

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

CR 132 of 2019

IN THE MATTER OF SECTION 19(D) OF THE MONEY LAUNDERING AND
PROCEEDS OF CRIME ACT 2000

BETWEEN: POLICE - Applicant

AND: JOHNNY FELIPE JR - Respondent

Counsel: Mr T. 'Aho for the Applicant
Mr William Edwards for the Respondent

**JUDGMENT ON APPLICATION TO EXTEND THE DETENTION OF
RECOVERABLE CASH**

- [1] On the 22nd July 2019, Paulsen CJ made an order ex parte that recovered cash mentioned in the affidavit of Senior Constable Leveni dated 19th July 2019 be detained for a further three months from the date of the order.
- [2] The money located by Police at the residence of the accused pursuant to a search under warrant was;
 - a) TOP 10, 912.00 on the Respondent's person;
 - b) TOP 125, USD 96.25 inside a black purse inside a drawer next to the Respondent's bed;
 - c) TOP 31, 178.35; AUD 1385 NZD 15.40 found in the Respondent's safe, and

rec'd 26/08/19
AAC

- d) TOP 2000 which was allegedly money given to Constable Fifita as an inducement to steal methamphetamine from the police exhibit room, and is currently in the custody of the Tonga Police
- [3] The basis for the warrant had been advanced in these terms by Senior Constable Leveni that the search had been conducted as part of a police operation to arrest the Respondent for bribery of a police officer, contrary to section 165(2) of the Police Act. This charge arose out of an allegation that he gave \$2000 TOP to a Police officer one Constable Alalea to bribe a member of the Special Drugs Task Force, Constable Fifita, to enter the exhibit room and steal the methamphetamine. The affidavit stated that Constable Fifita had reported the matter and Constable Alalea was subsequently arrested. It was said that Mr Alalea confessed to the police that he was given money by the Respondent, to induce someone with access to the police exhibit room to steal methamphetamine.
- [4] In addition to the money located in the residence, the Constable deposed that members of the task force found substances which were suspected to be cannabis buds located on top of a set of drawers next to the Respondent's bedroom. Further there were 2 test tubes which he identified as smoking apparatus for methamphetamine which were located in the top drawer next to the Respondent's bed; 2 electric apparatus with suspected cannabis oil, and one small circular object which contained cannabis residue in the ensuite bathroom.
- [5] Constable Leveni said in para 29 of this affidavit that;
- “Given the close proximity of the drugs to the property, the Applicant is of the view that the property is materially linked to drugs and the attempted bribe of a police officer.”
- [6] The order of Paulsen CJ expressly allowed the Respondent to apply to discharge the order upon 72 hours written notice to the Applicant.
- [7] On the 26th July 2019, Mr William Edwards filed an application to discharge the order and filed an affidavit from the Respondent in which the Respondent had deposed that he had never been convicted and had never been charged with criminal offending until recently. He explained that on an earlier search of his property in

connection with another matter on the 8th April 2019, the police had been provided with access to his safe and had not seized any of the large sum of money located. He said that on or about the 16th July 2019 he had been charged with attempted bribery and also possession of 6 grams of marijuana.

[8] He explained the \$10,912 on his person was for payment for items imported totalling \$T 10,508.89 of lawfully acquired goods, and some for storage charges. He said he had 6 containers located on his property containing goods that he had imported which police had examined and said they substantiated the legitimacy of his import business. He was critical in his affidavit of Constable Leveni, as was Mr Edwards, in not including this fact in his affidavit. He said cash held in the safe was derived from many cash sales between the 13th July through to 23rd July, 2019. He annexed also documentary evidence in support of these allegations and certain banking records. He explained some of the foreign currency as money left over from travel. Part of the money in the safe belonged also to, he said, to his in laws, and his wife and was there for safekeeping. He denied that any of the currency was the product of criminal conduct or intended for that.

[9] He said that he strongly denied the charges.

[10] I arranged for the matter to be heard on the 8th August 2019 but prior to this I had asked for both counsel to file written submissions which I received. This meant the hearing was short with brief submissions and I reserved to consider my judgment. Mr Aho indicated that he did not wish to cross-examine the Respondent.

[11] I have reviewed the affidavit material and counsels' submissions for which I am grateful. The issue I have to consider is whether in the light of the material filed the order should be extended. The relevant provisions for me to consider under the Money Laundering legislation is contained within section 19C of the Act. This section provides an authorized officer may seize any cash;

- a) If he has reasonable grounds for suspecting that 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.

[12] Further provisions relating to detention of seized cash are set out in section 19(D) and in particular section 19D (3) which relevantly provides that the Court may extend the order in the first case to an additional three months, which is what Paulsen CJ did in this case, and on a further application to a further period the period of two years if the following conditions are met-

(a) There are reasonable grounds for suspecting that 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. Any 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 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.

[13] For completeness, section 19D (4) provides that 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 an 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.

[14] Further, it is important to consider the definition of proceeds of crime when it comes to considering what may be regarded as recoverable property. The definition states;

- a) Any property derived or realized directly or indirectly from a serious offences and includes, on a proportional basis, property into which any property derived or realized directly from an offence was later successively converted, transformed or intermingled as well as income, capital or other economic gains derived or realized from such property at any time since the offence; and
- b) Includes any property used or intended to be used in the commission of any serious offence.

[15] Mr Edwards submitted that his client was a legitimate businessman as he had deposed and the containers of property should have been revealed in the ex parte affidavit because it demonstrated that he had been engaged in legitimate and quite substantial importing activity and that the money was linked to more than \$300,000 of goods found within the containers adjacent to his home. He said the Police could not dispute the existence of his business, the banking on a daily basis and receipts of large amounts of cash on a regular basis. In this regard, he mentioned Chinese clients who he said regularly transacted business in cash. He submitted that the continued detention of the cash was not justified because the source of the money was not from dealing in drugs, nor was its use intended for the purchase of drugs and the destination was not drugs. Mr Edwards contended that there was no basis for the allegation or belief that the money that was found in the possession of the Respondent was linked to drugs and or an attempt to bribe an officer.

[16] Mr Aho claimed the onus is on the Respondent to show a legitimate provenance of that cash for this Court to set aside the restraining order. He submitted that the Respondent has not provided the necessary evidence to that effect. He noted the Respondent had made no submission relating to the cash mentioned in the bag beside the bed or in relation to the bribe therefore the Applicant submits that those two lots of cash should be continued to be restrained. He disputed the provenance of the money found on the Respondent's person, and seems to broadly take issue with the supporting documents mentioned in para 30 and 31 of the Respondents affidavit. He questioned the storage charges which he notes seem to be low for goods that

were on the wharf for a period of about 8 months. He submitted that the lack of documentation concerning storage fees rightly results in questions concerning provenance of all the money found on his person.

[17] He also indicated that he took issue with the sources of cash in the safe and their origin. He complained that the money had not been disentangled, from his business, his wife's savings, in law's savings and marital savings. He submitted the Respondent had an onus to provide evidence to this effect.

[18] I have carefully considered the affidavits and the submission of counsel as I have said. No reasons were given by Paulsen CJ for his determination to grant an order which was ex parte. He did envisage, however, that his order could be rescinded if the Respondent took such steps to contest the order. Paulsen CJ did not have before him the benefit that I have of the evidence, undisputed, of police searching containers of goods located at the Respondent's property that did not contain illicit substances. I agree with Mr Edwards that this fact should have been placed before Paulsen CJ on the issue of whether the money was recoverable cash and came within section 19(C). All that the Respondent has been charged with relevantly here is one count of bribery. The affidavit of Senior Constable Leveni in support of the ex parte application in para 6 to 8 reveals that the respondent paid \$2000 to Constable Alalea who he said admitted having been given the money. Assuming that his is so, the proceeds for the bribe being in police custody would be an exhibit and may, if the Respondent is convicted, be the subject of an application for forfeiture as tainted property under the Money laundering provisions but I do not see that it is amenable to restraint under this application. I do not accept that money found in his drawer could be inferred to be other than personal. Further, I have no reason to dispute that the Respondent does in terms of his affidavit travel overseas and foreign currency could have been acquired in this way. I refer to paragraph 4 of his affidavit and annexed as H to his affidavit. By the date the police searched his home on the 15th July, the prosecution at least and probably the police were in possession of this affidavit plainly indicating that he was operating a business and had travelled to New Zealand in connection with this and had sought further permission to do so. This had not been included in Constable Leveni's affidavit, either. As I have mentioned Mr Aho did not seek to cross-examine the Respondent on the veracity of his explanations

[19] I am concerned in any event at the paucity of evidence that could in the initial stages have justified Senior Constable Leveni seizing the money as recoverable cash. He had to have reasonable grounds for suspecting that it was recoverable cash or intended for use or was undeclared cash intended for use in unlawful conduct. All the evidence, the police had, as revealed in Leveni's affidavit before Paulsen CJ, was that the Respondent had offered a bribe the proceeds of which were in the possession of the Police. The other evidence amounted to no more than possible earlier possession of unknown amounts of cannabis or methamphetamine and some cannabis residue. Leveni from this concluded in paragraph 29 that given the close proximity of the drugs to the property (by which I interpret him to mean recoverable cash) meant that the property was materially linked to drugs and the attempted bribe of a police officer. I have already said why the bribery could not provide a basis for restraining the cash. I regard the officer's suspicion as not much more than a hunch that the cash located was proceeds of crime rather than a suspicion based on reasonable grounds. Whilst suspicion may be a lower threshold than belief (see McGregor J in *Seven Seas Publishing Proprietary Limited v Sullivan and others* [1968] NZLR 663, at 666-667), I do not consider the police had a foundation of evidence sufficient to amount to reasonable grounds of suspicion that the Respondent was involved in drug dealing and the cash found was recoverable property derived from drugs activity. There is nothing of the indicia of supply or distribution that might constitute reasonable grounds for suspicion that cash is recoverable cash such as the presence of a significant amount of drug, weighing machines, plastic or deal bags, tick lists of customers, together with an absence of any other lawful justification for the possession of significant amounts of cash that might well suggest supply of drugs and constitute reasonable grounds for suspicion and seizure. I do not consider that the mere fact a person may consume drugs without more meets the threshold of reasonable grounds for suspicion that cash found in the Respondent's possession was the product of drug dealing or activity. For reasons I have given, I do not consider that there were reasonable grounds advanced by Senior Constable Leveni to justify seizure of the cash on the basis he advanced in his affidavit, The fact that the police knew he was an importer of legitimate products and had sought permission to extend his bail to travel on business to New Zealand, should have in my view be placed before Paulsen CJ before he made his ex parte order. If I am wrong about this, however, and if there is, as Mr Aho appeared to suggest, a legal onus that lies

upon the Respondent to establish a legitimate foundation for the cash, when seeking to rescind an ex parte restraining order, rather than merely an evidential burden of legitimacy, then I consider that the Respondent has discharged this onus on the evidence that he has produced. His explanations went largely unchallenged. Consequently, I rescind the orders made by Paulsen CJ, and order the return of the cash seized from the residence to the Respondent.

[20] I recognise Tonga is still a society where a lot of business is transacted in cash and I mention that only to acknowledge Mr Edward's observations concerning some of the Respondent's Chinese customers' preference for cash transactions. I do accept Mr Aho's criticism about the failure to adduce evidence disentangling the cash in the safe but as against this there was no cross-examination of the Respondent from which I can infer that his explanation is untrue. I have considered all of Mr Aho's objections including his comment about storage charges being undocumented but for all the reasons I have given, I consider that the orders should be rescinded and the money seized returned to the Respondent.



Cato

C. B. Cato

ACTING CHIEF JUSTICE

NUKU'ALOFA: *23* August 2019