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

CR 158 of 2018

26/03/19

BETWEEN: **R E X** **- Prosecution**

AND: **QIAN XIYUN** **- Defendant**

BEFORE THE HON. ACTING CHIEF JUSTICE CATO

Mr T. 'Aho for the Prosecution
Mr C. Edwards SC for the Accused

JUDGEMENT ON SETTING ASIDE PLEA AND PRIMA FACIE CASE

[1] This prosecution raised some interesting points. The accused, Mr Qian Xiyun, had originally been charged with;

i) Count 1, failure to declare carrying currency over TOP 10,000 contrary to section 97 of the Customs and Excise and Management Act;

ii) Bribery of a Government servant contrary to section 51 of the Criminal Offences Act;

iii) Bribery of a Government servant contrary to section 51 of the Criminal Offences Act;

iv) Money Laundering contrary to section 17(1) (a) and (b) (ii) of the Money Laundering and Proceeds of Crime Act;

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[2] On or about the 11th December 2018, the accused pleaded guilty to count one failing to declare carrying over TP $10,000, and elected trial by judge alone in relation to the remaining counts. Mr Edwards appeared for him at trial which commenced on the 18th March 2019. Prior to that, Mr Edwards foreshadowed that he would apply to have the guilty plea set aside on count one. He had not been counsel when that plea was entered. Essentially, it was Mr Edwards's submission that the prosecution had not proceeded under the appropriate legislation and that the accused had wrongly pleaded guilty to an offence that the Crown could not sustain in law. I heard quite lengthy submissions on this matter at the commencement of the trial, both counsel having filed helpful memorandum. I indicated to counsel that I would reserve my judgement on whether the plea should be set aside until the end of the trial.

[3] The prosecution arose out of events that arose at Fua'amotu International Airport on the 15th May 2018 at the passport control booth at the Departure terminal. A customs officer was processing departing passengers for a flight to Fiji when the accused approached her after completing security screening by aviation officers. He handed the customs officer his passport and passenger departure card. He declared on his departure card that he was not carrying more than TP $10,000.00 in cash, or its equivalent in foreign currency. Several requests of him by the officer as to whether he was carrying cash, to which he had responded that he was not, eventually revealed that he was in fact carrying about his person and in his clothes a large sum of money in Tongan, US, and other currencies. This had led the customs officer to consult a more senior officer for further questioning. He said he was not carrying any more cash to her. She persisted in her questioning and he removed some more cash from his trousers. A male officer was also called to assist in a search of the accused's body after which a further large sum of money was located strapped to his leg. In all, I am informed about $149,000 TOP equivalent dollars was located in US, Tongan and other currencies.

[4] During the course of the evidence, the more senior of the Tongan female customs' officers said that she had asked him about further money and he had pulled out wads of money and placed them on the table. At one point, she had been questioned by airline staff as to whether the accused could leave to get the plane and she had said that the inquiry must be completed. About this time, she said the accused had produced more money in his hand which he had held out and had asked to go on the plane. She took this to amount to a bribe. Although the more junior officer was

present when this occurred, no evidence was led from her about whether this had occurred.

The Bribery Counts

[5] There was no express declaration to either officer that the money the accused pulled out of his pocket was intended for them as a bribe or could be taken by them personally. The more senior officer who gave evidence saw the accused's action in this light, but it is for me to determine whether the evidence at its highest for the prosecution reaches a level where a properly directed jury could convict the accused beyond reasonable doubt of bribery. As I have said, only one customs' officer gave evidence about this. I do not consider that the state of the evidence is such that a properly directed jury could draw an inference of a bribe being offered on the evidence placed before me. The evidence stands no higher than, after several requests about cash to which the accused was only partially compliant, he withdrew more money. About this time, there had been an indication from airline personnel as to whether he could board and some resistance by customs to this occurring before their inquiry and process was complete. The production of money may have been no more than compliance with the request by customs to produce any further money he had. The statement of the accused to allow him to go on the plane could be inferred to be no more than an entreaty to customs to allow him to take his place so that he could travel. There was no evidence from the accused, in my view, from which a reasonably directed jury could beyond reasonable doubt infer that the production of the money was intended to be a bribe and offered as such.

[6] In these circumstances, I consider that there is no prima facie case for the accused to answer on these charges. Mr Edwards, before making the submission of no case, had indicated he would not call his client. I consider even on the narrowest of bases had I ruled there to be sufficient to constitute a prima facie case, I would have found the accused not guilty on both counts of bribery. Those charges are dismissed.

Money Laundering

[7] I find there is no evidence of money laundering and hence no prima facie case, either. The offence of money laundering under section 17(1) of the Money Laundering and Proceeds of Crimes Act arises if the person;

"Acquires, possesses or uses property knowing or having reasonable grounds to believe or suspect that it is derived directly or indirectly from the commission of a serious offence."

[8] A serious offence is defined relevantly as;

"Arising under any law of Tonga for which the maximum penalty is imprisonment or other deprivation of liberty for a period not less than 12 months or more severe penalty."

[9] The Prosecution led no evidence as to the origin of the cash the accused carried with him when departing. As such, there was no evidence that it had been derived from serious crime. See also, R v Potemani (18th May 2018, SC, per Paulsen CJ)

[10] Mr Aho endeavoured to persuade me that the prosecution could establish the derivation of the money as being the proceeds of a serious crime because the accused had made a false custom's declaration concerning the cash he was carrying which exceeded the permissible amount namely $10,000 TOP. I reject that submission. The proceeds must be shown to have been derived from a serious crime. The fact that a declaration falsely conceals the currency in the hands of the departing passenger has nothing to do with the origin of the cash. For this reason, there is no prima facie case and this charge must be dismissed, also.

Failure to Declare carrying Currency over TOP $10,000 under section 97 of the Customs and Excise Management Act

[11] On this issue, I consider Mr Aho is on stronger ground. He argued that section 45 of the Customs and Excise Management Act is applicable. That section provides;

"The Minister may, with the approval of Cabinet by Order prohibit or restrict the importation or exportation of goods into or from the Kingdom".

[12] The Minster made orders in 2007 pursuant to section 45 under title "List of Restricted orders", which stated that the order applied to goods the exportation of which is restricted under any other law in force in the Kingdom except in accordance with law.

[13] This was expanded in the Customs and Excise Management (Amendment) Order 2012 where it is provided;

> (b) Under the list of restricted Exports by inserting a new clause 2 as follows-
>
> "2(a) the amount of $10,000 or more in cash, except with the written permission of the Governor of the National Reserve bank of Tonga.
>
> (b) This amount may be made up in the currency of any country in any combination that is equal to or exceeds the value of $10,000 cash.

[14] Mr Edwards, in his memorandum, drew my attention to section 19 of the Money Laundering and Proceeds of Crimes Act which provides as follows;

> 19 Cash declarations
>
> (1) Any person who enters and leaves the Kingdom with cash amounting to more than the prescribed sum or its equivalent in any cash shall make a declaration to an authorized officer in the prescribed form in the Foreign Exchange Control Regulations.
>
> (2) Any person sending out or receiving into the Kingdom currency amounting to more than the prescribed sum by any means including but not limiting to postal services, courier services or transhipment by any craft must make a declaration to Customs in the prescribed Form under the Foreign Exchange Control Regulations.
>
> (3) Any person failing to declare cash in the prescribed sum to an authorized officer commits an offence under this Act and shall be liable on conviction to a fine not exceeding $50,000.

[15] During the course of the hearing, Mr Aho supplied me with a copy of the Foreign Exchange Control (Restriction on Removal of Cash) Regulations, made under the Foreign Exchange Control Act, the latter which commenced on the 27th September 1963. These referred to restricted cash being an amount that exceeded the amount of $10,000, and came into effect after the Cabinet (Restriction on Removal of Cash from the Kingdom) order made under the Emergency Powers Regulations on the 22nd November 2006, relating to the export of currency after the riots of late 2006 ceased to be operative. The Emergency Powers Regulations had come into being in response to the riots in late 2006. The date they ceased to have effect I am informed

was the 12th August 2009 when the Foreign Exchange Control (Restriction on Removal of Cash) Regulations came into force. In turn, these Regulations were repealed under the Foreign Exchange Control Act 2018 after the 1st June 2018. The effect of the application of those Regulations between 12th August 2009 and their repeal on 1st June 2018 would seem to be that those Regulations made it an offence to remove any restricted cash being an amount in excess of $10,000 TOP without the written approval of the Reserve Bank Governor. A person was required under Regulation 4 to complete and sign a declaration form as prescribed in the Schedule to confirm whether he was removing any restricted cash or not. The penalties provided for under regulation 5(5) in the case of an individual was a fine not exceeding $100,000 or imprisonment for three years, that is heavier than that laid down under section 19 (3) of the Money Laundering and Proceeds of Crimes Act

[16] Mr Edwards argued that the prosecution should not have been commenced under the provisions of the Customs and Excise Management Act and pointed out that the penalties under section 97 of the Act consisted of the possibility of a fine not exceeding $100,000 or a term of imprisonment not exceeding ten years or both, whereas a prosecution under the Money Laundering and Proceeds of Crime Act that resulted in conviction raised only the prospect of a fine not exceeding $50,000. He also argued that the Customs and Excise Management (Amendment) Order 2012 which adds the amount of $10,000 to the list of restricted exports was ultra vires.

[17] The point I have to decide is whether the Prosecution was entitled to proceed to prosecute under the Customs and Excise Management Act, in the light of section 19 of the Money Laundering provisions and the operation also of the Foreign Exchange Control (Restriction on Removal of Cash) Regulations which were still in force at the time of the offending.

[18] First, I do not consider that the Customs and Excise Management (Amendment) Order 2012 was ultra vires of the Minister to make under the enabling legislation. He was expressly enabled to do this under section 45 of the Act. This section provided that, with the approval of Cabinet by Order, he could prohibit or restrict the importation or exportation of goods into or from the Kingdom and this supplemented the list of restricted exports made under the Customs and Excise Management Order 2007. Under the definition of goods in section 2 of the Act appears currency.

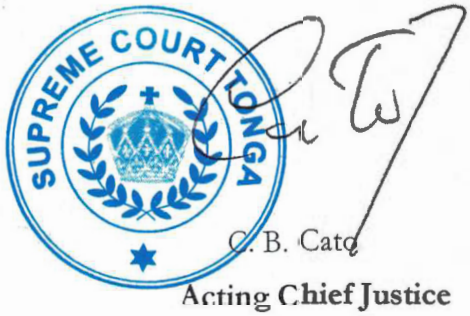
[19] The Customs and Excise Management Act does not expressly repeal the relevant provisions of the Money Laundering Act relating to false declaration under section 19.

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 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 my view, the provisions relevant to the operation of section 19 of the Money Laundering Act and 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 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.



C. B. Cato

DATED: 22 MARCH 2019

Acting Chief Justice