

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

CR 30 of 2018

BETWEEN:

REX

Prosecution

AND:

VILIAMI LATU

Accused

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: Mr T. 'Aho for the Prosecution  
Mr. S. Tu'utafaiva for the Accused

Date of Hearing: 6 – 8 March 2019

Date of Verdict: 11 March 2019

VERDICT

- [1] Mr Latu is charged with one count of falsification of accounts contrary to s. 159(b) of the Criminal Offences Act and one count of simple fraudulent conversion by a Government servant contrary to s. 53(1) of the Criminal Offences Act.
- [2] He entered pleas of not guilty to both counts and elected trial by Judge alone.
- [3] At the commencement of the trial Mr. 'Aho applied to amend the indictment. Mr. Tu'utafaiva did not oppose the amendments. I was satisfied that there was no prejudice to Mr Latu and allowed the amendments. For the record I note that the amendments are:

- (a) In the English language version of the indictment the court number was corrected to CR 30 of 2018;
  - (b) In respect of count 1 in the English language version of the indictment, the words 'concurred for Lesieli Halafihi to make' were deleted and the word 'made' was substituted; and
  - (c) In respect of both counts 1 and 2 in the Tongan language version of the indictment, the words 'Lesieli Halafihi 'o Fungamisi' were deleted and the words 'Viliami Latu 'o Neiafu' were substituted.
- [4] Accordingly, the particulars of the offences set out in the indictment as amended are as follows:

**Count one**

Viliami Latu of Neiafu, on or about 30 June 2017, at Neiafu, whilst employed as a Government servant at the Ministry of Finance and National Planning, you did wilfully and with intent to defraud, make false entries in the Main Cash Book of the Ministry of Finance and National Planning.

**Count two**

Viliami Latu of Neiafu, on or about the months of September 2016 to June 2017, at Neiafu, whilst employed as a Government servant at the Ministry of Finance and National Planning, you did fraudulently convert to your own use \$1,200 which was entrusted to you by virtue of your employment as a Government servant in the Ministry of Finance and National Planning.

**Burden and standard of proof**

- [5] I remind myself at the outset that the onus of proof lies on the Prosecution at all times and it is to the standard of proof beyond a reasonable doubt in relation to the charges and every constituent element of the charges.
- [6] I note also that there is no obligation on Mr. Latu to prove anything nor was there any obligation for him to call evidence or give evidence himself or provide any explanation for matters relied upon by the Prosecution in support of its case. Mr. Latu did give

evidence but there is no significance in that in the sense that the onus and the standard of proof are unchanging and rest on the Prosecution throughout.

- [7] I have reminded myself also that I must judge this case only on the evidence which I have heard in this Court. If the Prosecution has not called all its potential witnesses or led all the available evidence then so be it. On the basis of the onus and standard I have already mentioned, the prosecution must stand or fall on the evidence which is before me (*R v Fa'asoa* (Unreported, Supreme Court, CR 520/95, 13 February 1996, Hampton CJ)).

### **The facts**

- [8] The facts fall within a narrow compass and in large measure are not in dispute. The issues of fact and law that require resolution have been clearly articulated by Counsel and are few in number. It is not necessary for me to set out in detail the evidence of all the witnesses and I do not propose to do so. What I will do is set out below the proven facts against which the issues are to be considered. These facts were either not in dispute or I have found them proven beyond reasonable doubt.
- [9] Mr Latu began working at the Vava'u branch of the Ministry of Finance and National Planning in 2015. The office handles the public revenue and disbursements of Government Ministries operating at Vava'u.
- [10] The officer in charge of this office is known as the Sub-Treasurer and was at the material time Samuela Fakatou.
- [11] Mr. Latu was the second in command in the office. He was the Senior Accounting Officer and had duties which included checking vouchers for payment of Government debts, maintaining leave and attendance records and maintaining and balancing the Main Cash Book which recorded the total of all revenue and expenses each month. Mr. Latu also performed other duties as directed by the Sub-Treasurer.
- [12] Mr. Latu was a senior Government servant who was familiar with the rules and procedures which applied to the receipt and expenditure of Government money and the maintenance of the office's records relating to it. He understood that he was required to maintain accurate records and of the importance of doing so.

- [13] Another employee in the office was Lesieli Halafihi. She was the cashier and worked closely with Mr. Latu but she was his subordinate. Miss. Halafihi handled large amounts of cash. As required the Sub-Treasurer transferred money to her from the vault. She also collected Government revenue. She maintained a summary of the daily balance, which recorded, *inter alia*, the cash balance at the close of the day's operations with a breakdown of the denominations of notes, coins, cheques etc. She also maintained a cashier's cash book, recording the total of expenses and any revenue collected each day. Miss. Halafihi kept the cash that was under her control in a drawer.
- [14] Miss. Halafihi took a large sum of Government money that was under her control for which she has been tried and convicted. On occasions Mr. Latu asked Miss. Halafihi to give him money from her drawer. He said in his record of interview to the Police that this occurred from around February 2017. This was when he was short of cash. Miss. Halafihi gave him the money when he requested it and he spent it for his personal needs.
- [15] Mr. Latu said that in total Miss. Halafihi gave him around TOP\$1,200 and he always paid it back the same day. I do not accept his evidence. If he had money available, so as to be able to pay back what he took the same day, I do not believe that he would have done something as obviously improper and perilous as to ask for the money in the first place. He also acknowledged that there was an occasion when he did not pay the money back the same day and had instructed Miss. Halafihi to disguise this. This would have involved her make false entries in the summary of daily balance and cashier's cash book.
- [16] Mr. Latu was aware that the money Miss. Halafihi gave him was Government money, that he had no entitlement to the money and that it was wrong of him to request and/or take it. In his record of interview he said he knew that taking the money was 'strictly prohibited'. Mr. Latu was acting dishonestly and fraudulently when he asked for and took the money, converted it to his own use and when he, on at least one occasion, told Miss. Halafihi to falsify records to cover it up.
- [17] Mr. Maika Haupeakui is a Deputy Chief Executive Officer for Finance at the Ministry of Finance and National Planning. He is responsible for the internal audit division. He took a team from Tongatapu to Vava'u to conduct a surprise audit at

the Vava'u branch office. He arrived in Vava'u on 28 June 2017 and the members of his team the next day. On arrival he went to the office and made known the purpose of his visit. Mr Latu was present.

- [18] On 28 June 2017, Mr. Fakatou directed Mr. Latu to conduct the end of day cash count. This was usually done by Miss. Halafihi. Mr. Latu said in his record of interview that he already knew there was a shortage of cash because Miss. Halafihi had told him. The summary of daily balance and cashier's cash book showed a cash balance at day's end on 27 June 2017 of TOP\$93,460.88. This represented a small surplus of TOP\$2.91. When Mr. Latu did the cash count on 28 June 2017 the correct cash balance was TOP\$121,713.24 but the cash on hand amounted to just TOP\$53,035.14. There was a cash deficit of TOP\$68,678.10. This is recorded in the summary of daily balance (Tab 7A) which was signed by Mr. Fakatou. Mr. Haupeakui was advised by Mr. Fakatou that there was a shortfall but for an amount that was much smaller than was in fact the case.
- [19] On 29 June 2017, Mr. Latu and Miss. Halafihi went and obtained loans from a person called Mohtonu. Mr. Latu gave the quite incredible evidence that he was told to go with Miss. Halafihi by Mr. Fakatou, that he did not know where they were going and it was only when he was there and waiting for Miss. Halafihi that he decided to take out a loan of TOP\$1,500 for his grandchildren's needs. He then said that he gave TOP\$1,000 to Miss. Halafihi to assist her with her loans. The irresistible inference is that having been surprised by the auditors' visit and knowing there was a large cash shortfall Miss. Halafihi and Mr. Latu obtained loans to pay back some of the money that had been taken, including money given to Mr. Latu. I can think of no other sensible reason why Mr. Latu would on the spur of the moment take out a loan or having done so for his grandchildren's needs then give the greatest share of it to Miss. Halafihi.
- [20] On 29 June 2017, Mr. Latu was again directed to do the end of day cash count. It was discovered that the cash deficit had increased to \$69,878.81. There was no evidence as to how this happened. This was again recorded in the summary of daily balance. On this occasion the summary was signed by Mr. Latu himself.
- [21] The auditors worked during 30 June 2017. This was the last day of the financial year. One of their tasks was to do a cash count. This could only be done once the

day's business had been completed. They worked late and started the cash count before midnight. They finished it around 12.30am. The total cash on hand was TOP\$41,311.85 whereas the sub-treasurers cashbook balance was TOP\$119,812.27. This represented a shortfall of TOP\$71,500.42.

- [22] One of those auditors, Taumafa Tangata'iloa, gave evidence that when they commenced the cash count they had still not been given the Main Cash Book by Mr. Latu. Mr. Latu said it was not ready as entries were still being recorded in it. Mr. Latu was present during the cash count. He handed the Main Cash Book over at around 3am. The second page of entries for 30 June 2017 were completed by Mr Latu. They show a balance brought forward from the month before, the total of all revenue and expenses for the month and then the following entries:

C/F of JULY 2017	119812.27
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Comments:	Cashier 119,812-27
	Vault NIL

- [23] The notation 'C/F' stands for 'carried forward'. The numbers '119812.27' represent the cash on hand carried forward to the following month. The 'comments' indicate that there was no cash held in the vault and the entire TOP\$119,812.27 was held by the cashier.
- [24] At the end of each quarter the Main Cash Book was to be co-signed by the members of a body called the Survey Board. They are expected to do a cash count and independently verify the entries in the Main Cash Book. In practise these independent enquires were not done. Mr. Latu prepared the Main Cash Book for signature by the Chief Medical Officer, the Principal Magistrate, and Superintendent Police. It appears to have been signed by the Principal Magistrate and someone from the Ministry of Infrastructure only. This must have occurred the following week as 30 June 2017 was a Friday and the Main Cash Book was not handed over by Mr. Latu until 3am on the Saturday morning.
- [25] Mr. Haupeakui prepared an internal audit report on his findings. An investigation was carried out by the Auditor General's office and it released a report also. Both reports were produced by consent.

## **The elements and the issues**

### *Falsification of accounts*

- [26] The Prosecution case is that Mr. Latu made entries in the Main Cash Book knowing them to be false and intending to deceive future observers of the Main Cash Book. The entries in issue are the ones showing a balance carried forward to July 2017 of TOP\$119,812.27. These are said to be false because the cash on hand amounted to just TOP\$41,311.85 and there was a known deficit of TOP\$71,500.42.
- [27] I note at this juncture that whilst Mr. Latu undoubtedly concurred in Miss. Halafihi making false entries in the records of the Ministry on at least one occasion to hide the fact that he had taken money for personal needs, he was not charged with that. The indictment alleges only that Mr. Latu made false entries in the Main Cash Book.
- [28] Section 159 of the Criminal Offences Act provides:
- Every person employed as or acting in the capacity of a clerk, officer or servant and whether in the service of the Government or of a private employer who wilfully and with intent to defraud —
- (a) destroys, alters or falsifies any book, valuable security, account or document which belongs to his employer;
- (b) makes or concurs in making any false entry in any such book or document;
- or
- (c) omits or alters or concurs in omitting or altering any material particular in any such book or document, shall be liable to imprisonment for any period not exceeding 7 years.
- [29] The elements to the offence under s. 159(b) that must be proved against Mr. Latu to the criminal standard are:
- (a) That Mr. Latu;
- (b) Was employed in the service of the Government; and
- (c) Wilfully and with intent to defraud;
- (d) Made a false entry in the Main Cash Book; and

(e) The Main Cash Book belonged to the Government.

- [30] Mr. 'Aho submitted, and Mr. Tu'utafaiva agreed, that in relation to whether there was an intention to defraud the Court should adopt the test of dishonesty in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67 at [74] as follows:

When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.

- [31] I do not see how *Ivey* is applicable. Mr. 'Aho could not refer me to any cases where it had been applied in relation to s. 159 or in any other context in Tonga. The case is concerned with the meaning of the term 'dishonesty' as it applies in both the civil and criminal law, but that term is not used in s. 159. Section 159 requires proof of a specific intention to defraud and I can see no basis to read this requirement down. I do not need to finally decide the issue as it will make no difference to the result of this case.
- [32] Mr. Tu'utafaiva advised in closing that it is accepted that the the elements referred to in paragraphs 29(a), (b) and (e) above were proven. He said that the only two issues that required determination in relation to this count were first, whether the entries in the Main Cash Book were false and secondly, if the entries were false whether they were made by Mr. Latu wilfully with an intention to defraud.
- [33] Mr. Tu'utafaiva argues that the Main Cash Book entries are not false as they represented the position as it should have been as at 30 June 2017, Mr. Latu was able to explain logically how the figures were arrived at and there was no criticism of the entries in the reports of the internal auditor or the Auditor General. I do not accept this submission.



- [34] Without accurate financial records Government could not function. Mr. Latu accepted that it was his duty to keep accurate records. It is trite that entries in the Main Cash Book are not accurate if they do not record the circumstances as they actually exist. The entries in question are demonstratively false because the cash available to be carried forward to July 2017 was not TOP\$119,812.27. That figure was overstated by TOP\$71,500.42. The entries were not unaccompanied by any explanation, notation, comment or information that would suggest to a reader that the situation was other than represented.
- [35] However the second issue is not so clear. Mr. Latu was a poor witness and gave different explanations in his record of interview and his evidence of the reasons he made the entries as he did. However, he generally maintained that the entries were, to his mind at least, not false and had been completed correctly in accordance with his understanding of what was required. He also said that it was usual that the Main Cash Book was given to the Sub-Treasurer to confirm that it was correct after he had prepared it.
- [36] Despite his senior position and experience, in the unusual circumstances of this case it has not been proven beyond reasonable doubt that Mr. Latu wilfully made false entries intending to defraud any person by them.
- [37] The matter must be considered in the context of the facts that were known to Mr. Latu. He had made cash counts on 28 and 29 June 2017 and identified large shortfalls. He had recorded these and reported them to the Sub-Treasurer. He did not hide the shortfalls. He knew the office financial records were being audited and that these records included the summary of daily balance. He was present during the auditor's cash count which confirmed the amount of the shortfall. He knew that the auditors had identified for themselves that there was a shortfall and the amount of it. The auditors' cash count was completed hours before he handed over the Main Cash Book. Mr Latu did not hand over the Main Cash Book until 3am in the morning and provided an explanation for this. Mr. 'Aho did not attempt to suggest there was anything sinister in it in closing. It is the case then that at the time the Main Cash Book was handed over all concerned knew there was a shortfall and the amount of it and no one with that knowledge would be misled by entries Mr. Latu had made in it (and no one was misled). I cannot accept in these circumstances that

Mr. Latu would be so totally unsophisticated as to believe or intend that the entries would or could deceive anyone.

[38] Mr. 'Aho argued that Mr. Latu intended to deceive 'future observers' of the Main Cash Book. He presented a scenario that the office might have burnt down leaving no records other than the Main Cash Book which would, in absence of other records, be misleading. This is whimsical and certainly not something that would have been in the contemplation of Mr. Latu.

[39] For completeness I would add that if *Ivey* applied, given Mr. Latu's state of mind and knowledge of the facts as set out above, I do not consider that his conduct in making the entries in the Main Cash Book was dishonest by the objective standards of ordinary decent people.

[40] For the reasons set out above, this this count of the indictment has not been proven.

*Fraudulent conversion by a Government servant*

[41] The Prosecution case is that the TOP\$1,200 that Miss. Halafihhi gave to Mr. Latu at his direction was Government money that was entrusted to him by virtue of his employment as a Government servant and that he converted it to his own use without his employer's consent.

[42] Section 53(1) of the Criminal Offences Act provides:

Every person who being employed as or acting in the capacity of a Government servant fraudulently converts to his own use or to the use or benefit of any other person or in any manner fraudulently disposes of any money, valuable security or thing of any description whatever or any part thereof which has been entrusted to or received by him by virtue of his employment as a Government servant shall be guilty of an offence under this section.

[43] It should be noted that the section provides that the money, valuable security or thing must have been 'entrusted to or received by' the accused. Mr. Tu'utafaiva takes the point that the indictment alleges only that the TOP\$1,200 was 'entrusted' to Mr. Latu, not that it was 'received' by him. I deal with the case on that basis.

[44] Mr. 'Aho submitted, and Mr. Tu'utafaiva accepted, that the elements that the Prosecution must prove to the criminal standard are:

- (a) That Mr. Latu;
- (b) Whilst employed as a Government Servant;
- (c) Did fraudulently convert to his own use TOP\$1,200 which;
- (d) Was entrusted to him by virtue of his employment as a Government Servant.

[45] For reasons that I have set out above there is overwhelming evidence establishing beyond reasonable doubt the matters in paragraph 44(a), (b) and (c). I understood Mr. Tu'utafaiva accepted this was so.

[46] Mr. Tu'utafaiva argued that the TOP\$1,200 was not 'entrusted' to Mr. Latu but to Miss. Halafihi and for that reason the matter in paragraph 44(d) was not proved and no offence was committed. He could not provide any relevant authorities as to the meaning of the term 'entrusted' to support his argument. This submission is not correct.

[47] Mr. Latu owed fiduciary duties to the Government as its servant. He could not deal with Government money that came into his possession other than strictly as he was instructed. Upon receipt of money that he knew belonged to the Government it became entrusted to him by virtue of his employment. It makes no difference at all that the money was first received by Miss. Halafihi or even that the Government was unaware that Mr. Latu had taken possession of it.

[48] If authority is required it can be found in *Rex v Grubb* [1915] 2 K.B. 683. The accused in *Grubb* appealed from his conviction under the Larceny Act, 1901 of having fraudulently converted to his own use property 'entrusted' to him for a specific purpose. The Court said at page 689:

... a person may be entrusted with property, or may receive it, for or on account of another person, within the meaning of this section, notwithstanding that the property is not delivered to him directly by the owner and that in fact the owner does not know of his existence and has no intention of entrusting the property to him. If the accused has obtained or assumed the control of the


property of another person under circumstances whereby he *becomes* entrusted or whereby his receipt *becomes* a receipt for or on account of another person, and fraudulent converts it or the proceeds, he has committed an offence within the section. For the purpose of determining whether the offence has been committed the words 'being entrusted' should not be read as being limited to the moment of the sending or delivering of the property by the owner but may cover any subsequent period during which a person becomes entrusted with the property..

- [49] I am satisfied beyond reasonable doubt that as a Government servant Mr. Latu fraudulently converted to his own use TOP\$1,200 of Government money that was entrusted to him by virtue of his employment in breach of s. 53(1) of the Criminal Offences Act. This count of the indictment has been proven.

**Result**

- [50] I find that count one of the indictment of falsification of accounts contrary to s. 159(b) of the Criminal Offence Act has not been proven to the required standard and Mr. Latu is acquitted on that charge.
- [51] I find that count two of the indictment of simple fraudulent conversion by a Government servant contrary to s. 53(1) of the Criminal Offences Act has been proven beyond reasonable doubt and Mr. Latu is convicted of that charge.
- [52] I will hear from Counsel as to a suitable date for sentencing and as to whether Mr. Latu should be granted bail in the interim.

NUKU'ALOFA: 11 March 2019

  
O.G. Paulsen  
LORD CHIEF JUSTICE