded in the decision of *Orchard v R*.⁷

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

Purposes and principles of sentencing

[29] In this case I accept that the relevant principles of sentencing require me to take into account the gravity of the offending in the particular case, and the degree of culpability. The general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in similar cases. I must take into account any information provided to me concerning the effect of the offending on the victim. I must impose the least restrictive outcome that is appropriate in the circumstances. I must take into account the particular circumstances of the offender, and her personal family, whanau community and cultural background, and I must bear in mind rehabilitation.

⁶ *Moses v R* [2020] NZCA 296.

⁷ *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37 at [28] and [32].

[30] The purposes of sentencing require me, in this case, to take into account the need to hold the offender accountable for the harm done to the victim and the community by the offending; to promote in the offender a sense of responsibility and acknowledgement of the harm done; to provide for the interests of the victim and for reparation for the harm done by the offending; to denounce the conduct; to deter the offender or other persons from committing the same or a similar offence; and to protect the community from the offender. I must also consider rehabilitation and reintegration.

Probation Report

[31] The Probation report describes Mrs Thompson-Elui as a contributor to the community. She is currently unemployed and supported by her family.

[32] The report notes that in the past she has held responsible jobs, and they were outlined by Mr George in his submissions on behalf of Mrs Thompson-Elui. She is not well off.

[33] The submissions for the defendant and the pre-sentence report notes that she apologises for the offending to the Police, and she is ashamed. She has pleaded guilty, albeit at a later date.

[34] The victim impact statement indicates the offending had a negative effect on the Police and its finances. Mrs Thompson-Elui had a key leadership role in Police management, she was a central character in encouraging her co-defenders' dishonesty. This offending has been embarrassing for the Police. It is very important that the community respect the Police Service. Mrs Thompson-Elui should have been able to be trusted by the Police.

[35] Police Service initially sought reparation in the vicinity of \$300,000; however, after further discussions it accepted that the amount taken was \$241,000-odd, and today further negotiations have reached a practical figure for the amount of reparation, one that will realistically be repaid with the support of Mrs Thompson-Elui.

[36] The Probation Service indicates that Mrs Thompson-Elui has acknowledged her wrongdoing and did not want to drag the others down with her in the process, and the report recommends a custodial sentence, as must be inevitable.

[37] So I turn to the first step to set the starting point. I take theft as a servant as the lead offence for the purposes of sentencing.

[38] The Crown says the offending involves high culpability in that the loss to the Police Service was over \$240,000, and occurred over a period of approximately 3.5 years. It was sustained and it was premeditated. In addition, Mrs Thompson-Elui held a senior management position, so the offending involves a substantial breach of trust. A further factor is that the motivation was personal gain, and the money was used mainly on living expenses and overseas travel.

[39] In the New Zealand decision of *Kiro v R*⁸ a case involving charges of theft as a servant following a fraudulent scheme, the sum of \$249,765 was taken over 16 months. Reparation of \$62,000 was made. In that case the sentencing Judge adopted a starting point of 5.5 years' imprisonment. On appeal this was described as "stern" but not outside the acceptable range. I bear in mind, of course, that it is excess of the maximum period of imprisonment of 5 years available in the Cook Islands for that offence.

[40] A number of other offences were referred to by the Judge in *Kiro v R*,⁹ which ranged from 6 years, in relation to theft of \$510,000 using sophisticated financial schemes in *Mount*, to 3 years' imprisonment in *Bayly* which involved the taking of \$317,000 taken over 18 months and involved 50 charges. In that case the starting point of 3 years was described as "lenient".

[41] The Crown also pointed to the New Zealand decision in *Procter v Police*¹⁰ where a university employee, on a representative charge of dishonesty by using a

⁸ *Kiro v R* [2016] NZHC 1550.

⁹ Fn 8 above at [46].

¹⁰ *Procter v Police* [2016] NZHC 2656.

document for pecuniary advantage, took \$481,000 over 3 years. The aggravating factors there were:¹¹

- (a) the considerable amount stolen of \$481,000;
- (b) that a Crown entity was the victim; and
- (c) the dishonesty was sophisticated and premeditated involving a grave breach of trust. The offending only stopped when the discrepancies were noted.

The start point was 4 years' imprisonment.

[42] Turning to the Cook Islands decisions. In *Police v Kamana*,¹² an employee of a Government Department stole \$12,700 over 3 months. She was the Deputy Director of the National Environment Service where she had worked for over 20 years. In that case the Chief Justice reviewed other Cook Islands cases, including the Cook Islands Court of Appeal decision in *Nicholls v Police*.¹³ That case made it clear that a sentence of imprisonment was inevitable as at least the starting point for offences involving reasonable sums for theft as a servant. In *Nicholls* \$19,200 was taken from a resort employer over six months.

[43] In *Police v Kamana* the Chief Justice took 2.5 to 3 years as the start point.

[44] In this case the culpability is high. The offending involves a gross breach of trust, and a sophisticated and pre-meditated system of theft from a public agency. In addition, the amount involved of \$240,000 is significantly higher than in the previous Cook Islands cases to which I have referred, and to those which I have dealt with here.

[45] New Zealand authority would indicate that somewhere in the region of 3 to 6 years would be an appropriate starting point, but more likely in the vicinity of

¹¹ At [3].

¹² *Police v Kamana*, CR Nos. 515–517/21, 537/21, 22 April 2022.

¹³ *Nicholls v Police* 2022 CA 5/02, 11 December 2002.

4.5 years. As I have said, care needs to be taken with the New Zealand cases due to the higher maximum period of imprisonment for the similar charges.

[46] Nevertheless, in this case there is a high level of culpability which I have described. I accept the Crown submission that a starting point of 4 years' imprisonment is appropriate. The breach of trust and other aggravating factors, including the method of the systems used, the sophistication and persistence as well as fostering a culture of dishonesty in the Police Service Finance team, must be taken into account. Therefore, I take a start point of 4 years. I do not provide an uplift on that for any aggravating factors as they are taken into account, including the abuse of trust in the start point of 4 years.

[47] Mr George submitted in relation to the offending that the systems allowed the offending to happen as they were not effective. However, the reason that the defendant was with the Police Service was to assist the Service to create better systems and, in fact, she merely took advantage of the existing systems, which had been described as "chaotic" to hide her own offending. In addition, Mrs Thompson-Elui encouraged others to participate. As I have said, she was a key player in promoting a dishonest culture and did so for personal gain.

[48] Therefore, I conclude 4 years is an appropriate start point when compared to the other Cook Islands cases involving such offending, but none of them involve the amount or sophistication of this offending.

[49] At the second step I adjust the start point with uplifts and discounts to reflect factors personal to the offender.

[50] Mr George said everything that could be said on behalf of Mrs Thompson-Elui. I note that she has no previous convictions. The testimonials paint the picture of a dedicated and hardworking mother who has contributed to the community. She is relied on by others, she is clearly capable. As I have said, she has produced at least nine testimonials supporting that. She has shown remorse and is very ashamed of her offending.

[51] In view of the offending those factors alone would not be sufficient to provide a discount to the start point. However, a significant factor which reflects the remorse and the approach that Mrs Thompson-Elui now takes to the offending is that there has been a negotiation of a realistic reparation sum and careful consideration has been given as to how that will be paid.

[52] In my view, that is an important factor which goes toward a discount for personal circumstances. The arrangement is for reparation of \$25,000. I accept that that is only a drop in the bucket, some 10% of what has been stolen, but it is a realistic amount and, as I have said, Mr George has indicated that Mrs Thompson-Elui has undertaken careful consideration of how that will be repaid when she is released from the inevitable prison term. Therefore, in my view, that is a significant factor and I would allow for the personal factors a discount of 10%.

[53] Further, Mrs Thompson-Elui pleaded guilty. I accept the Crown's submission that she is not entitled to the full guilty plea discount of 25% because the plea was entered at the last moment, and it followed earlier negotiations. Therefore, the pleas were not entered at the first opportunity. I consider a discount of 20% for the guilty plea is appropriate.

[54] In total that amounts to a deduction of the range of 30% from the 4 year starting point, that is an approximate figure. The sentencing exercise is not an arithmetical exercise; therefore, applying discounts of approximately that amount I reach a conclusion that a term of 33 months' imprisonment, or 2 years 9 months, is an appropriate end point for imprisonment. That is a term less than the Crown was seeking but recognises the arrangements that have been made for reparation.

[55] Standing back and looking at the offending as a whole, I consider that is an appropriate sentence. The amount involved is substantial, by far the most the subject of the Cook Islands cases of similar offending, and it was taken from a public authority which has caused it difficulty in providing its services and public embarrassment.

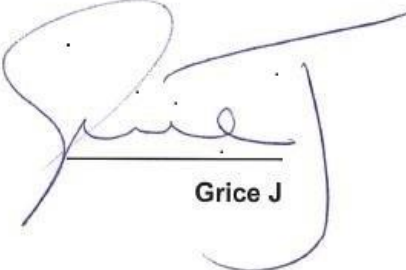
[56] I am also going to incorporate the arrangements as to reparation that have been made. These will be the subject, I understand, of a short agreement between the Crown and Mrs Thompson-Elui which will be signed up following this sentencing.

[57] On the charge of theft as a servant I impose:

- (i) a term of imprisonment of 2 years' 9 months.
- (ii) I order reparation in the sum of \$25,000 under s 415 of the Crimes Act. I note that arrangements for payment are to commence when Mrs Thompson-Elui is released from jail, and those arrangements will be supervised by the Probation Service during the 12 month probation period that follows the imprisonment. Beyond that, arrangements are to be made for direct payments to the Police.

[58] On each of the two charges of conspiracy to defraud I impose sentences of 6 months' imprisonment respectively.

[59] The sentences are to be served concurrently.



Grice J