

**IN THE DISTRICT COURT
AT DUNEDIN**

**I TE KŌTI-Ā-ROHE
KI ŌTEPOTI**

**CRI-2024-012-000873
[2024] NZDC 25523**

NEW ZEALAND POLICE
Prosecutor

v

JULIE ELISABETH MORTON
Defendant

Hearing: 18 October 2024
Appearances: C Flatley for the Crown
S Saunderson-Warner for the Defendant
Judgment: 18 October 2024

NOTES OF JUDGE D PROBINSON ON SENTENCING

[1] Ms Morton, you will appreciate that the lawyers have addressed me in some detail both orally and in writing and there are a number of matters that I need to cover. In fairness to you, what I propose to do is let you have a seat during the majority of the sentencing remarks and then at the end, when it comes to formally passing a sentence, I will invite you to stand.

Charges

[2] You appear for sentence having pleaded guilty to six representative charges of theft by a person in a special relationship. Each carries a maximum penalty of seven years' imprisonment.

Facts

[3] The charges relate to you misusing a power of attorney and stealing almost \$1 million from your mother. She was living in a rest home due to her declining health and on 13 January 2015, the enduring power of attorney that you held over her property affairs was activated when a health practitioner certified that she no longer had capacity to manage her own affairs due to her deteriorating health.

[4] What is apparent from the date range in the charges is that you immediately helped yourself to her assets, variously transferring money from her bank accounts to yours and making purchases or paying bills using her cards.

[5] In total you spent about \$965,000 of your mother's money in the period between 5 January 2015 and 28 March 2018 and within that period repaid just short of \$7,000. The net benefit to you from the offending was just short of \$960,000; \$958,443.03 to be precise.

[6] To give some perspective on the regularity and extent of the offending, between 15 January 2015 and 28 March 2018, you transferred just under \$720,000 from your mother's three bank accounts to your two accounts across 164 separate transactions. Analysis of your bank accounts revealed that between December 2014 and April 2018 you spent around \$750,000 out of your Kiwibank accounts.

[7] Between 13 January 2015 and 4 February 2018, you spent a total of \$245,000 by way of purchases made on your mother's bankcards or bill payments that were made through her bankcards and there were a total of 221 transactions across her cards within that period.

Victim impact

[8] The immediate consequence of the offending is that your brother received significantly less inheritance than he was entitled to and the effect of the offending is laid bare in the victim impact statement.

[9] I appreciate that he did not wish it to be read in court, but the effect has been devastating on him and on the family. It is profound, there is a real sense of betrayal and loss of trust. He is struck by the fact that there is no acknowledgement of wrongdoing beyond receipt of the outstanding sum. He discovered the thefts some time ago and since then has been without apology or explanation. He regards your offending as offensive to the memory of your mother, who was careful with money, who had foregone luxuries to provide for the family's future.

[10] I agree where he describes your offending as an egregious breach of trust and note his comments about the distress, humiliation and isolation that have resulted.

Submissions

[11] Crown counsel has cited a number of cases that involve similar amounts where terms of imprisonment between four years and four years nine months have been imposed or upheld on appeal. The Crown submission is that the starting point is in the order of four and a half to five years. I think Ms Flatley has amended her stance slightly to suggest a starting point in the order of five years, given my observations around how the Court tends to respond to charges involving the misuse of a power of attorney.

[12] Ms Flatley has analysed the various culpability features by reference to a Court of Appeal case, *R v Varjan*, highlighting the extent of the loss, the breach of trust and the vulnerability of your victim.¹ Ms Flatley reminds me in her written submissions that the extent of the loss or how much was taken is not determinative of the seriousness of the offence, but it does have relevance in assessing the need for deterrence, particularly where breach of trust is involved.

[13] The Crown acknowledges that you are entitled to credit approaching 25 per cent. The Crown submits that nothing is due in respect of remorse (there have been no indications of that) and asks that I carefully measure the amount of credit you are entitled to for the payment of reparation.

¹ *R v Varjan* CA97/03, 26 June 2003.

[14] Your counsel agrees with the starting point or the range that has been identified by Crown counsel and she has given particular emphasis to the lack of sophistication in the offending. She seeks full credit for the fact of the guilty plea. I think the most contentious areas of the submissions, really, are around credit for the repayment of the sum taken.

[15] A Deed of Family Arrangement was entered into in February 2023, that ensured that your brother received the full inheritance that was due to him, and I am told that money was paid within a matter of days of that deed being executed.

[16] Your counsel seeks credit of 25 per cent for that payment, pointing to authority for the proposition that voluntary payment of reparation warrants particular credit, where an offender exhibits genuine remorse and has done their best to atone financially for the fraud, including by means of selling assets, borrowing and agreeing to instalments.

[17] There is also a detailed psychological report. Your counsel seeks credit in the order of five per cent for matters that are dealt with in that report and I will address that separately.

Pre-sentence report

[18] I have a pre-sentence report that records that you feel a terrible sense of guilt and shame. It records, however, that the reasons behind your actions remain unknown, you saying that you are not sure what led to your committing the offences, describing it as a compulsion that left you feeling better afterwards.

[19] The report repeats a number of the themes in the psychological report dealing with your childhood and suffering at the hands of your mother, the diagnosis of post-traumatic stress disorder subsequent to the fraud offending in 1997. The recommendation in the report is for imprisonment with release on conditions.

[20] The report notes that you appear to have been shocked when police laid their charges after the substantial financial settlement that you entered into under which your brother received a sum in excess of \$1 million.

Psychological report

[21] The psychological report gives some limited insight into the offending. It is largely based on a self-report but does detail an abusive upbringing which I have touched on.

[22] There is reference to you potentially having suffered post-traumatic stress disorder at about the time of the matters giving rise to your 1997 conviction, but it does not seem that the psychologist has been referred to any medical evidence or other reports confirming that diagnosis. The account of the 1997 offending records that you stole about \$220,000 from your employer which was a real estate company, and the motivation is surprising. You said that it was an organisation making plenty of money for doing little work.

[23] One aspect of the report that I found surprising was that you did not appear to be able to draw any parallels between that offending and the current charges. You denied that your offending was motivated by financial need and you had difficulty in identifying the underlying motivating factors that contributed towards the offending and that is certainly consistent with what I have read in the pre-sentence report.

[24] There are some glimpses or suggestions of remorse, but in my assessment that really is around the impact on you and your family rather than reflecting remorse for the harm that has been caused to others, particularly your brother. You had difficulty identifying the thoughts and emotions that were present during the offending and that has complicated the assessment of the reasons behind the offending.

[25] The psychologist has described the presence of fleeting offence specific cognitive distortion when she reviewed the summary of facts and that included aspects of denial of parts of the offending. That I think goes directly to this question of remorse. Significantly, on a mental state examination, you did not endorse submissions consistent with post-traumatic stress disorder or anxiety disorders, obsessions or other compulsions.

[26] The psychologist considers, based on your self-report, that your history is characterised by severe childhood adversities that have led to a number of

consequences which included you becoming numb and disconnected, and having difficulty in regulating thoughts, emotions and behaviours.

[27] I think I need to remark, though, that observation has to be seen in the context of you being able to maintain a period of around 20 years offence free.

[28] Ultimately, the report did not really shed any particular light on the background to this offending. The psychologist has commented that the offending is complex and a comprehensive understanding of the psychological mechanisms behind it, remain somewhat unknown at this stage. That reflects in part that you do not endorse any of the risk factors that are often found in offender populations.

[29] The best explanation the psychologist can offer me is that your offending is highly contextual and that there are matters, including early trauma and the death of your sister, that need to be explored in order to develop a robust formulation of your actions. The psychologist certainly forms the opinion that your motivation was to seek retribution against your mother, wanting control and dominance within the relationship, with the offending leading to some form of momentary gratification or relief from stress.

[30] Ultimately, she concludes that while your actions are likely to have been somewhat influenced by your formative years, the extent of the causal association of the offending is extremely difficult to determine. Then, of course, there is the complication of this being your second dishonesty offence with the consequences of the first doing little to deter you.

Purposes and principles of sentencing

[31] I need to draw all these threads together in a sentence that promotes a sense of accountability in you for what you have done, promotes responsibility, denounces your conduct, deters you and, to an extent, protects the community from you. In doing that, I need to weigh the gravity of the offending with a particular emphasis on your culpability. I need to be consistent with other cases, have regard to the effect of the offending on your victim, as well as your personal and family background.

[32] What that involves is me establishing a starting point which incorporates the aggravating and mitigating factors of the offence, adjusting that for aggravating and mitigating factors personal to you, together with a discount for a guilty plea.

Aggravating features

[33] In terms of the aggravating features or assessing your culpability, I do that by reference to the Court of Appeal decision in *R v Varjan*. Some of these factors overlap and, as I said to Ms Saunderson-Warner, I am particularly careful in making sure that I do not double count any of these factors to your disadvantage.

[34] The first features are the nature of the offending, the breach of trust and I can reflect in that also the vulnerability of your victim. This was a theft from an elderly, incapable and inherently vulnerable person which occurred through you grossly abusing the trust that was placed in you by your mother when she appointed you as her attorney.

[35] What is apparent from a review of the authorities, is that this kind of offending is treated particularly seriously by the Court. That is because of the nature of the underlying relationship of trust and that victims are particularly susceptible to this type of offending. These victims have no ability to manage their own affairs, no ability to know what is happening to their money or their property. They are completely helpless and vulnerable, and it follows for those reasons that it is more serious than situations of theft from employers. In employment cases, there is always at least the possibility of oversight, or the offending being detected early and that simply is not the case where a power of attorney is being abused. As has been recognised, and I commented on the decision in *Tainsh v Police*, the position of the attorney is recognised by law as one of the utmost trust and confidence.²

[36] Beyond those features, there is the magnitude of the offending and that can be assessed by reference to the extent of these thefts. A net benefit to you of \$958,000 and change occurring across 385 transactions.

² *Tainsh v Police* [2023] NZHC 2768.

[37] Then there is sophistication. I generally agree with the submission made by your counsel that your offending is not particularly sophisticated. The summary refers to you mislabelling some references on bill payments to a landscaping company and that has the effect of disguising that some of the work was done at your own home. So there is an element of deception but beyond that, it is not particularly sophisticated offending.

[38] I am required to have regard to the type, circumstances and number of victims. I have commented already on the situation of your mother. Your brother is also a victim of the offending. He should have received a substantial inheritance without issue. That has been remedied but he should not have been put in that position of facing a very substantial loss.

[39] Then there is the motivation for the offending. Your counsel does not necessarily accept that motivation is an aggravating feature, rather it perhaps going to the absence of a mitigating factor, but by reference to *Varjan*, it is certainly relevant to assessing the overall culpability of the offending.

[40] I can only conclude that this was offending motivated by greed. You wanted to advantage yourself at the expense of your mother and ultimately at the expense of your brother. You bought jewellery, clothes and improved your property at her expense and the psychologist's report invites a conclusion that the offending was in part motivated by revenge.

[41] In terms of loss, the loss was ultimately zero through the substantial settlement that has been achieved. The period of offending was substantial, being conducted across three years and, of course, having substantial impact on your victim.

[42] Plainly, the offending was premeditated. That is the only conclusion that is available for the duration of your offending and the repeated defalcations.

Starting point

[43] I have already indicated that I think the starting point advocated for by counsel is too low. In my judgment, four and a half to five years is not sufficient to reflect the

culpability and the aggravating features that I have described. What I have noted from a survey of the cases is that even relatively low levels of theft under a power of attorney result in significant starting points.

[44] One of the examples that I gave to counsel was the case I have already cited of *Tainsh*, involving \$230,000 being taken over a seven-month period where a four year starting point was upheld on appeal.³ Three years four months was adopted as a starting point in a case of *Police v Whelan* involving \$147,000 over five and a half years.⁴ When one looks at larger amounts, such as *R v Fay*, \$700,000 a starting point of five years and *McGregor v R*, \$470,000, starting point five years.⁵ Four and a half years starting point in *Police v Teina*, \$550,000 was taken.⁶ I also refer to the cases that I have included in the schedule appended to these remarks.

[45] The Crown's cases, including *Love v R*, *R v Williams* and *R v Grant* do stand for sentences in the range of four and a half to five years being available, but they do not necessarily reflect the significance of the fraud offending involving a power of attorney.⁷ *Love* would suggest that in a Trust relationship, an executive chairman of a Trust, who stole just over \$1 million, a starting point of five to five and a half years was available.

[46] Having regard to the authorities that have been cited by counsel and those I have identified in my own research, my judgment is that the appropriate starting point is five and a half years' imprisonment. I think that is within the appropriate range and certainly a higher starting point could have been available. But in my judgment, reflecting the submissions of counsel and the authorities that I consider I am bound by, the starting point is appropriately five and a half years' imprisonment.

Adjustments

[47] I am required to have regard to your prior conviction for fraud as an aggravating feature. You were sentenced to nine months' imprisonment in 1997 for

³ *Tainsh v Police*, above n 2.

⁴ *R v Whelan* [2018] NZDC 23517.

⁵ *R v Fay* DC Christchurch CRI-2005-009-1894, 5 April 2006; and *McGregor v R* [2015] NZCA 565.

⁶ *Police v Teina* [2015] NZDC 5037.

⁷ *Love v R* [2017] NZCA 265; *R v Williams* [2021] NZHC 3301; and *R v Grant* [2020] NZHC 98.

what appears to have been a fraud in the order of \$220,000. Your parents met reparation on that matter. There is a sad irony that you later stole from your mother when she needed you to look after her affairs, despite her supporting you when you were in need back then. That conviction did occur 20 years ago. The amount involved was significant. The type of offence is directly relevant to the current charges. It involved a theft in a position of responsibility. The uplift is five per cent, which reflects counsel's assessment of the appropriate uplift.

[48] The question then is the credit for mitigating factors. First, I accept your plea was early. It was entered though in the face of overwhelming evidence. In terms of the decision in *Hessell v R*, I am allowed to consider the strength of the prosecution case and consider it entirely open to me to reduce the credit available to you, but I do not do so in this case.⁸ I afford you credit of 25 per cent.

[49] The more difficult issue I think is the question of reparation that has been paid. On the one hand, a reduced sentence should not be able to be purchased through the payment of reparation. On the other hand, the fact that loss has been remedied in full needs to be reflected and encouraged to limit the impact on victims. That reflects the fact that your victim is not left with the uncertainty of whether there is going to be some recovery in the washup of your affairs.

[50] The terms of the Deed of Family Arrangement are not before me, but I understand that the settlement funds have been provided by your children. Ms Saunderson-Warner has expanded on that before me indicating that your children have forgone or disclaimed \$300,000 cash legacies due to them and contributed \$350,000 of cash, with you disclaiming the balance of the estate. As I have commented to your counsel, beyond that I do not know the terms that are attached to it beyond your assets being sold and placed in a trust where you, your children and grandchildren would be beneficiaries.

[51] The point that the Crown makes is that cases where there is substantial credit being given for reparation generally involves significant and substantial attempts by defendants themselves to personally atone, often to the point of causing hardship. So

⁸ *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

the sale of property, realising investments, borrowing, working greater hours, living frugally and certainly those are the features that were central to the decision in *Anderson v Police*, that Ms Saunderson-Warner cited, where a 25 per cent credit was afforded for reparation.⁹ Another one of the judge's decisions is *Williams v Police*, involving a defendant taking steps which the judge said would, no doubt, have adverse consequences for the defendant and his family, resulting in a 15 per cent discount.¹⁰ Other cases involve credits of 20 per cent in substantial frauds such as *R v Pian* and *Zhang v R*.¹¹

[52] I do not consider that this is a case where there has been someone going above and beyond in meeting reparation or subjecting themselves to particular hardship. Against the background to this offending, in my judgment, the circumstances warrant credit in the amount of 20 per cent for the payment of reparation.

[53] The other issue is the credit available for matters raised in the psychological report. You will recall I corrected Ms Flatley that credit can be available where there is a causal connection between a person's background and the offending. In this case though, even at its highest, I think the psychologist has really struggled to make that connection. She says that your actions are likely to have been somewhat influenced by your formative years, but the extent of that causal association is extremely difficult to determine. The evidence of that causal connection is not strong. There has been, as I have said, a 20 year period where you have been offence free. There is likely a contextual aspect to the current offending but, in the absence of greater certainty around that causal connection, I think I am limited in the credit that I can afford.

[54] Ms Saunderson-Warner has pointed to what she has described as a situational linkage where your prior offending occurred in the context of your sister's death and the current offending in the context of your father's death. But I am still stuck with the limitations of the psychological report. You show limited insight. Insight may develop with treatment; I do not know. It is certainly early days. While the limited causative link, in your counsel's submission should not reduce the discount, something

⁹ *Anderson v Police* [2023] NZHC 2644.

¹⁰ *Williams v Police* [2018] NZHC 732.

¹¹ *R v Pian* [2020] NZHC 2724; and *Zhang v R* [2022] NZCA 267.

more is needed. I cannot speculate on what might be revealed with treatment where I am fixing the level of credit here and now. It follows that I limit the credit for background factors to two and a half per cent.

[55] The net credits that you are due total 42.5 per cent. Standing back, in my judgment those matters properly reflect the mitigating factors in the case before me.

Sentence

[56] Ms Morton would you stand please.

[57] Applying the net credits to the starting point of five and a half years' imprisonment that I have calculated, I get to an end sentence of three years and two months' imprisonment.

[58] It follows that any release conditions will be set by the Parole Board. That sentence is imposed on each charge concurrently. Thank you. Stand down.

Judge DP Robinson

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 06/11/2024

Schedule

Case	Amount	Span	Transactions	Prior	Reparation paid?	SP
<i>Fay</i> DC Chch CRI-2005-009- 1894	\$700,000	6.5 y	109	N	\$200k	5y
<i>McMahon</i> [2017] NZHC 78	\$65,000	8 y		Y	N	3y
<i>Wilton</i> [2015] NZHC 427	\$91,000	15 m	176	Y	N	3y 6m
<i>Morris</i> [2016] NZDC 7208	\$125,000	6 y		N	N	3y 4m
<i>McGregor</i> [2015] NZCA 565	\$470,000	5 y	150	N	N	5y
<i>Teina</i> [2015] NZDC 5037	\$550,000	17 m		Nil relevant	N	4.5y
<i>Jones</i> [2016] NZHC 1660	\$6,000 plus cellphone	2 y	86	N	N – order for full payment	2y 6m
<i>Brooks</i> [2017] NZHC 851	\$34,500	2 m	76	Nil relevant	N	2y 9
<i>Whelan</i> [2022] NZDC 1353	\$147,000	5.5 y		N	Full	3y 4m
<i>Tainsh</i> [2023] NZHC 2768	\$230,000	7 m	20	N	Limited offer	4y