
AUSTRALIA / JUDGMENT

R v Tautai

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District Court

New South Wales

Medium Neutral Citation:

R v Tautai [2021] NSWDC 345

Hearing dates:

1 May 2020, 14 October 2020

Date of orders:

29 January 2021

Decision date:

29 January 2021

Jurisdiction:

Criminal

Before:

Beckett DCJ

Decision:

See paragraph [111]-[123]

Catchwords:

CRIMINAL PROCEDURE — sentence proceedings — federal offences — fraud — dishonestly obtain financial advantage by deception — exceptional circumstances — greed v need — comfort — exceptional hardship — post natal depression — COVID 19 restrictions — access to children

Legislation Cited:

Crimes Act 1900 (NSW) s 66C(1)

Crimes Act 1914 (Cth) s 16BA; s 16A(2)

Crimes Amendment Regulations 2010 (No 4) (Cth) Crimes Regulation 1900 (No 6) (Cth)

Crimes (Sentencing Procedure) Act 1999 s 66(1)

Criminal Code 1995 (Cth) s 134.2(1)

United Nations Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

Cases Cited:

Cameron v The Queen [2002] HCA 6; 209 CLR 339

Carter v The Queen [2018] NSWCCA 138

Dipangkear v R [2010] NSWCCA 156

DPP (Cth) v Bui [2011] VSCA 61

DPP (Cth) v Ip [2005] ACTCA 24

DPP v Alateras [2004] VSCA 214

Elshani v The Queen [2015] NSWCCA 254

Hili v R; Jones v R (2010) 242 CLR 520

HJ v R [2014] NSWCCA 21

Kovacevic v Mills (2000) 76 SASR 404

Payne v R [2010] WASCA 177

Police v Hatty [2007] SASC 180

R v Aller [2004] NSWCCA 378

R v Baker [2019] ACTSC 316

R v El Hani [2004] NSWCCA 162

R v Girard [2004] NSWCCA 170

R v Hinton [2002] NSWCCA 405; 134 A Crim R 286

R v Holdsworth [1993] QCA 242; CA No 94 of 1993

R v Hurst; Ex parte Commonwealth DPP [2005] QCA

R v MacLeod (2001) 52 NSWLR 389

R v Newtown [2010] QCA 101

R v Pham [2015] HCA 39

R v Piu Man Liu [2005] NSWCCA 378

R v Purdon [2017] NSWCCA 141

R v Schultz [2008] NSWCCA 199

R v Togias [2002] NSWCCA 363

R v Togias (2001) 127 A Crim R 23

R v Wong (2001) 207 CLR 584

R v X [2004] NSWCCA 93

R v Zerafa [2013] NSWCCA 42

The Queen v Pham [2015] HCA 39; 256 CLR 550

Zaky v R [2017] NSWCCA 141

Zaky v R [2017] NSWCCA 141

Category:

Sentence

Parties:

Regina (Crown)

Tautai (Offender)

Representation:

Crown: Ms Burton, ODPP

Offender: Ms Soto, Solicitor Legal Aid

File Number(s):

2019/281728

Judgment

The offender comes before the court for sentence in respect of the offence that by deception she dishonestly obtained a financial advantage, being single-parent payments from the Commonwealth, by intentionally representing that she was not a member of a couple and by under declaring her employment income to Services Australia, contrary to s 134.2(1) of the Criminal Code 1995 (Cth) ('the Criminal Code').

The offender asks that the court take into account on a s 16BA Schedule an additional matter: that between 21 June 2016 and 11 April 2017 she did engage in conduct, namely that she intentionally failed to inform Services Australia of her income from employment, and as a result of that omission obtained a financial advantage for herself from the Commonwealth.

The offence pursuant to section 134.2(1) of the Criminal Code carries a maximum penalty of 10 years and/or a fine of 600 penalty units (\$102,000). The offence pursuant to section 135.2(1) of the Criminal Code carries a maximum penalty of 12 months' imprisonment.

The offender was committed for sentence to the District Court on 1 May 2020.

Facts

An agreed statement of facts was tendered in the proceedings setting out the circumstances of the offending conduct. I do not propose to repeat those facts in their entirety, however, for abundant clarity I have had regard to the full contents of that document.

Between about 12 November 2013 and about 3 July 2018, the offender falsely represented to Services Australia that she was not a member of a couple, whilst she received single-parent payments, in circumstances where she was in fact married to Mr Nifae Sita. As a result of the offender's provision of incorrect information to the Department of Human Services ('the Department'), the offender received single-parent payments and the Department did not account for employment income which was earned by Mr Sita in determining the offender's payments.

Between 18 August 2015 and 15 September 2015, whilst she was receiving single-parent payments, the offender intentionally misrepresented her true circumstances to the Department by incorrectly declaring the amount of her income with the consequence that the offender received additional single-parent payments to which she was not entitled.

The nature of the deception was in respect of her marital status and her family income, resulting in an overpayment of \$79,259.57.

Additionally, between 21 June 2016 and 11 April 2017, by failing to advise the Department of an event or change in circumstances to her income the offender received an additional payment in the sum of \$13,589.04 to which she was not entitled. This conduct is the subject of the s 16BA matter.

In total the offender received overpayments of \$92,848.61.

During the period of the offending single-parent payments were deposited into a bank account in the sole name of the offender. During this period the offender was married to Mr Sita, having been married on 13 July 2013. She gave birth to her first and second children on 27 October 2013 and 1 May 2017 respectively. On 12 November 2013, shortly after the birth of her first child, the offender contacted Services Australia claiming single-parent pension on the basis that she was not a member of a couple. The grant was thereafter backdated to the birth of the child on 27 October 2013.

Extensive records obtained by the Department, including personal email correspondence between the offender and her husband, Mr Sita, rental documents, and photographs of the couple together (including a wedding photograph) confirmed that they were in a long-term relationship. The birth certificates of both of the offender's children born in the period of offending listed the offender and Mr Sita as the parents.

During the relevant period, the offender contacted the Department on 69 occasions in order to make general inquiries, update her payment details or make applications for advance payments of money, but at no time did she disclose that she was living with her husband.

Mr Sita was employed with Quay Three Pty Ltd on a casual basis from 3 May 2013 until 20 December 2013, recommencing employment there from 20 January 2014 until 12 February 2014. From 17 February 2014, Mr Sita was employed at the Northern Sydney Local Health District and subsequently commenced work with Western Sydney Local Health District on 2016. His employment was ongoing at least until 4 April 2018. During the period of the offending Mr Sita earned \$271, 915 in gross income (\$2,228 gross income per fortnight).

Analysis of Mr Sita and the offender's bank accounts indicates that Mr Sita shared to a significant degree the responsibility for payment of family's outgoings, including payments for shared grocery expenses, rent and made regular fortnightly deposits into the offender's account.

As stated, in addition to the deception about her partnered status, the offender failed to declare income she earned from employment when she worked as a casual nursing assistant with South Eastern Sydney Local Health District. During the period between 18 August 2015 and 15 September 2015 the offender earned \$3,291.54 in gross income across three fortnights but deliberately under-declared her income on three occasions, reporting across the offending period a gross income of only \$1,031.70.

The offending was detected by way of a tipoff and data-matching program cases on 27 February 2018.

The offender was invited to participate in a formal interview on 19 July 2018, which she declined.

The facts in relation to the offence dealt with pursuant to s 16BA of the Crimes Act 1914 (Cth) are that the offender was employed on a casual basis by Quay Appointments between 6 June 2016 and 28 March 2017. During the period of 21 June 2016 to 11 April 2017 the offender earned \$39,315 gross income (an average of \$1,709 gross income per fortnight). When the offender resumed employment on 6 June 2016 at Quay Appointments she failed to inform Services Australia of her change of circumstances as required, as stated.

The evidence in the offender's case

The offender tendered a bundle of material on sentence including the following material:

Psychological reports by Mr Sheehan dated 6 July 2020 and 19 November 2020;

TAFE enrolment course and details;

Details of outstanding debts;

Documentation confirming her child had an acute allergic reaction requiring hospitalisation on a number of occasions in 2018 (requiring administration of adrenalin) and again in 2020 due to difficulty breathing and development of rash, diagnosed as severe peanut allergy requiring action plan for anaphylaxis and use of EpiPen; and

Confirmation that the offender taught Sunday School at the Church of Jesus Christ at Carlingford, and was a good member of the congregation.

The offender gave evidence. Based upon my recollection of her evidence (noting there is no transcript of her evidence presently available) together with the narrative provided in the psychologist's report and the history obtained from the Corrections during the preparation of the Sentencing Assessment Report, the following chronology of events can be summarised.

The offender is 31 years of age. She was raised in South West Sydney to Samoan parents closely associated to the Samoan Christian Church. The offender said, in effect, when she had got married to her husband she had not known him particularly long nor did she know him particularly well. She said that she had become pregnant within only months of forming a relationship with him leading to them marrying immediately in July 2013. She said that she had first child 3 months after the wedding, on 27 October 2013. Despite the fact of the marriage the offender described the relationship at this stage as "tenuous". She said that initially her husband was "tight" and did not provide sufficiently for her needs when she left her employment and was without income with the child. She said that she was wholly dependent on him providing her with money for groceries and the additional needs of the child. She said it was in this context that the offending started (within weeks after the birth of the child) in November 2013, because at that time she did not feel supported by him financially and was wholly dependent on him stating she felt insecure and lacked independence. She said at the time she "knew that her actions were wrong but underestimated the degree of criminality and justified to herself that the deception would be time limited..."

Whilst the offender earned her own money at times when she returned to work after the birth of the child (working for periods as a nursing assistant for example during 2015) she remained largely dependent on her husband for support.

In 2016 the bank records indicate that the offender's husband commenced paying the rent for the family's rental premises and made deposits of between \$30 and \$60 into the offender's account on a fortnightly deposit referred to as "Tuatai's fees". This is largely consistent with what the offender told Corrections that the offender had started to provide additional financial support to her about 3 years prior and the evidence she gave to the court that her husband over time became more financially generous and she did not "go without", with her husband largely providing for groceries and rent.

Despite this additional support from her husband in 2015 the offender continued to receive the single parent payment.

During her second pregnancy she suffered diabetes and pre-eclampsia. In April 2016 her second child was still born almost at full term, namely at 35 weeks gestation. The loss of the baby was reported to significantly impact upon her emotional and mental health. This loss was temporally linked with her husband being charged with historical child sexual assault charges which concerned events that predated their relationship. The offender described a “complex grief reaction” from this year despite the marriage staying on foot and described to her psychologist that she at the time adopted an avoidant approach to coping with the loss by quickly returning to employment and avoiding talking about the loss of her second child.

The offender’s third child was born on 1 May 2017. According to her counsel Mr Brassil who also represented her husband during his trials, her husband went to trial for the first time that year and that whilst some offences resulted in acquittal the jury were hung on certain charges. The trial was re-listed for a second trial in 2020. The offender was reported in 2017 following the birth of her third child to have been suffering post-natal depression and having attachment issues with her third child.

It is the events of 2016 and 2017 that are the basis for the offender’s mental condition referred to as “resolving post-natal depression that may be secondary to delayed complex bereavement”.

The offending continued during 2017 up until her arrest in July 2018. During this period the offender described her offending to the psychologist as “habitual” with the “end date...continually extended”.

On arrest there was no evidence of luxury items. The offender and her husband at the time were described as living in rental accommodation. Her husband had received legal aid to fund his criminal trials.

In about May 2018, before she was notified of the investigation into the offending conduct, the offender fell pregnant for the fourth time, giving birth to her third (living) child on 20 February 2019.

In late 2020, following the offender’s husband second trial he received a conviction on one count of sexual assault of a child. He was bail refused.

On the offender’s sentence hearing the offender attended with her parents having by then told them of the criminal proceedings against her and been forced, due to her current circumstances, to quit the rental premises and move her and her three children, in with them following the incarceration of her husband.

Evidence of various debts owed by the offender were tendered on sentence, including:

A debt of \$6, 295.15 to the Council of Tara Anglican School for Girls. The offender stated that this debt was owed because she enrolled one of her children, at the school but decided afterwards not to follow through as the enrolment costs were too great. The amount owing is for the first term of school that the child did not attend.

A debt to St Francis of Assisi School to be paid via a payment plan of \$150 per fortnight.

A debt of \$1,417 to Panthera Finance for the offender's "Origin" account, presumably concerning an electricity bill.

A letter from Lion Finance indicating the offender's debt concerning energy bills had been placed on hold due to the offender's financial and/or medical circumstances was also tendered on sentence.

Evidence was given to the effect that the offender is currently repaying 8 other debts to Services Australia in the sum of \$16,000.

The offender attended court with her parents both of whom are in employment with her father working as a truck driver and mother in aged care. She said that her parents were willing to care for the children should she be placed in full-time custody.

General principles for sentencing Commonwealth offences

The offender is to be sentenced for an offence against Commonwealth law. The overarching requirement imposed by Part 1B of the Crimes Act 1914 (Cth) is that the court imposes a sentence which is of severity appropriate in all the circumstances of the offence. Section 16A(2) of the Crimes Act 1914 (Cth) requires the court to consider the matters listed in that section to the extent that they are relevant.

Nature and circumstances of the offence: s 16A(2)(a) Crimes Act 1914 (Cth)

The period of the offending took place over 4.5 years (from 12 November 2013 to 3 July 2018) and the overpayment sum totalled was \$92,848.61. The offender contacted social security on 69 occasions perpetuating the fraud. The quantity of the overpayment is significant and the offending was calculated and sustained over a significant period of time. However, the nature of the offending was unsophisticated in that the offender did not use a false identity or a false bank account, which is an important distinguishing factor when considering this case against other matters where this factor is present.

The Crown submits that the offending was motivated by greed rather than need in that the offender's family income was significant, she was supported by her husband and there was evidence that the offender was willing to spend \$1500 on enrolment fees at a private school, TARA Anglican School for Girls, North Parramatta.

The Crown referred to a number of cases relevant to the categorisation of the offending conduct contending that there is no proper distinction between offending motivated by a desire for comfort and that as against greed. In *R v Purdon* [2017] NSWCCA 141 at [33] the New South Wales Court of Criminal Appeal said "...if the fraud is based upon a perceived need, a custodial sentence must be expected except in very special circumstances. If the fraud is based on greed, the custodial sentence will be longer". See also *Zaky v R* [2017] NSWCCA 141 at [33]. In *Police v Hatty* [2007] SASC 180 ("*Police v Hatty*"), being the judgment of a single judge, Layton J, following

appeal from the Local Court, held that there is no proper distinction between offending motivated by a desire to live in “comfort” as against “greed” (at [28]). It is noted that this case has not been cited or considered by any intermediate appellate court.

It is noted that the offender’s husband earned \$271,915, gross, over the period of the offending which, spread over 4.5 years is about \$60,000 per year gross. During that same period the offender earned some modest income in respect of her assistant nursing employment, which appears to have been largely sporadic given the number of pregnancies within that period. Based upon the rough calculations the total money earned by the family unit was likely to have been less than the median wage per person at the relevant time.

Taking into account the expenses related to 3 pregnancies, and the birth of 2 children during the years of offending, raising children in a city known for its high cost of living, including rental accommodation, it is difficult to reach a conclusion that the offending was based out of greed as the Crown submitted. There is no evidence that the sums of money that she was receiving were being spent on luxury items noting that the child never did attend the private school despite being enrolled to do so in 2019. As the offender said, she was withdrawn due to the high cost of the fees (subsequently incurring a debt concerning the first term fee).

The offending may have commenced on the basis of perceived need in the circumstances in which she found herself. Thereafter she continued knowingly collecting the funds and deceiving the authorities because the funds assisted in meeting the costs of a young family despite the fact her husband from 2016 met various bills and rent, she had come to rely on the receipt of funds and the fraud had become habitual. From 2016 she additionally had in her mind the prospect of her husband being convicted and placed into prison following trial.

I cannot accept that there is always a bright line delineating need from comfort and greed. There was no doubt comfort derived by the offender in having her financial needs met but on the balance of probabilities I cannot categorise the offender as committing the offences based upon “greed” or “comfort” as it is contextualised in *Police v Hatty*. I do not accept the categorisation of comfort/greed as they arose in that case can be so readily applied to this case. This case is far removed from the comment made by Layton J in *Police v Hatty* (see [25] - [28]) where the circumstances involved the use of funds put towards luxury items like trips, “lifestyle enhancement and indulgence”. As stated, the only evidence of discretionary spending was the enrolment of the offender’s first child in a private school which was cancelled.

Nonetheless the offending was sustained and deliberate and only came to an end because the offender was discovered.

In summary, the considerations that inform the objective seriousness of this offence are:

The length of the ongoing course of offending conduct – not insignificant period of 4.5 years.

The total sum of the overpayment – not insignificant sum of \$92, 848.61.

The motivation for the offending conduct – the offending initially took place in a context of relationship and financial insecurity. I do not find that the offences were committed out of greed. Thereafter the offending became habitual in the back drop of the real prospect that her husband was to be imprisoned.

The degree of planning – the offending was consistent throughout and involved the offender making false claims herself and ringing Social Security personally. The offence was unsophisticated because the claims were in her own name and involved payments into her own bank account and did not involve features such as the receipt of multiple benefits or the use of false identities or false bank accounts.

Other offences that are required to be taken into account: section 16 A(2)(b)

The additional offence of obtaining financial advantage is to be taken into account in passing sentence pursuant to s 16BA of the Crimes Act 1914 (Cth), requiring that greater weight be given to the need for specific deterrence and the community's entitlement to extract retribution in the form of punishment. However care must be taken given that some of the features may be relevant to sentencing for the principal offence. It is not required that a separate offence or quantification be made.

As stated the s 16BA offence concerned 22 fortnightly payments totalling \$13,589.04 in payment the offender was not entitled to receive. As noted this is a matter that would have been a strictly summary offence had it been dealt with in the Local Court as a principal offence to which a maximum penalty of 12 months would have applied.

Injury, loss or damage resulting from the offences: s 16A(2)(e)

The loss in respect of this offence is to the Commonwealth revenue. The quantum of the funds is substantial. The funds have not been recovered. There are obvious expenses in investigating and prosecuting such offences which occur with concerning regularity in our society. Offending of this nature is easy to commit and difficult to detect.

Plea of guilty and contrition and remorse: ss 16A(2)(g) – (h) and (f)

Plea of guilty

For Commonwealth offences, an offender who pleads guilty is entitled to a discount on the sentence if the plea is evidence of their remorse, acceptance of responsibility and willingness to facilitate justice (Cameron v The Queen [2002] HCA 6; 209 CLR 339 at [11] – [15]).

The offender entered a plea of guilty at the first available opportunity. The offender is entitled to a reduction in the sentence that would otherwise have been imposed, to reflect the utilitarian value of the early plea and I intend to discount the sentence by 25%.

It is noted that in the determining the subjective value of the plea of guilty the plea was entered in the face of a strong Crown case.

Remorse

On sentence two reports of Mr Patrick Sheehan, forensic psychologist, (dated 6 July 2020 and 19 November 2020) were tendered. Mr Sheehan reported that during his interview with the offender he found her to be genuine, describing her affect as primarily anxious, at times distressed. He said she was quietly tearful for much of the interview but maintained composure. He reported she indicated moderate positive mood but remains troubled by situational anxiety. She acknowledged the offences as described in the agreed facts. She was described as appearing embarrassed and distressed whilst discussing her offence but had some insight into the problematic decision making that facilitated her offence.

Mr Sheehan opined the offender understood her actions were wrong even at the time but underestimated the degree of criminality and justified to herself that the deception would be time limited and that the money was going towards supporting her children.

The offender additionally expressed her regret for her actions to Community Corrections stating that despite her reasons her actions were wrong and acknowledged they had a significant impact on her family and the wider community. They also referred to her as having insight into her conduct.

The offender as stated gave evidence corroborating the account given to the psychologist and Community Corrections. The distress as to her current predicament was palpable, both as to her account of events but also her demeanour.

I accept that there is evidence of remorse in this case. I do not accept the Crown submission that in the face of the offender's current financial circumstances the failure to pay back the funds owed indicated a lack of genuine remorse.

General deterrence and punishment: s 16A(2)(ja)

As stated when sentencing an offender for social security fraud, a key sentencing consideration is general deterrence. The Department – and, indeed, the general public – depends upon recipients of benefits being trustworthy and honest in their dealings with the Commonwealth.

Dishonesty undermines the integrity of the social security system, leading to a loss of confidence in the integrity and worth of the system: *R v Hurst*; *Ex parte Commonwealth DPP* [2005] QCA per McMurdo P at 7. Several appellate courts have indicated that, in the case of a deliberate and sustained fraud, a sentence of imprisonment is ordinarily required because it is unlikely that mitigating factors will outweigh the importance of general deterrence.

The need to ensure that the person is adequately punished for the offence: s 16A(2) (k)

When sentencing a federal offender, the court must have regard to what has been done in comparable cases throughout the Commonwealth, not just in this jurisdiction (*The Queen v Pham* [2015] HCA 39; 256 CLR 550 at [24]).

Appellate courts have held that in cases of sustained and deliberate fraud against the social security system imprisonment is ordinarily likely to be required or that imprisonment will be imposed unless there are exceptional circumstances. Those principles derive from the cases of *R v Holdsworth* [1993] QCQ 242; CA No 94 of 1993; *Kovacevic v Mills* (2000) 76 SASR 404 and *DPP v Alateras* [2004] VSCA 214. I have not been provided with any authorities which indicate the application of these principles in the context of the availability of intensive corrections orders and it is accepted that those authorities do not establish a prescriptive principle that fetters sentencing discretion. Nonetheless they provide guidance as to the seriousness with which courts view social security fraud.

Specific deterrence is also a relevant consideration given sustained period of the offending and the multiple occasions the offender contacted social security perpetuating the fraud.

Character, age, antecedents and background: s 16A(2)(m)

The offender has no criminal convictions for dishonesty offences the matters on her record being limited to traffic matters.

The reports of Mr Sheehan set out factors relevant to the offender's background.

Family history and development

The report indicates the offender was born and raised in South West Sydney to Samoan parents. She is the second of three children. The family lived in public housing until the offender was aged 12 years at which point they were able to purchase a family home.

The offender described a favourable and prosocial home life. The family shared close links with the Samoan Christian Church and social connection revolved around this source. There were no reported familial problems with substance abuse, domestic violence, mental illness, or criminality. She denied experiencing any childhood trauma or neglect. The family unit was close and remained intact. The offender moved from her family home aged 25 years and (until very recently) has lived independently since that time.

The offender stated to Mr Sheehan during the time of the assessment that she had not advised her family of the current offence matters. Mr Sheehan reported that the offender told him she did not want to upset her family and also felt that she could cope better with the current circumstances by keeping the matter to herself. I note however that both of the offender's parents, along with other family members, attended the offender's sentence hearing.

Education and vocational history

The offender described a favourable experience of education to Mr Sheehan. She attended mainstream schooling from the age of five years and had no problems with conduct, learning or social engagement. She attended William Carey Christian School and Saint Patrick's College. She completed her Year 12 certificate in 2007.

The offender reported that her parents desired her to enter university and she commenced a bridging program at Western Sydney University in 2008, however she deferred her studies within the first semester. She worked in a café for a period of two years before completing Certificate III in Aged Care in 2012. The offender began her family in 2013, with her employment taking a secondary role to that of parenting since that time.

She has worked as an Assistant in Nursing for periods of up to four months. In September 2019 she commenced a Diploma in Nursing at Kingswood TAFE. She hopes to complete this qualification in coming months. She hopes to acquire work as an enrolled nurse at Westmead or Nepean Hospitals.

Social and intimate relationships

The offender described an early history of positive social adjustment in a prosocial milieu. She is described as having healthy relationships with her family members and is closely associated with her church community.

The offender's physical and mental condition: ss 16A(2)(m) – (n)

Substance use

Mr Sheehan found that the current offence is in no way related to substance use. The offender has no history of disordered gambling behaviour.

Medical and psychiatric history

The offender reported favourable health and is currently prescribed no medications however the SAR confirmed the offender was currently in receipt of psychological treatment for anxiety and low mood.

The offender reported to the psychologist stable mental health during earlier adulthood and the onset of the current offence in 2013 was not associated with any affective crisis. Mr Sheehan opined there are no clear grounds to suspect the presence of personality pathology, although some avoidant traits may be evident. There is no known history of anti-sociality in adolescence or early adulthood, and there is no pattern of criminally versatile behaviour. Mr Sheehan suggests the absence of antisocial personality orientation is significant because it points towards a more favourable prognosis in terms of the offender's ability to respond to sanction and correct her behaviour.

As stated in April 2016, the offender's second child was stillborn at 35 weeks gestation. She described an avoidant approach to coping with this loss, quickly returning to employment, not discussing the matter and not facing her grief. She said that this short term strategy had been partially successful, but later emerged as Post Natal Depression after the birth of her third (living) child in 2017. She was unable to bond with the infant, struggled to cope with the care needs of the child, and was excessively tearful and inactive, with hypersomnia, overeating, low self-esteem, guilt and resentment. She did not seek help. In February 2020, the offender obtained a GP Mental Health Care Plan with a provisional diagnosis of Post Natal Depression. She was referred to "Wellbe Counselling and Psychology" in Riverstone. She has engaged in psychotherapy on four occasions since that time with further sessions scheduled.

It is accepted that from the time of the death of her second child in 2016 the offender's mental condition was compromised, compounded that same year from the anxiety of her husband's arrest on the child sex offences, and the following year from her post-natal depression following the birth of her third (living) child. These various events impacted upon the offender's mental health during the last 2 years of the 4.5 years of offending. Whilst there is no clear nexus between her mental condition and the type of offending itself, her capacity to make sound decisions is likely to have not been as formed as a person who was not suffering from these multiple life stressors.

In his second report, Mr Sheehan noted that in the offender's case: "the recent history of complex bereavement and post-natal depression adds further degrees of hardship as well as increasing the likelihood of emotional collapse and escalation of depressive symptoms ... Her separation grief is attached to traumatic loss of her child in utero in 2016 as well as complex attachment issues to her child born in 2017".

The offender's loss of her child in 2016 was also temporally linked with her husband being charged with historical sexual assaults (that he sought to defend in court). The offender described a complex grief reaction to this loss and stress.

As stated the offender gave evidence. She appeared a subdued individual. She was clearly upset during the giving of her evidence and I find her demeanour to be broadly consistent with the psychologist's observations as to distress and anxiety as much as can be assessed from a non-expert point of view.

Prospects of rehabilitation: s 16A(2)(A)(m)

The Sentencing Assessment Report dated 27 July 2020 confirms the offender has been assessed at a low risk of reoffending, as well as the offender expressing a willingness to undertake any intervention required to address her behaviour.

Mr Sheehan opined the offending would seem linked to feelings of financial insecurity and distorted attitudes that reduced her perception of the magnitude of wrong doing. In his view the adverse experience of the current proceedings should likely be an adequate disincentive to reoffend and he does not recommend any formal program participation as a strategy to correct her behaviour. The offender expressed a desire to cooperate with any supervision requirements imposed.

Both reports confirm that the offender has prosocial supports in both her family and larger community. In 2020 the offender has worked towards completing her Diploma of Nursing at NSW TAFE.

I am satisfied that the offender's current predicament has significantly caused her distress, embarrassment and public humiliation which will deter from engaging in similar offending in the future.

In all the circumstances the offender's prospects of rehabilitation are very good.

Probable effect that sentence would have on family and dependents: s 16A(2)(p)

The probable effect on family or dependants is only to be taken into account where it is exceptional: *R v Zerafa* [2013] NSWCCA 42 ("Zerafa"). The interpretation of the provision has been the subject of some debate (see the judgments of McCallum J in *Carter v The Queen* [2018] NSWCCA 138 at [54] – [70] and *Elshani v The Queen* [2015] NSWCCA 254 per Adams J, Gleeson JA agreeing at [34] – [35] in support of the position taken by Beech-Jones J in *Zerafa* at [140]). Despite the tension in the authorities the current position in NSW remains that hardship to the family or dependants will only reduce the sentence in circumstances that are so extreme and go beyond the sort of hardship that occurs when an offender is imprisoned in the ordinary course: *R v El Hani* [2004] NSWCCA 162. I am accordingly bound by the findings of the court in *R v Togias* (2001) 127 A Crim R 23 as noted by Hoeben CJ at CL in *Zerafa* at [93]. The existence of family hardship is to be assessed on the balance of probabilities: *DPP (Cth) v Bui* [2011] VSCA 61 at [28]. If a custodial sentence is required but there is evidence of extreme hardship, a court may take into account the extraordinary features of the case by suspending the sentence of imprisonment, shortening the term of sentence and/or reducing the non-parole period: *Dipangkear v R* [2010] NSWCCA 156 ("*Dipangkear v R*") at [34]; *R v MacLeod* (2001) 52 NSWLR 389 at [49] (judicial statements made at a time when intensive correction orders were not available). Each case will depend on the seriousness of the crime, whether there is a need for deterrence and the nature and degree of the impact of the sentence upon the third person: *Dipangkear v R*, at [34].

Where family hardship does not meet that threshold the probable effect of the sentence on the offender's family may nonetheless be recognised as one of the relevant factors "in the general mix" of subjective factors in determining the appropriate sentence: *R v X* [2004] NSWCCA 93 at [24]; *R v Girard* [2004] NSWCCA 170 at [56], [68].

In circumstances where an offender has the care of children a court is required to have regard to the fact that an offender is the mother of a young baby and the effect of separation on her and the degree to which it may impact upon the hardship of her custody: HJ v R [2014] NSWCCA 21. If exceptional circumstances are shown then it is relevant to have regard to any effect on the applicant's child (at [76]).

The real question in this matter is whether the circumstances are such as to reach the exceptional category so that the circumstances can be given substantial weight for the purposes of section 16A(2)(p) of the Act. As was noted in the case of R v Hinton [2002] NSWCCA 405; 134 A Crim R 286 at [31] Howie J stated:

"...each case will, to a very great degree, depend upon its own facts involving an evaluation of the seriousness of the objective circumstances of the offence committed, the extent of the requirement for general and perhaps, specific deterrence, and the nature and degree of the impact of the sentence upon the third person. It should be emphasised that the question of whether the probable effect of a sentence upon a third party will give rise to an exceptional case, cannot be considered in isolation from the facts of the particular matter and the degree of criminality involved in the offences for which sentencing is to be imposed."

There are four interconnected features about the sentencing of this individual that are relevant to the consideration of this threshold question as to the assessment of the probable effect of incarceration on third parties: firstly, the recent imprisonment of the offender's husband; secondly the offender's recently resolving mental health condition concerning post-natal depression and complex bereavement; thirdly, her care and financial provision for 3 children one of whom is 21 months old and the other who has a medical condition; and fourthly, the complicating factor of the impact on the COVID-19 restrictions on her ability to have physical contact with her children during any period of imprisonment.

I take into account the first of the unique features in this case: that is the imprisonment of the offender's husband on 13 November 2020, following conviction after trial for one count of sexual intercourse with a person between 10 and 14 years pursuant to s 66C(1) of the Crimes Act 1900 (NSW). He is currently bail refused and awaiting sentence on 29 January 2021. Through no fault of the offender the family have already undergone significant changes resulting from this event, namely with her becoming the principle carer of her three children and sole bread winner. The evidence indicates that she has mounting debts that she is attempting to pay off by instalments. As confirmed in her evidence before the court she has, as a result of the incarceration of her husband, been forced to leave the rental premises that comprised the family home and move in with her parents, both of whom are in employment, with her father working as a truck driver and her mother in the aged care sector. Whilst the offender has been the sole care giver of her children since the imprisonment of the father, both of these people are available to look after her children albeit with significant reliance on childcare given their own needs to meet living and mortgage expenses. As the Crown properly points out the offender's parents appear to be willing and able to care for the children and they appear to be people of reasonable means, good repute and character.

In consideration of the probable effect on third parties, noting the three children are currently aged 7 years, 3 ½ years and 21 months, I note that there may be a possibility for one of the children to reside at Jacaranda House where mothers and young children can in some circumstances be imprisoned together, however there is no way of knowing at this stage whether this facility would be available to the offender in circumstances at 21 months that there is no evidence for example that the youngest child is still being breast fed. Any arrangements that might possibly be available allowing for the youngest child to reside at Jacaranda, would clearly involve the separation of the three children, the eldest being 7 and of school age. I proceed on the basis that the probable effect on the sentence would result in the removal of the offender from her three children.

A possibly peripheral matter, but one to note in the mix, is that the middle child has a medical condition in the nature of an apparently severe reaction to peanuts. The combined effect of various medical documents tendered on sentence indicates that the child has been at least twice admitted to hospital suffering from acute allergic reactions, apparently requiring the administration of adrenaline and has since been diagnosed with anaphylaxis requiring the child or carer carry an EpiPen at all times together with an Anaphylaxis Emergency Plan. The child is under the care of a paediatrician. It appears obvious from this medical material that the care provided to the offender's second child must be particularly vigilant as to exposure of the child to this possibly life-threatening condition, including during childcare arrangements.

As to the offender's mental condition I note the evidence concerning her own vulnerabilities concerning her attachment to her children. The psychologist noted the following in relation to the impact of incarceration on the offender's mental state (at p 2 of the report dated 19 November 2020):

In my report (dated 6 July 2020) I opined that Ms Tautai has a resolving post natal depression that may be secondary to delayed complex bereavement. I opined that in the event of a custodial sentence and separation from her children, I would anticipate decompensation in her mood state, in which case close review through Justice Health would be indicated.

Whilst separation from young children is a commonly encountered hardship of imprisonment across prison populations, in Ms Tautai's case, the recent history of complex bereavement and postnatal depression adds further degrees of hardship as well as increasing the likelihood of emotional collapse and escalation of depressive symptoms (such as excessive tearfulness, inactivity, with high pulse on the, overeating, low self-esteem, guilt and resentment). I cannot predict the severity of this reaction or how long such adjustment problems would take to resolve, but I do not think it is not controversial to suggest that imprisonment would undermine Ms Tautai's recovery. The separation grief is attached to traumatic loss of her child in utero in 2016 as well as complex attachment issues to her child born in 2017. Further, I understand that on 13 November 2020 Ms Tautai's husband ended custody having been convicted of sexual offences. This recent development adds the further degree of complexity to Ms Tautai's situation, raising questions about the care of her young children and adding to the burden of guilt and shame she will experience in being unable to provide care for her children with abrupt absence of both

caregivers.

A narrow view of this evidence might indicate that the hardship of this mental condition being relevant only to the position of the offender. However, a more considered view indicates that the offender's mental health is important to the care of her children (including as to attachment issues) both during the course of her sentence and afterwards.

I note that family visits have only recently recommenced in NSW correctional centres, including Silverwater Women's Prison and Dillwynia, which since 23 November 2020, now providing for visits with a number of safety measures introduced to ameliorate the spread of COVID-19. Upon request, the Crown provided an information sheet from Corrective Services NSW regarding COVID-safe protocols for these visits. That document indicates that children of all ages may now attend a visit but the limit of 2 visitors per inmate includes children (this means two adults or one adult and one child only). Counsel for the offender submits that although physical visits are allowed, the attitude of the facility is that such visits may not be appropriate for young children due to the necessity that restrictions as to social distancing still apply. In this respect, counsel for the offender emphasised the following excerpt from the Corrective Services document: [emphasis added]

"Given the need to apply physical distancing rules we ask that parents and/or guardians of children be aware that it may be a challenging and confusing environment for children. Video visits will continue to be available and we encourage parents and/or guardians to consider whether video visits may continue to be the best option for children during this time."

From this information it would appear that the offender would be prevented from being able to have physical contact with any of her children for the duration of the time in custody. A zoom conference is likely to be a less effective form of communication with very young children.

Recent material is before the court as to the possible damage to the relationship between caregiver and child which may result from incarceration. I have had reference to the recent publication by the Judicial Commission of New South Wales, Equality Before the Law Bench Book September 2020 – update 17 which states as follows (relevant footnotes incorporated):

While the children of male prisoners are usually cared for by their mother, research shows that the children of female prisoners are frequently cared for by temporary carers which impacts much more negatively on their children. It also means the contact between children and mothers or primary carers in custody is less frequent and more disrupted: A Symonds, "Children of Prisoners" (2009) 21(3) JOB 24, E Stanley and S Byrne, "Mothers in prison: coping with separation from children"; A Larson, "Gendering criminal law: sentencing a mothering person with dependent children to a term of imprisonment" (2012) 1 Australian Journal of Gender and Law.

Attachment research shows that separation of children from their primary caregivers before three years of age can have deleterious effects on the quality of their attachment to their mothers, which in turn is strongly associated with compromised psychological development that may reverberate throughout life. Prior to age 3, infants experience heightened periods of separation

anxiety and stranger anxiety. Separation during the stages of development are associated with behavioural problems in the short term and in the longer term impaired mental health, and social and occupational functioning. The younger the age of separation the greater the emotional trauma experienced: K Kenny, Meeting the needs of children of incarcerated mothers: the application of attachment theory to policy and programming, consultant report prepared for the Department of Corrective Services (NSW), October 2012, p2.

Separations or disruptions to the attachment between a mother and her child before three years of age can have major negative consequences for the child subsequent development that may reach into adult hood...(ibid at p 5).

Whilst this information of which I take judicial note is relevant to any hardship in custody consideration, it also is relevant to the attachment issues concerning particularly the youngest child. The separation of the mother from her child in this situation has a double danger in the circumstances of this offender's mental health vulnerabilities. Not only will the 21 month old child be physically separated from her mother during the course of any Covid-19 restrictions with associated deleterious effects on the quality of the attachment between the child and her mother, there is a real possibility based upon the evidence, that during that time the mother's vulnerability in the areas of bereavement, attachment and anxiety surrounding parenting issues may deteriorate, further exacerbating that condition apparently presently in remission.

Counsel for the offender made reference to Australia's ratification of the United Nations Convention on the Rights of the Child, entered into force for Australia in 1991 (Australian Treaty Series 1991 No 4). Whilst it is noted article 3:1 provides that in all actions concerning children the "best interests of the child shall be given primary consideration" the interpretation by the courts of the application of s16(2)(p) does not reach this threshold. As noted by Spigelman J in *R v Togias* (at [33] – [37]) that whilst such instruments do not form part of Australian law, they serve to underscore the importance of provisions such as s 16A(2)(p) of the Crimes Act 1900, which, where possible, should be construed and applied consistently with them.

I accept that assessments of what constitutes exceptional hardship are matters upon which reasonable minds might differ and that a high bar has been set by the established case law. I can see that similar tensions arose in *R v Togias* [2002] NSWCCA 363, per Hodgson JA (Simpson J) agreeing at [28] and [31] and [48] and in the case of *R v Piu Man Liu* [2005] NSWCCA 378 per McClellan CJ at CL, [1]. However I must consider the issue in the unique circumstances that this family is placed taking into account both the circumstances of the mother and children. I am prepared to find that the combination of those factors, arising from the family circumstances, the age of the children (including the health issue of one), the vulnerability of the mother to a mental condition concerning her children and finally the custodial circumstances currently at play in NSW prisons arising from the Covid-19 environment, exceptional hardship to third parties has been established on the balance of probabilities.

JIRS statistics and comparable cases

I have had consideration to the JIRS statistics for this offence noting that statistics are a blunt tool saying nothing about the objective criminality of the offending and little about the individual: Wong (2001) 207 CLR 584 at [59], nonetheless they provide some assistance as a reference in respect of the sentencing patterns in this state. The JIRS sentencing statistics indicate that in the period between 2008 and 2018, 72% of offenders received a sentence of imprisonment. The statistics demonstrate that of those 72% of matters that resulted in imprisonment, the range of head sentences for a principal offence under s 134.2 is between 18 months and 5 years, with sentences often in the range of 3 years. Post-reform statistics, which comprise of only 12 cases, indicate that 67% of offenders received a sentence of imprisonment whilst 33% received ICOs.

A number of comparable cases were put before the court on sentence. As was made clear in *Hili v R*; *Jones v R* (2010) 242 CLR 520 and *R v Pham* [2015] HCA 39, the need to sentencing consistency requires the court to have regard to sentencing practices across the country and to follow decisions of intermediate appellate courts unless convinced they are plainly wrong, although consistency in federal sentencing does not require numerical equivalents.

I have had consideration to the table of cases provided to me on sentence by the Crown, which contained the following cases:

R v Desborough [2010] QCA 297 – concerned one offence under s 134.2 of the Criminal Code 1995 (Cth) for the overpayment of \$49,334.55. The offender reported to Centrelink that the father of her child was unknown when in fact he was not. The offender was 45 years old and had a minor criminal history. On appeal, after a 25% discount the offender received a sentence of two years imprisonment with release after three months upon giving security by recognizance in the sum of \$3,000, conditioned that she be of good behaviour for 3 years. She was also ordered to repay the Commonwealth \$41,096.22.

Payne v R [2010] WASCA 177 – concerned one count contrary to s 134.2 of the Criminal Code (Cth) and one count contrary to s 135.1 of the Commonwealth Code (Cth) for the overpayment of \$50,754.98. The overpayments were for parenting payment (single). On appeal, after a 25% discount, the offender received a total effective sentence of 18 months imprisonment with release after 9 months upon entering into a recognizance in the amount of \$3,000 to be of good behaviour for a further 9 months.

I have also had consideration of the two cases provided on behalf of the offender:

R v Baker [2019] ACTSC 316 – concerned one offence under s 134.2 of the Criminal Code 1995 (Cth) for the overpayment of \$83,721. The offender failed to correctly declare her employment income and made around 50 false declarations for almost 5 years. The offender was a grandmother and assisted in the care of her grandchildren (aged between 7-10 years) who lived with her and her son the father of the children. After a discount of 25%, the offender received a sentence of two years imprisonment to be served by way of ICO in the community. The ICO included 250 hours of community service work and a reparation order.

R v Newtown [2010] QCA 101 – concerned two offences under s 134.2 of the Criminal Code 1995 (Cth) for the overpayment of \$50, 379. The offender failed to declare to Centrelink income received over a period of 3 years and 7 months. On appeal, the offender was sentence to 2 years imprisonment to be released after 5 months on recognizance.

Clearly the case of Baker is not an appellate case and therefore is of less guidance to this court, although it is notable that it was not the subject of Crown appeal. I also must have consideration to the different approach taken by ACT (and Tasmanian) courts, to s 16A(2)(p) and the exceptional circumstances requirement: DPP (Cth) v Ip [2005] ACTCA 24, [60].

I also take into account the following cases involving more serious offending, taking into account the combination of factors namely the period of the fraud, the quantum involved and the degree of sophistication:

R v Aller [2004] NSWCCA 378 – concerned one offence under s 134.2 of the Criminal Code 1995 (Cth) and one offence under s 29D of the Crimes Act 1914 (Cth) for a total overpayment of \$146, 706. The offender received social security payments in two names over 8 years. The offender suffered extensive medical problems, including severe depression. She was 77 years old at the time, living in a Housing Commission house and acting as the sole carer for her disabled and ill 40 year old son. The court characterised these circumstances as “exceptional”. After a discount of 25%, the offender received a 2 year sentence to be released on recognizance for 5 years.

R v Schultz [2008] NSWCCA 199 – concerned one offence under s 134.2 of the Criminal Code 1995 (Cth) and one offence under both ss 29B and 29D of the Crimes Act 1914 (Cth) for a total overpayment of \$198, 503. The offender received age pension payments made in the name of his deceased mother for 22 years after she had died. He submitted three false declarations during that time. By selling her house she made full reparation. After a discount of 25%, the offender received a sentence of 2 years and 3 months to be released after 6 months on recognizance for 2 years.

R v Dagher [2017] NSWCCA 258 – concerned one offence under s 134.2 of the Criminal Code 1995 (Cth) for an overpayment of \$66, 447. The offender obtained welfare payments from Centrelink for over two and a half years in respect of two children whom she knew were not unwell. She paid two co-offenders a fee of \$8,000 to obtain assistance to fill out forms and obtain supporting documentation. The court reduced the sentence because the offender undertook to cooperate with law enforcement agencies. After a discount of 25%, the offender received a sentence of 2 years, released on recognizance after 1 year.

R v Zaky [2015] NSWCCA 161 – concerned one offence under s 134.2 of the Criminal Code 1995 (Cth) and one offence under s 29D of the Crimes Act 1914 (Cth) for a total overpayment of \$27,374. The offender claimed rental assistance over 11 years. Her offending involved sustained deceit and numerous false statements. She had a significant physical disability. After trial, the offender was sentenced to 20 months of imprisonment, released after 10 months on recognizance.

It is a distinguishing feature that in some cases the amount stolen had been repaid. It is noted however that the offender is involved in repayments to the social services in other respects and repayment of these funds will no doubt follow. At this stage, the offender is struggling to support her three children and no longer has the assistance of her husband's income.

I find that weighing the nature and circumstances of the offence set out in detail above, the combination of factors indicating together that exceptional circumstances have been made out a sentence of imprisonment, served by ICO can meet the community expectation of punishment, deterrence both general and specific in the sentencing of this individual. Having regard to the seriousness of the offending I find that the seriousness of the offending can be appropriately reflected in a sentence of this type structured in a particular way. This is not a case of such a degree of seriousness (as can be seen in those several cases concerning drug importations for example) such that the objective seriousness of the offence committed overwhelms the impact on the children.

Determination

As stated, the offender entered a plea of guilty at an early stage and is entitled to a 25% discount in respect of the utilitarian value of her plea.

In sentencing the offender I take into account the additional matter contained in the s 16BA Schedule.

I note that the Crimes Amendment Regulations 2010 (No 4) (Cth) amended reg 6 Crimes Regulation 1900 (Cth) enables and ICO to be imposed for a commonwealth offence.

I note pursuant to s 66(1) of the Crimes (Sentencing Procedure) Act 1999, that community safety must be the paramount consideration when making an order for a sentence to be served by way of an intensive corrections order. I note the offender's risk of reoffending is low, she is currently continuing with her nursing studies, working as a nursing aide and caring for her children. Her prospects for rehabilitation are good. I do not find that serving the sentence by way of full-time detention is more likely to address the offender's risk of re-offending, per s 66(2).

I have considered the provisions set out in s 3A of the Act, in accordance with s 66(3). I am not satisfied that any sentence other than one which involves a custodial sentence is appropriate in all the circumstances of the case: s 17A Criminal Code 1995 (Cth). Whilst I accept that the imposition of an ICO still incorporates a degree of leniency, I have come to the conclusion that an ICO, with a number of stringent conditions would, in combination, be adequate to satisfy the sentencing principles calling for the adequacy of the punishment, the necessity to ensure the sentence reflects the community's loss resulting from the offending and that provides for both general and specific deterrence.

I have had regard to the content of the assessment report dated 27 July 2020 per s 69 of the Crimes (Sentencing Procedure) Act 1999.

Accordingly the offender is convicted.

I am satisfied of the matters set out in s 67(1) and have had regard to the matters set out in s 67(2) of the Crimes (Sentencing Procedure) Act 1999.

Pursuant to s 73A(3) I have had regard to the content of the two Sentencing Assessment Reports dated 27 July 2020 and 25 January 2021 which state that the offender is suitable to serve an ICO with home detention and community service conditions.

The offender is sentenced to a term of imprisonment of 2 years, to be served by way of an Intensive Corrections Order.

That sentence will commence on 29 January 2021 and expire on 28 January 2023.

The standard conditions that apply during the term of the order are that the offender; must not commit any offence, and

must submit to supervision by a community corrections officer, at the Campbelltown Community Corrections Office, and to report to this office by today to facilitate this condition.

The following additional conditions that apply are that the offender:

is subject to home detention for 14 months to date from 29 January 2021 and must report to Campbelltown Community Corrections Office today to facilitate this condition;

must perform 210 hours of community service work; and

must participate in counselling with counsellors and/or psychologists as deemed necessary.

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Decision last updated:

26 July 2021

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Prepared on 30 October 2026 · Esheria