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IN THE COURT OF APPEAL
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AC4 of 2019
[CR158 of 2018]

BETWEEN : ATTORNEY - GENERAL

- Appellant

AND : XI YUN QIAN

- Respondent

Coram : Whitten P
Handley J
Blanchard J
White J

Counsel : Mr. T. 'Aho for the Appellant
Mr. C. Edwards SC for the Respondent

Hearing : 3 September 2019

Date of Judgment : 6 September 2019

JUDGMENT OF THE COURT

1 The Attorney-General purports to raise a question of law arising from reasons for sentence given by Cato J on 10 May 2019.

2 The respondent, Xi Yun Qian had pleaded guilty on 11 December 2018 to a charge of failure to declare that he was carrying currency to a value of over TOP$10,000 contrary to s 97 of the *Customs and Excise Management Act.* Section 97 provides:

> **"Failure to make declaration**
>
> Any person who fails to make declarations required under the Customs laws commits an offence and shall be liable upon conviction to a fine not exceeding $100,000 or to a term of imprisonment not exceeding ten years, or both."

3 On 22 March 2019 the primary judge declined to set aside the plea of guilty to the charge under s 97 of the *Customs and Excise Management Act.* The respondent was convicted of that charge.

4 The prosecution's Summary of Facts in relation to the charge was that the respondent is a businessman who resides in Longolongo. On 15 May 2018 he sought to board a departing flight to Fiji. He had completed a passenger departure card on which he declared that he was not carrying more than TOP$10,000 in cash, or its equivalent in foreign currency. He told an Immigration Officer that he was not carrying cash and then under further questioning, gradually revealed cash secreted on his person in the following quantities:

(a) NZD$9,490;

(b) USD$54,275;

(c) AUD$10,050;

(d) FJD$1,700; and

(e) TOP$2,015.

5 The respondent was charged with other offences, but those charges were dismissed after the judge ruled that the respondent had no case to answer.

6 For the offence against s 97 of the *Customs and Excise Management Act* the respondent was sentenced on 10 May 2019 to a fine of TOP$15,000 to be paid within 30 days, or six months' imprisonment in default.

7 The cash that the respondent had secreted in his clothes and about his person was seized at the time of his arrest and detained under, or purportedly under, ss 19C and 19D of the *Money Laundering and Proceeds of Crime Act* ("the Money Laundering Act"). Those sections provide:

> "**19C Seizure of Cash**
>
> (1) An authorised officer may seize any cash, if he has reasonable grounds for suspecting that –
>
> (a) it is recoverable cash;
>
> (b) intended by any person for use in unlawful conduct; or
>
> (c) it is undeclared cash intended for use in unlawful conduct.
>
> (2) Any authorised officer may also seize cash part of which he has reasonable grounds for suspecting that it is –
>
> (a) recoverable cash;
>
> (b) intended by any person for use in unlawful conduct; or
>
> (c) it is undeclared cash intended for use in unlawful conduct.
>
> **19D Detention of seized cash**
>
> (1) While the authorised officer continues to have reasonable grounds for his suspicion, or for the purposes of investigation, cash seized under section 19C may be detained for a period of 72 hours.
>
> (2) The period for which the cash or any part of it may be detained may be extended by an order made by the Court, but the order may not authorise the detention of any of the cash –
>
> (a) beyond the end of the period of 3 months beginning with the date of the order; or
>
> (b) in the case of any further order under this section, beyond the end of the period of 2 years beginning with the date of the first order.

(3) An application for an order under subsection (2) may be made by the authorised officer, and the Court may make the order if satisfied, in relation to any cash to be further detained, that either of the following conditions is met –

(a) there are reasonable grounds for suspecting that the cash is recoverable cash and that either –

(i) its continued detention is justified while its source, ownership, use or destination is further investigated or consideration is given to bringing proceedings against any person for an offence with which the cash is connected; or

(ii) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded;

(b) there are reasonable grounds for suspecting that the cash is intended to be used in unlawful conduct and that either –

(i) its continued detention is justified while its intended use is further investigated or consideration is given to bringing proceedings against any person for an offence with which the case is connected, or

(ii) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.

(4) An application for an order under subsection (2) may also be made in respect of any cash seized under section 19D, and the Court may make the order if satisfied that –

(a) the condition under subsection (3) is met in respect of part of the cash; and

(b) it is not reasonably practicable to detain only that part.

(5) An order under subsection (2) shall provide for notice to be given to any persons affected by it."

8 In his reasons for sentence the primary judge stated that on 16 May 2018 an order had been obtained by the Crown under s 19D of the Money Laundering Act ex parte, authorising the detention of the currency seized for three months from 16 May 2018. (Judgment [6]).

9 The primary judge stated (at [6]):

> "He pleaded guilty to making a false declaration under section 97 of the Customs and Excise Management Act, on the 11th December, 2018. Mr Xiyun proceeded to trial on the remaining charges on the 18th March 2019. Mr Edward[s], his new counsel,

attempted to have his earlier plea on the declaration charge under section 97 of the Customs and Excise Management Act set aside and had argued the appropriate charge lay under the Money Laundering legislation. In my judgement of the 22nd March 2019, I ruled that the plea could not be set aside, essentially because the relevant provisions of the Customs and Excise Management Act applied to a false declaration relating to the export of currency and earlier legislation such as section 19(1) of the Money Laundering legislation and relevant regulations had been impliedly repealed by section 97 of the Customs and Excise Management Act, that is subsequent legislation."

10 On the sentencing of the respondent an issue arose as to whether the cash that had been seized had been forfeited to the Crown pursuant to s 19G of the Money Laundering Act. Section 19G provides:

> "**19G Forfeiture**
>
> (1) While cash is detained under section 19D, an application for the forfeiture of the whole or any part of it may be made to the Court by an authorised Customs or Police officer.
>
> (2) The Court may order the forfeiture of the cash or any part of it if satisfied that the cash or part is –
>
> (a) recoverable cash; or
>
> (b) intended by any person for use in unlawful conduct.
>
> (3) In the case of recoverable cash which belongs to joint tenants, one of whom is an exempted joint owner, the order may not apply to so much of it as the Court thinks is attributable to the exempted joint owner's share.
>
> (4) Where an application for the forfeiture of any cash is made under this section, the cash is to be seized (and may not be released under any power conferred by this Act) until any proceedings in pursuance of the application (including any proceedings on appeal) are concluded.
>
> (5) Where cash has been seized under sections 19C and 19D and no notice of appeal has been received by either the seizing authority or the Court within the period of 30 days from the time of seizure, then the cash will be automatically forfeited to the Crown."

11 The Crown contended that the cash seized had been forfeited to the Crown pursuant to s 19G(5) because no notice of appeal had been received by either the seizing authority or the Court within 30 days from the time of seizure (s 19G(5)). The respondent contended to the contrary. He claimed to be entitled to the return of the money.

12 The primary judge stated (at [11]) that he considered it necessary to resolve this issue prior to sentencing. Logically, if, as the Crown contended, the cash had been forfeited to the Crown, then a lesser sentence would be warranted, whereas, if, as the respondent

contended, he was entitled to the return of the moneys, a more severe sentence would be warranted.

13 The primary judge concluded that the cash had not been forfeited to the Crown. This consideration informed the sentence imposed.

14 The primary judge's reasons for concluding that the cash had not been forfeited to the Crown were that the proceedings commenced by the Crown to detain money under s 19D of the Money Laundering Act were misconceived and could not lead to forfeiture under s 19G(5).

15 Section 19 required a person leaving the Kingdom with cash amounting to more than the prescribed sum to make a declaration in the prescribed form in the Foreign Exchange Control Regulations.[1] The Foreign Exchange Control (Restriction On Removal Of Cash) Regulations provided:

> "**3 Removal of Restricted Cash**
>
> (1) No person shall remove any restricted cash, except with the written permission of the Governor.
>
> (2) Any person who acts in contravention of subregulation (1) commits an offence."

16 Regulation 4 provided:

> "**4 Declaration**
>
> (1) Any person intending to travel out of the Kingdom shall complete and sign a declaration in the form prescribed in the Schedule to confirm whether he is removing any restricted cash or not.
>
> (2) Any person who makes a false declaration under subregulation (1) commits an offence."

17 "Restricted cash" was defined to mean any cash exceeding the amount of $10,000 pa'anga or cash in currency of any country or countries in any combination that exceeds the value of $10,000 pa'anga.

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1. The regulations were repealed by s 33(2) of the Foreign Exchange Control Act 2018 assented to on 21 June 2018. The regulations were in force on 15 May 2018 when the offence occurred.

18 An "authorised officer" within the meaning of s 19C and 19D includes a customs officer. The question whether a customs officer had reasonable grounds for seizing the cash under s 19C would raise questions of fact that could not be determined on the sentencing of the respondent. The first question would be whether the customs officer had reasonable grounds for suspecting that the cash was "recoverable cash". There is no definition in the Money Laundering Act of the phrase "recoverable cash". In *Police v Felipe (CR132 of 2019)* Cato ACJ treated it as equivalent to "proceeds of crime" (as defined). At least arguably it is cash which is proceeds of crime or tainted properly (as defined) recoverable under another provision of the Money Laundering Act. A question would also arise whether the officer had reasonable grounds to suspect that the cash was intended by any person for use in unlawful conduct. Under s 19C(1)(c) the question would be whether the customs officer had reasonable grounds to suspect that the cash was undeclared cash intended for use in unlawful conduct.

19 Prima facie, those questions could not be resolved without a hearing in which the customs officer in question would be expected to give evidence. Section s19D(1) makes it clear that the authorised officer must not only have reasonable grounds to suspect but must have a suspicion of any of the matters in ss19B and 19C. The lawfulness of the detention of the cash and hence the application of the automatic forfeiture provision in s 19G(5) would in turn depend upon such evidence.

20 The respondent was charged with an offence against s17(1)(a) and (b)(ii) of the Money Laundering Act. The primary judge found that there was no case to answer on the charge of money laundering. Mr Edwards SC, who appeared for the respondent, submitted that this meant that the cash could not be seized, detained and forfeited under ss19C, 19D and 19F. That does not follow. If the customs officer suspected with reasonable cause that the undeclared cash was intended for use in unlawful conduct then it could be forfeited. But no conclusion could be reached about that in the sentence hearing.

21 The primary judge considered that he could determine that the cash had not been forfeited to the Crown pursuant to s 19G(5) because the relevant provisions of the Money Laundering Act had been impliedly repealed. The primary judge said:

> "[13] Closer consideration of the Money Laundering legislation further revealed that section 19 which governed cash declarations relating to the import or export of currency was dependent on declarations being made to an authorised officer in

the prescribed form in the Foreign Exchange Control Regulations. I have reviewed this legislation and observe that the Foreign Exchange Control (Restriction on Removal of Cash) regulations contain a passenger declaration in the schedule that restricts the removal of $10,000 pa'anga or equivalent cash in other currency without the written [permission] of the Governor of the Reserve Bank. The form also expressly stated that the possible consequence of a false declaration is forfeiture of the cash. The regulation provided that there could be an appeal to the Minister of Finance against forfeiture. These procedures had their origin in regulation 4. They were intended to advise the offender of the consequences of seizure and the procedure for seeking to avoid forfeiture. In my view, contained in regulation 4 was a specific or discrete procedure intended to govern false declarations as to excess cash intended for export or import under the Money Laundering legislation as opposed to other procedures in the Act governing the confiscation or the seizure of tainted property or tainted cash recovered in other circumstances. A similar procedure was embodied, I note, in the Cabinet (Restriction on Removal of Cash from the Kingdom) Order made pursuant to Regulation 3 of the Emergency Powers (Maintenance of Public Order) Regulations 2006 which came into effect after the riots on the 22nd November, 2006.

[14] As I have said, a false declaration as to currency is now an offence under the Customs and Excise Management Act which impliedly repealed the provisions of the Money Laundering Act as to false cash declarations and also subordinate legislation being the Foreign Exchange Control (Removal of [C]ash) Regulations, which set down the statutory procedure for the seizure of cash that was the subject of a false declaration under the Money Laundering Act. Under the Customs and Excise Management Act, there is a statutory procedure also laid down for forfeiture and the seizure of goods or, in this case, currency that has not been declared and intended to be exported. The statutory definition of goods includes currency.

[15] Section 107 provides that the Chief Executive Officer shall have the power inter alia to order that goods which are required by this Act to be dealt with in a particular way and are dealt with contrary to that authorisation shall be liable for forfeiture. In my view, cash which is intended to be exported in excess of $10,000 is required to be declared under sections 22 and 97 of the Act and has not been declared contrary to the Act is liable for forfeiture under an order made under section 108(d). Under section 109, goods liable to forfeiture may be seized by a Customs Officer, any police officer, or His Majesty's Armed Forces Officer who shall as soon as practicable provide details of the seizure to the Minister. The seizure notice must be provided to the owner within 14 days of seizure, and the seized goods must under section 111 be secured by a Customs officer in the Crown's warehouse. Section 112 provides the statutory procedure for the owner of the seized goods to apply for their return and the Minister has the power to do so if he has been provided reasonable grounds for doing so and other conditions are met.

[16] These seizure and disposal provisions do not involve the Courts unlike the provisions of the Money Laundering legislation that do. The orders obtained from this Court were in retrospect obtained under a misapprehension of the relevant power to seize and forfeit undeclared currency. Following *Woolwich Building Society v Inland Revenue Commissioners*, Mr Xiyun is entitled to have restitution of the cash seized by police and claimed to be now [forfeited] to the Crown under section 19 G (5) of the Money Laundering Act. Mr Aho, during the course of argument, stated that the statutory procedure could not have [been] invoked because there had been no Order for forfeiture of undeclared

> cash made by the Chief Executive officer under section 109 of the Customs and Excise Management Act."

22 His Honor added (at [17]) that the appropriate procedure for seizure and forfeiture was contained in Part 13 of the *Customs and Excise Management Act.*

23 The crux of the primary judge's reasoning is that a combination of the exercise of the Minister's power under s 45 of the *Customs and Excise Management Act* to make orders prohibiting or restricting exportation of goods from the Kingdom, r 75(a) of the Customs and Excise Management Regulations 2008 and s 97 of the *Customs and Excise Management Act* impliedly repealed ss 19-19G of the Money Laundering Act and the Foreign Exchange Control (Removal of Cash) Regulations, insofar as they concerned the offence of making a false declaration as to currency.

24 Those provisions of the Money Laundering Act were inserted by Act 32 of 2010 (the *Money Laundering and Proceeds of Crime (Amendment) Act 2010*).

25 Section 97 of the *Customs and Excise Management Act* was introduced by the *Customs and Excise Management Act 2007* that commenced on 1 February 2008.

26 Regulation 75(a) of the Customs and Excise Management Regulations 2008 provides:

> **"75 Declaration of restricted and prohibited goods**
>
> A passenger or crew member entering or leaving the Kingdom shall declare to the Customs officer whether that person has in their possession concealed or not on their person or in accompanied or unaccompanied baggage any -
>
> (a) prohibited or restricted imports or exports."

27 Section 45 of the *Customs and Excise Management Act* provides that the Minister may, with the approval of Cabinet by Order, prohibit or restrict the importation or exportation of goods into or from the Kingdom.

28 On 5 June 2012 the Chief Commissioner of Revenue,[2] with the approval of Cabinet made the *Customs and Excise Management (Amendment) Order 2012* that prohibited the export of cash exceeding $10,000 pa'anga, whether in local or foreign currencies.

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[2] No issue was raised concerning the Commissioner's right to exercise the Minister's power to make the order.

29 Hence, both s 97 of the *Customs and Excise Management Act* and s 19 of the Money Laundering Act required the respondent to declare the cash he was carrying on his person, but provided different penalties for contravention of those provisions.

30 The primary judge's reasoning is more fully contained in his judgment of 22 March 2019 refusing to set aside the respondent's plea of guilty to the charge under s 97. On the respondent's application to withdraw his plea of guilty the respondent argued that he could only be charged with the offence against s 19 of the Money Laundering Act. The judge rejected that submission for the following reasons:

> "[19] The Customs and Excise Management Act does not expressly repeal the relevant provisions of the Money Laundering Act relating to false declaration under section 19. The issue for me to resolve is what effect in law did the Customs and Management Order of 2012 have on section 19 of the Money Laundering Act and the Foreign Exchange Control (Restriction on Removal of Cash) Regulations? Section 17 [sic] of the Acts Interpretation Act provides;
>
> > 'Whenever any Act is passed which contains provisions irreconcilable with but does not expressly repeal an existing Act, then the provisions in such existing Act which are irreconcilable with the provisions of the New Act shall be held to be impliedly repealed.'
>
> In my view sensibly, the Minister in 2012 decided it was appropriate to consolidate the export of money or currency under the umbrella of the Customs and Excise Management Act where one declaration form on departure could be used to accommodate restricted currency as well as other restricted goods, and provide the same penalty for a currency violation as a false declaration relating to other restricted goods. Mr Aho was not able to provide me with information as to whether there had been prosecutions up to that date under section 19 of the Money Laundering Act for restricted currency false declarations. By that stage, it would seem the question of penalty had been complicated by the higher penalties that were provided in the Foreign Exchange Control (Restriction on Removal of Cash) Regulations which may have led to legal issues at least concerning penalty had there been efforts made to prosecute under section 19 of the Money Laundering Act. I consider in doing so the Minister, in the subordinate legislation, he promulgated as Order 2012 under the Customs and Management Act had intended to rationalise the law and penalties relating to false declaration of restricted amount of currency. In so doing, he must have intended to have repealed the operation of section 19 of the Money Laundering Act which provided a lesser penalty and also the operation and penalties contained in the Foreign Exchange Control (Restriction on Removal of Cash) Regulations in so far as they dealt with false declarations relating to restricted currency were impliedly repealed under section 17[sic] of the Interpretation Act.
>
> [20] For these reasons, I rule that the prosecution were entitled to proceed as they did to prosecute the accused under section 97 of the Customs and Excise Management Act and, this being so, there is no reason to set aside the guilty plea on count one. The accused is duly convicted of failure to declare he was carrying currency over TOP 10,000 contrary to section 97 of the Customs and Excise Management Act and he awaits to be sentenced."

31 The *Customs and Excise Management Act* does not contain an Henry VIII clause authorising the making of regulations or statutory instruments that can amend or repeal legislation. Section 129 provides that the Minister may, within the consent of Cabinet make regulations required for the administration of the Act. Section s 10 of the *Interpretation Act* relevantly provides:

> "10 Power to make regulations
>
> When in any Act which is now or may hereafter be in force power is given to any authority to make rules or regulations, the following provisions shall, unless in any case the contrary is expressly provided or by necessary implication appears to be intended, have effect with reference to the making and operation of the rules and regulations —
>
> ...
>
> (c) any rule or regulation may at any time be altered or rescinded by the same authority and in the same manner by and in which it was made;
>
> (d) no rule or regulation shall be inconsistent with the provisions of any Act;
>
> ..."

32 Section 10 (1) (d) embodies a well-established principle of statutory interpretation that a general power to make regulations will not authorise the making of regulations that are inconsistent with a law made by Parliament (*Federal Capital Commission* v *Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 588; *De L* v *Director – General, NSW Department of Community Services (No.2)* (1997) 190 CLR 207 at 212).

33 Section 16 provides:

> **"16 Repeal by implication**
>
> Whenever any Act is passed which contains provisions irreconcilable with but does not expressly repeal an existing Act, then the provisions in such existing Act which are irreconcilable with the provisions of the new Act shall be held to be impliedly repealed."

34 The judge quoted this provision at [19] of his first judgment as set out above at [30].

35 An "Act" is defined to include a regulation or other statutory instrument unless a contrary intention appears (*Interpretation Act*, s 2). In the absence of express or necessarily implied authority to the contrary a regulation or statutory instrument cannot impliedly

repeal an Act of the King and Legislative Assembly made under s 56 of the Constitution.

36 A later Act may impliedly repeal an earlier inconsistent Act but this is comparatively rare. It must be clear that the later Act is not capable of a sensible operation if the earlier Act stands, or that it is intended to cover the whole subject of the earlier Act (Leeming, *Resolving Conflicts of Laws*, Federation Press para. 3.7).

37 A regulation may impliedly repeal an earlier inconsistent regulation, unless to do so would be inconsistent with the provisions of an Act. The Ministerial Order of 5 June 2012, which expanded the scope of r 75(a) of the Customs and Excise Management Regulations 2008 and hence the scope of s 97 of the *Customs and Excise Management Act*, could not impliedly repeal ss 19-19G of the Money Laundering Act (*Re Davis; Ex parte Davis* (1872) LR 7 Ch App 526 at 529; Oliver Jones, *Bennion on Statutory Interpretation* (6th ed, 2013 LexisNexis Butterworths) at 216-218; *Interpretation Act*, s 10(d)).

38 The fact that there are alternative forfeiture provisions does not mean that the forfeiture provisions under the Money Laundering Act were impliedly repealed, even if the *Customs and Excise Management Act* forfeiture provisions were to be treated as later in time (which they were not for the reasons previously given). Section 108(d) upon which the primary judge relied provides that:

> "The Chief Executive Officer shall have the power to order that the following goods shall be liable to forfeiture –
>
> ...
>
> (d) Goods which are required by this Act to be dealt with in a particular way and are dealt with contrary to that authorisation."

39 It may be accepted that cash are goods within the meaning of s 107. Section 2 defines "goods" so as to include tangible personal property. Because s 45 of the *Customs and Excise Management Act* provides that the Minister may, with the approval of Cabinet by Order prohibit or restrict the importation or exportation of goods into or from the Kingdom and the Order was made prohibiting the export of cash to the value of more than $10,000 pa'anga, the attempt to carry the cash out of the Kingdom was a dealing with the cash contrary to the Act. It was not on that account a dealing with the goods contrary to an authorisation provided by the Act. Even if it were, the availability of

alternative forfeiture procedures does not indicate an intention that one would cover the field to the exclusion of the other so as to bring about any implied repeal.

40 Regulation 5 of the Foreign Exchange Control (Restriction on Removal of Cash) Regulation also confers a power of forfeiture of restricted cash (cash of any currency exceeding $10,000 pa'anga: see para. [17] above). Regulation 5(1) required a Customs officer to temporarily hold a person who made a false declaration. Regulation 5(2)(b) required a Customs officer to seize and confiscate the restricted cash. Regulation 5(2)(d) required the Customs Officer to give the person a receipt and a notice that he may apply in writing to the Minister for the return of the restricted cash. The restricted cash may be forfeited to the Crown unless the person who had the cash satisfies the Minister in writing within 4 weeks that it is in the interests of fairness and justness that some or all of the cash should be returned (Reg. 5(3)).

41 The Crown did not invoke this power of forfeiture. Again, this alternative forfeiture procedure did not preclude the Crown's having recourse to ss. 19C – 19G of the *Money Laundering Act.*

42 The Crown submitted that the "appeal" (so-called) raised three issues:

(a) does 'forfeiture of property' fall within the ambit of the Attorney–General's authority outlined in clause 31A of the constitution;

(b) is the Attorney–General expressly barred from exercising her constitutional powers to deal with undeclared cash by the forfeiture procedure in Part 13 of the Customs and Excise Management Act; and

(c) is legitimate cash immune from automatic forfeiture under s. 19G(5) of the Money Laundering Act.

43 The first issue does not arise. The Crown's submissions did not address the primary judge's reasoning. On the primary judge's reasoning there were not alternative available procedures for forfeiture: one by order of the Court or the automatic operation of the statute under s.19 of the *Money Laundering Act*; the other by order of the Chief Executive Officer under s.108 of the *Customs and Excise Management Act.*

44 As to the second issue, for the reasons above we agree with the Crown's submissions that the forfeiture provisions of the Customs and Excise Management Act do not preclude recourse to the forfeiture provisions of the Money Laundering Act.

45 So far as appears from the Appeal Book the third issue was not raised before the primary judge. It was not dealt with by the primary judge because his reasons proceeded on different grounds.

46 It is clear from the terms of ss 19B and 19C that merely failing to declare cash which is not less than the prescribed minimum does not mean that the cash is recoverable cash. (s.19B (2)). It is also clear that the power to seize, detain and apply for forfeiture of cash under ss 19C, 19D and 19G applies only to cash referred to in s.19C. That includes undeclared cash intended for use in unlawful conduct. It is not clear what the Crown means by "legitimate cash", but if it means cash not falling within s.19C then the answer to the issue posed would be that if there was no power to seize the cash under s.19C, there was no power to detain it under s.19D and no occasion for it to forfeited under S.19G.

47 Notwithstanding the comments in the foregoing paragraphs, the first question is what jurisdiction does this Court have to entertain the Crown's application? The Attorney-General does not seek leave pursuant to s 17B of the *Court of Appeal Act* to appeal against the sentence pronounced by the Supreme Court on the ground that the sentence was too severe. Instead, the Crown's notice of appeal relies upon s 17A of the *Court of Appeal Act*. That section provides:

> **"17A Point of law stated by the judge**
>
> In addition to his power to do so under section 3 a judge of the Supreme Court before whom any person is tried and convicted on indictment may submit any question of law arising at or in reference to such trial or conviction to the Court of Appeal for determination, and such submission shall be dealt with as if it were an appeal under section 16."

48 Contrary to the purported "Notice of Appeal on a Point of Law" filed by the Crown, the primary judge did not submit a question of law for determination by this Court. Rather, the primary judge decided a question of law in the course of sentencing the respondent.

49 Nor could a submission of the question of law be dealt with as if it were an appeal under s 16. Section 16 provides a right of appeal, either as of right or with leave, to a person convicted on a trial before the Supreme Court. The respondent does not seek to appeal from his conviction. He pleaded guilty and he does not appeal from the primary judge's refusal to allow him to withdraw that plea.

50 In her written submissions the Attorney-General asked the Court to vary the primary judge's "sentencing ruling" pursuant to s.19 of the *Court of Appeal Act*. Section 19 deals with a different subject matter. It is irrelevant.

51 In oral submissions, Mr Aho for the Attorney contended that the Attorney could appeal against part of the primary judge's sentencing decision, namely his finding that the cash had not been validly forfeited. But the Attorney-General sought no variation of the sentence pronounced by the Supreme Court (*Court of Appeal Act s.17B*). Save perhaps in very exceptional circumstances (*Arbuthnot* v *Chief Executive of the Department of Work and Income* [2008] NZLR 13 at 25 [25], unless a statute granting a right of appeal provides otherwise, appeals lie against orders, not reasons (*Commonwealth of Australia* v *Bank of New South Wales* [1950] A.C 235 at 294).

52 We have thought it right to address the issues sought to be raised by the Crown lest it be thought that the judgment below allows the Executive by regulation or statutory instrument to amend or repeal enactments of the King and Legislative Assembly without clear statutory authority. That would be inimical to the rule of law and prima facie contrary to s 56 of the Constitution. Nonetheless, this Court does not have jurisdiction to entertain the point sought to be raised by the Crown. The issue could be raised in civil proceedings, either by the Crown's seeking a declaration that the cash had been validly forfeited or by the respondent's seeking its return. The questions referred to at [18]-[20] and [46] would then arise. If the Crown now accepts that the cash seized was "legitimate" and does not fall within s.19C then no such proceedings should be necessary.

53 In such proceedings a question might also arise as to whether it is open to the Crown to contend that the cash was validly forfeited when the respondent received a presumably more severe sentence than he would otherwise have received had the primary judge not concluded that the respondent was entitled to the return of the cash.

54 No issue estoppel would arise because whether the cash was validly forfeited to the Crown was not a legally indispensable issue that needed to be decided to determine the sentence (*Blair v Curran* (1939) 62 CLR 464 at 532 (Dixon J), even if issue estoppel could reasonably be applied in criminal law (*R v Davis* [1982] 1 NZLR 584 at 589). Nor did the primary judge decide facts so as arguably to attract s 99 of the *Evidence Act*.

55 Nonetheless, there may be an issue as to whether it would be an abuse of process for the Crown to seek to relitigate the issue decided by the primary judge upon sentencing the respondent when there was no appeal against the severity of sentence (*Hunter v Chief Constable of the West Midlands Police* [1982] AC 529; *Bryant v Collector of Customs* [1984] 1 NZLR 280; *Rogers v The Queen* (1994) 181 CLR 251).

56 It is not appropriate that this Court express any view about these potential issues.

57 The purported appeal under s 17A of the *Court of Appeal Act* is incompetent and must be dismissed.

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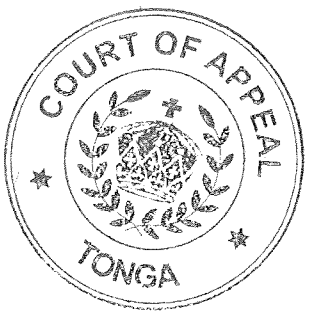
Whitten P



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