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

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15/05/19.

CR 158 of 2018

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

**AND:** **QIAN XIYUN** **- Accused**

**BEFORE THE HON. JUSTICE CATO**

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

## SENTENCE

[1] On the 22nd March 2019, I delivered a written judgement declining to set aside a plea of guilty of failing to declare currency over TOP 10,000 contrary to section 97 of the Customs and Excise Management Act. I ruled, however, that there was no case to answer for bribery of Governments servants (customs' officers) contrary to section 51 of the Criminal Offences Act, and no case of Money Laundering contrary to section 17(1) (a) and (b) (ii) of the Money Laundering and Proceeds of Crimes Act.

[2] The maximum sentence under section 97 of the Customs and Excise Management Act on conviction for making a false declaration is a fine not exceeding $100,000 or a term of imprisonment not exceeding 10 years or both. Failing to declare goods as required under Customs Laws namely 22 of the Act (passenger departure declaration) and regulation 4 of the Customs and Excise Management (Amendment) Regulations 2016 which sets out a prescribed form, require the Courts to impose heavy penalties for breaches of the statutory requirements. In this case, the failure to declare a sum in excess of $10,000 TOP or more or its equivalent in foreign currency involved a large sum of money in various



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currencies NZ $9490.00, USD $54275.00, $AUD $10,050.00, FJD $1700, and TOP $2015.00; when converted to TOP the amount is approximately $149,000. Mr Xiyun had the cash in his clothing as well as concealed and strapped under his clothing.

[3] Prior to the hearing of this matter, which has been adjourned for various reasons, Mr Aho and Mr Edwards raised with me an important issue. Mr Aho, prior to the trial had obtained from this Court orders under section 19 D of the Money Laundering Act for three months on the 16th May 2018 detaining the currency seized.

[4] Section 19 D provides that cash seized by an authorized officer, which includes a police officer or a customer's officer, may be seized if the officer 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.

[5] The period for which it may be detained initially is 72 hours under section 19 D (1). That period may be extended on application by a Court, first for a further period of 3 months beginning with the date of the order; and then in the case, of any further order, beyond the end of the period of two years beginning with the date of the order.

[6] Initially, Mr Xiyun had been arrested on the 15th May 2018 and charged by police under section 19(1) the Money Laundering and Proceeds of Crimes Act for making a false declaration and the cash had been taken or seized, it seems by a police officer who had assisted customs at the Airport. Orders were granted by this Court at the request of the Crown on the 16th May 2018 detaining the money for a further three months from the 15th May 2018 from the initial 72 hours seizure by police under section D(1) of the Money Laundering and Proceeds of Crimes Act and was not renewed for any longer period. This was an ex parte application made pursuant to section 19D (2) of the Money Laundering and Proceeds of Crimes Act. This Court made the order as requested with leave given for the Mr Xiyun to rescind the order on four days' notice. It seems that, on or about the 9th July 2018, he was summonsed to appear in the Magistrate's court and committed on charges which include the present charge of failing to declare currency under section 97 of the Customs and Excise Management Act, bribery under section 51 of the Criminal Offences Act, and Money laundering contrary to section 17(1) and (b) (ii) of the Act. By that stage, it had been appreciated that the appropriate charge for making a false

declaration as to currency lay under Customs and not the Money Laundering legislation. Later, on indictment, he faced these charges. 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, 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.

[7] As I have indicated, I did not consider the bribery counts supported a prima facie case and nor did the fourth count of Money Laundering contrary to section 17(1)(a) and (b)(ii) of the Money Laundering and Proceeds of Crimes Act. I ruled that the currency found in the possession of Mr Xiyun some being strapped to his body that formed the basis of the false declaration charge under section 97 of the Customs and Excise Management Act, could not form the basis of a separate Money Laundering offence under section 17 of that Act, as Mr Aho had submitted, because there was no evidence adduced from which it could be inferred that the cash had been derived directly or indirectly from a serious crime.

[8] Mr Edwards, prior to sentencing, claimed that his client was entitled to the return of the money that had been seized because there was no basis for its seizure or detention under the Money Laundering legislation, and even if the original orders had been made correctly they had lapsed. Mr Aho resisted this submission by arguing that the cash had been automatically forfeit under section 19G(5) of the Money Laundering Act which reads;

> "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."

[9] No notice of appeal or any other objection to seizure had been served on the prosecution or filed in Court. As I have said the ex parte application for a three month detention order

had given leave for Mr Xiyun to set aside the order with Notice to the Crown. No application to rescind had been made.

[10] I asked Mr Aho whether the money been paid into the Seized Assets Fund or equivalent as section 19H provided but he said that it had not been so applied.

[11] I consider it necessary that this matter be resolved prior to sentencing. There is, in the Customs and Excise Management Act, provision for substantial penalties, both as to fine and imprisonment for offending under section 97. Whether additionally the currency seized was also beyond Mr Xiyun to recover because of the operation of section 19G (5) of the Money Laundering Act or was able to be restrained by the Crown under an application made for a confiscation order under section 28 of the Act, as tainted property, (as the Prosecution had advised Mr Edwards by written notice more recently that it would argue alternatively applied) , were relevant issues that could affect the level of fine imposed for making a false declaration.

[12] I had initially expressed misgivings concerning Mr Aho's position and a closer examination of all the relevant legislation confirms my misgivings. If the basis for the detention order under section 19D of the Money Laundering and Proceeds of Crimes Act were shown not to exist, and yet the Crown was able to retain the proceeds as a consequence by operation of section 19D (1) and 19 (G)(5) of the Act the outcome would, in my view, be unjust. The proceedings commenced by the Crown to detain the money under section 19D leading to forfeiture under section 19(G)5, if misconceived, should not operate to prevent Mr Xiyun from obtaining restitution. The Courts since *Woolwich Building Society v Inland Revenue Commissioners* (No 2) [1993] AC 70 [1992] 3 All ER 737(HL), have not been sympathetic to the retention of taxes for example made pursuant to illegal or mistaken demands, and I consider that similarly the Crown should not be able to retain money seized and detained pursuant to an order that was misconceived. See further restitution of money paid under a mistake of law, *David Securities Ltd v Commonwealth of Australia* (1992) 175 CLR 353 (HCA).

[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 authorized 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 provision 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 cash) 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 been 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 forfeit 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 be 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.

[17] For completeness, I add that Mr Edwards submitted that, in any event, the cash did not qualify as tainted property upon which any alternative confiscation argument could proceed. Mr Aho submitted that it fell within the definition of property used in or in connection with or intended for use or in connection with the commission of an offence. It is unnecessary for me to resolve this argument, because the appropriate procedure for seizure and forfeiture is contained within part 13 of the Act.

**Sentence**

[17] Mr Xiyun is born of Korean parents who moved to China at the time of the civil war and is aged 55. He was born in China. He is a naturalized Tongan and has businesses here. He is married and his family have joined him in Tonga. He is said in the probation report to be a major and I take that to mean a substantial business man in Tonga. He is the current chair of the Tongan Chinese Federation which has a membership of over 300 Chinese. He said he was taking the money out to pay for goods and building materials to compete a commercial building in Tonga, and travel to Korea where he could obtain goods and materials cheaper than in Tonga. There is no evidence, however, that the cash had been obtained unlawfully. He is said to regret the offending. He now knows the seriousness of this kind of offending.

[18] It is plain that he must have known that he could not export such a large sum of money because he had part of it strapped to his body. I consider that this was a serious breach of the restriction on taking more than $10,000 pa'anga from Tongan without the approval of the Reserve Bank.

[19] He is a first offender and I accept of good character. Mr Edwards submitted that he was a well-respected member of his community and I accept this.

[20] The principal sentencing consideration is deterrence to others minded to attempt to export currency from Tonga in this way and to ensure that legislation designed to protect the currency and the economic security of Tonga is upheld. The amount involved nearly $150,000 is a significant sum.

[21] I was not cited any authorities (indeed Mr Aho noted that he was unable to locate any). I consider that the fine must be commensurate with the seriousness of the offending, reflected in the maximum fine of $100,000, or 10 years imprisonment or both to deter others from making false declarations. I consider an adequate starting point bearing in mind the sizeable cash involved is $20,000. By Tongan standards, this is a significant fine. I put to both counsel that I considered this level of starting point would adequately reflect the seriousness of the offending in this case. Both counsel accepted that this was in order. In mitigation, I take into account Mr Xiyun is a first offender, is of previous good character, has expressed remorse and had pleaded guilty at an early opportunity. I allow him a discount of 25% for the mitigating factors. I thank both counsel for their industry and submissions on what were novel issues not free from difficulty arising in relation to conviction, detention of the cash, and sentence.

[22] I impose a fine on count one making a false declaration of $15,000 to be paid within 30 days of todays' date or serve 6 months imprisonment in default.

SUPREME COURT TONGA

C. B. Cato

**NUKU'ALOFA: 10 May 2019** **JUDGE**