

and then depositing the total Tongan currency of the property into the Tongan Confiscated and Forfeited Assets Fund established in the Crown's public accounts under section 48A of the Money Laundering and Proceeds of Crimes Act 2000, and that such funds be managed and utilized in accordance with the relevant statutory provisions governing such a fund.

[2]. Although the legislation has been in force in Tonga since 2000, I am informed this is the first time it has sought to be used in this jurisdiction. Overseas, similar legislation has been used very successfully against particularly organized crime to attach the profits derived from criminal activity such as drug related offending by confiscation orders and pecuniary penalty orders directed at offenders' disgorging profits. In some cases, very large sums have been involved and confiscated to the Crown, and, or pecuniary orders have been made. The legislation is a potent reminder to offenders that property derived from criminal activity may be attached by confiscation orders (under sections 28, 29, 31, 34 and 35 of the Act) and that, where appropriate, profits that can be shown to have been derived from criminal offending may be the subject of pecuniary penalty orders under sections 28, 41- 45 of the Act. It has been said in a number of cases that these measures were enacted to deter serious criminal offending. Thus, in R v Pederson [1995] 2 NZLR 386 the Court of Appeal in New Zealand emphasised the deterrent purpose of these remedies by; in the words of Cooke P, demonstrating emphatically that crime does not pay.

[3] In this case, the application for confiscation arose out of a conviction which had been entered in the enhanced jurisdiction of the Magistrate's Court by Principal Magistrate Mafi on the 28th January 2015 for the offence of holding out expressly to be a medical practitioner, contrary to section 11 of the Medical and Dental Practice Act 2001. This is a offence punishable by up to

five years imprisonment. The prosecution had been commenced in this Court in July 2013 and a not guilty plea had been entered by the Respondent in November 2013. Later, by consent on the 12th May 2014, the prosecution was transferred for trial to Principal Magistrate Mafi in his enhanced jurisdiction given under section 4(4) of the Magistrate's Court Amendment Act, 2012. Later, there was a change of plea and conviction was entered on this and a related count, on the 28th January 2015, the Respondent being convicted and sentenced on each count to a fine of one thousand dollars.

[4] Principal Magistrate Mafi had originally ordered that the money located by the police in the respondent's bedroom and alleged to be tainted property be returned to the Respondent less the amount owing under the fines. The Crown (Mr Lutui) sought an order from the Magistrate and was successful in having the original order varied so that the money was retained by the Police. Mr Lutui had foreshadowed that the attorney General intended to commence proceedings under Money Laundering and Proceeds of Crimes Act 2000 for confiscation of the money as tainted property. The proceedings for confiscation were not however, commenced until 27th January 2017, that is a day before the two year limitation period under section 28 was to expire. The delay, Mr Aho candidly admitted on this occasion had been his fault.

[5] Mr Aho also attempted to couple this application or amend it to include a much greater claim for a pecuniary order alleging a sum of \$325, 491.00 T should be paid as a pecuniary penalty in addition to the tainted property sought to be confiscated. During the course of the police search of the Respondent's premises, they had found documentation which established that the Respondent had remitted very significant sums of money to China over a period of time dating back to about 2009. The

evidence that was presented before me suggested that some of this money had been used to acquire medicines and related products in China for her business. Mr Aho sought to amend the application to include a claim that these moneys also, represented profits acquired from this illegal activity, and should be the subject of pecuniary penalty order under section 41. It appeared to me on further inquiry that the bulk of the moneys sent to China were derived outside the period alleged in the offending. Mr Aho, on re-examination of the claim, conceded that this was so and those that fell outside the period to which the conviction related could not now be the subject of a pecuniary penalty order. That left only about \$75,000.00 that could be the subject of a pecuniary penalty order as tainted profits from her illegal dealing. I questioned Mr Aho further whether I could grant an amendment under section 30 (1) (a) of the Act because it appeared the police had obtained the information during their original search and thus, it could not be said that the property or alleged benefit was not reasonably capable of identification when the application was made. If this were the case, then amendment could not be made. However, there was a fundamental objection, it seemed to me in allowing any amendment for a pecuniary penalty order at this stage, because the application or amendment to include a pecuniary penalty was statute barred as being commenced beyond the two year limitation period. I indicated to Mr Aho that I agreed with Mr Tu'utafaiva's submission to this effect. For all these reasons, I indicated to Mr Aho that any application for a pecuniary penalty could not succeed, and I would not allow any amendment.

- [6] Mr Tu'utafaiva submitted to me that the confiscation application should not proceed either because he argued by committing himself to trial in the enhanced jurisdiction of the Magistrate's Court the Attorney- General could not now seek to argue for a confiscation order of the money on the basis that it was tainted

property. He contended that either the Application should have been made before the Principal Magistrate in his enhanced jurisdiction or not at all. He submitted also that the order sought was a penalty and the Magistrate in this case was responsible for sentencing the Respondent in his enhanced jurisdiction and this was a further reason why this Application could not be brought.

- [7] Mr Aho submitted that remitting a matter to the enhanced jurisdiction of the Magistrates Court did not in any respect convert the jurisdiction of a Magistrate into that of a Supreme Court Judge. In the absence of his being given jurisdiction to determine applications for confiscation and pecuniary penalty orders under the Act, he could not determine these applications. The Magistrate's Court Amendment Act 2012 simply, he submitted, gave the Principal Magistrate additional jurisdiction in relation to the penalties he could impose for offending not exceeding 7 years imprisonment or a fine of \$50,000 but it did not include jurisdiction to make orders under the Money Laundering and Proceeds of Crimes Act 2000. That jurisdiction belonged exclusively to the Supreme Court, and with that I agree. Nor do I agree that the fact that the Crown consented to trial in the enhanced jurisdiction of the Magistrates' Court means that the Crown should be precluded from now seeking a confiscation order in the Supreme Court. The jurisdiction to seek confiscation and pecuniary orders in the Supreme Court operates after conviction and that is what occurred here. Although in a sense, confiscation orders and pecuniary penalty orders supplement general sentencing powers, I do not think that the fact the Magistrate sentenced the Respondent under his general sentencing jurisdiction means that this Court is now precluded from making additional orders concerning tainted property, or tainted profits under the provisions of the under the Money Laundering and Proceeds of Crimes Act 2000. Nor does the fact that an application is made in this Court suggest that the

Respondent is placed under any additional or fresh accusation of any other offence. (Her Majesty's Advocate v McIntosh [2001] UKPC D1, DR A No 12 of 2000, Regina v Rezvi [2002] UKHL 1) I consider, however, that where the Crown intends, as was plainly the case here, to seek orders, under this Act, the Crown should ordinarily resist any application to have trial in the enhanced jurisdiction of the Magistrate's Court.

[8] In this case, I observe that the application to the Magistrate that was brought by Mr Lutui to vary the original order that the money seized by the police be returned to the Respondent less an amount representing the fines imposed against the Respondent, should have been by application for a restraining order in this Court under section 57 of the Act. I doubt that the Magistrate had the jurisdiction to make such any order relating to tainted property sought to be preserved under this Act. To further preserve and regulate the security of the money said to be held by the police in safe keeping at the Longo longo Station, I made a restraining order for its preservation by the police until further order of this Court. Mr Tu'utafaiva indicated, in any event, that his client had no intention of claiming it from the Police.

[9] Accordingly I consider that this Court has jurisdiction to hear this application and the application is not affected by the trial and sentencing having taken place in the enhanced jurisdiction of the Magistrate's Court. This Court has jurisdiction to make the order sought because the offence for which the Respondent was convicted qualified as a serious offence, the Act defining a serious offence as being one where the maximum penalty is not less than 12 months imprisonment. Further, the unchallenged affidavit evidence adduced by the Applicant was that the Respondent had no other source of income from which the money located in her bedroom could have been derived (see the

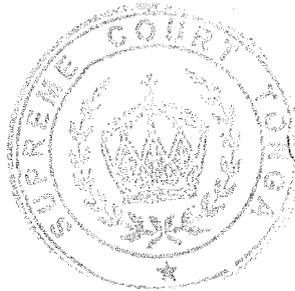
provisions of section 34(2) of the Act). I find that it was tainted property acquired from the illegal operation of her medical clinic (see the provisions of section 34(2) of the Act) as the Applicant claims.

[10] No evidence was presented from the Respondent alleging that the Money was from any legitimate source or that a confiscation order would lead to hardship of any kind. That said, Mr Tu'utafaiva argued strenuously for his client that the jurisdiction to confiscate was discretionary, and drew my attention to the provisions of section 34(4) of the Act. The essence of his plea was (and this was accepted by Mr Aho) that the Respondent could have legitimately have operated a business dealing simply in Chinese herbal medicine, and some of the money was sent to China to acquire Chinese herbal medicines and was the product of their sale and thus legitimate revenue. Mr Aho in response drew my attention, however, to the affidavit of Chief Inspector Atevalu and in particular annexure 3, which I agree would suggest the presence of many drugs and medicines that were not Chinese traditional medicines. That said, no evidence was presented for the consideration of this Court on this issue, nor was any attempt made to provide a sensible basis for the Court to apportion the money, or to disentangle that which was tainted and co-mingled with that which was not. At the end of the day, the Respondent admitted the offence of holding herself out as a medical practitioner under section 11 of the Medical and Dental Practices act from her premises known as Wei's Chinese Medical clinic in Havelu which she owned and operated, and the money I accept was derived from her operation of this business.

[11] Consequently, I grant the application and I make the following orders;

a. that the sum of \$28, 289.00, USD 91.00 and CYN 985.00 (the property) that was seized by Tonga police from the Respondent as tainted property under sections 2(1) and 34 of the Money Laundering and Proceeds of Crimes Act 2000, in respect of a serious offence of which the Respondent was convicted on 28th January 2015 in the enhanced jurisdiction of the Magistrate's Court, is confiscated to the Crown..

b. the Applicant shall be responsible for converting the foreign cash that is part of the Property into Tongan currency, and then depositing the total Tongan currency of the Property into the Tongan Confiscated and Forfeited Assets Fund established in the Crown's public accounts under section 48A of the Money Laundering and proceeds of Crimes Act 2000, and that such funds be managed and utilized in accordance with the relevant statutory provisions governing such a fund.



C. B. Cato
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JUDGE

DATED: 29 MAY 2017