

IN THE COURT OF APPEAL, FIJI ISLANDS  
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0030 OF 2003S  
(High Court Criminal Action No. HAA26 of 2003S)

BETWEEN:

DEEP SEA FISHING CORPORATION LIMITED

*Appellant*

AND:

THE STATE

*Respondent*

Coram:

Barker, JA  
Tompkins, JA  
Pathik, JA

Hearing:

Thursday, 13<sup>th</sup> and Monday, 24<sup>th</sup> November 2003, Suva

Counsel:

Mr. K. Vuataki and Mr. S. Valenitabua for the Appellant  
Mr. P. Ridgway and Mr. S. Leweniqila for the Respondent

Date of Judgment: Wednesday, 26<sup>th</sup> November 2003

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JUDGMENT OF THE COURT

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Introduction

Paek Kyeong Yeol ('Mr. Paek') pleaded guilty in the Suva Magistrates' Court on 26 May 2003 to 10 counts of taking fish without a licence from Fijian fisheries waters, contrary to sections 5(3) and 10(1) of the Fisheries Act (Cap.158) "the Act".

A Korean national, Mr Paek had been employed as master of the 'Sun 5', a Fijian registered vessel, which had been duly licensed to fish in Fijian waters in the year 2002.

According to an affidavit from the Secretary of the Fisheries Licensing Committee, Mr Raiwalui, (which the Court allowed to be filed by the respondent), on 13 February 2003, Mr Lee Kyung Sang (Mr Lee) on behalf of the Deep Sea Fishing Corporation Limited ('Deep Sea') applied for a fishing license for the year 2003. He said, in an accompanying letter, that the vessel had been offered to him for sale with the promise that it had a valid fishing licence and that he had paid for 70% of the agreed purchase price. According to Mr Raiwalui, the application was not considered by the Fisheries Licensing Committee at its meeting of 20 February 2003 because the application failed to provide necessary information such as particulars of the nationality of the shareholders, company registration documents, notarised proof of ownership and other details. Mr Raiwalui deposed that he had advised Mr Lee of the position by telephone within a day or so of the meeting. At the time of the offending, which extended from 14<sup>th</sup> February to 10 March 2003, no license had been issued by the relevant authority.

On 5 June 2003, the Magistrate fined Mr Paek \$250 for each offence. The maximum fine was \$500. The Magistrate declined to consider, as he should have, a prosecution application under s.10(7) of the Act that the vessel be forfeited to the State. He ordered the release of the vessel to its owner. The vessel put to sea at a later date and did not return to Suva until 24 September 2003. The vessel is still at the wharf in Suva in the possession of the owner, pending further order of the Court, in terms of undertakings given by the owner.

On 6 June 2003, the Director of Public Prosecutions [DPP] appealed to the High Court against the sentence imposed. The DPP claimed

- a) the fines were manifestly lenient and
- b) the Magistrate should have considered the prosecution's application for forfeiture of the vessel.

This appeal was made pursuant to s.308 of the Criminal Procedure Code (Cap.21), s.308(1) which includes a judgment, sentence or order in a Magistrate's Court as proper

subjects for appeal. The decision of the Magistrate to return the vessel to the owner was an 'order'. Under s.319 of the same Act, the High Court is empowered to exercise any power that the Magistrate could have exercised.

On 12 September 2003, Shameem, J. in a reserved decision, declined to increase the fines but made an order under s.10(7) of the Act that the vessel be forfeited to the State.

On 15 September 2003, a notice of appeal was filed in this Court in the name of Mr Paek against Shameem, J's decision to forfeit the vessel. Under s.22(1A) of the Court of Appeal Act (Cap.12), an appellant can appeal against a sentence imposed by the High Court in its appellate jurisdiction, only if one of the grounds stated in that subsection can be made out. The only possible ground in this case is that the sentence of forfeiture was passed "in consequence of an error of law." Several alleged errors of law were set out in the notice of appeal.

An application was then made in the name of Mr Paek to the High Court for a stay of the forfeiture order pending the hearing of the appeal in this Court. In a reserved decision delivered on 1 October 2003, Shameem, J. declined this application.

A further application, again in the name of Mr Paek, was then made to this Court for a stay. The DPP applied to the Court for an order striking out the appeal as being incompetent. The DPP's grounds noted that, because the appellant (Mr Paek) was not the owner of the vessel, he could have no interest in any forfeiture order. The DPP, on 12 November 2003, withdrew this application.

The application for a stay came before this Court on 18 November 2003. The Court considered that it would be sensible for the substantive appeal to be argued, rather than just the application for a stay. The next sitting of the Court is not until March 2004. The parties should know the fate of the vessel as soon as possible. Because time became available during the current session of the Court, the substantive appeal was heard on 20 November 2003. After discussion between the members of the Court and counsel, the appeal was further adjourned to 24 November 2003. In the exercise of its inherent

jurisdiction to preserve the rights of the parties pending an appeal, the Court ordered that the forfeiture order, made in the High Court, be stayed pending the Court's ultimate decision on the appeal.

### Factual and Statutory Framework

The undisputed facts relating to the offending were that, on 14 May 2003, a fisheries officer detained the 'Sun 5' for fishing without a licence. Later investigation showed that the vessel had fished in Fijian waters without a license on 10 separate occasions. The total value of the unlawful catch was alleged by the prosecution to be \$20,261 and by the defence \$17,900.

Deep Sea is the current registered owner of the vessel, which is a long-line vessel 2250 metres in length. Mr Lee deposed to the High Court and to this Court that he is a director of that company. The company was not registered as owner until after the offending had been completed, i.e. on 13 March 2003. The previous owner and the vendor to Deep Sea was Blue Ocean International Trade Limited (Blue Ocean.)

Counsel for the DPP produced an affidavit by Mr Lee made in civil proceedings in the High Court between himself and Blue Ocean in which he exhibited the contract for the sale and purchase of the vessel. The price was 280 million Korean won which was to be paid as to 27 million Korean won as deposit, 150 million Korean won by 31 December 2002 and 103 million Korean won on 28 February 2003. 30 million Korean won of this last payment was to be made from receipts from the vessel's operations. According to Mr Lee's affidavit, he has paid everything owing except the last 30 million Korean won.

Importantly, the contract of sale provided that ownership of the vessel would pass when the second progress payment of 103 million Korean won had been made. This occurred on 28 February 2003. The contract was not conditional on a fishing licence being in force for the vessel. It could not have been since such licences are declared under s.5(2) of the Act to be personal and non-transferable. They last for a calendar year.

This information is important because, in his affidavit in this Court, Mr Lee deposed "that I did not acquire the boat until after the period of offence." 4 of the 10 offences occurred after 28<sup>th</sup> February 2003.

Counsel in the High Court appeared for both the master and the owner. It was in the latter capacity that counsel applied to Shameem J. for a stay of the compulsory forfeiture order. Yet Mr Paek continued to be named as appellant, when he could have no further interest in the proceedings.

Section 5(3) of the Fisheries Act (Cap.158), provides:

*"No person shall take fish in Fiji Fisheries waters by way of trade or business or as an employee of a person carrying on the trade or business of a fisherman unless such person is authorised by a licence to take fish:*

*Provided that –*

- "(a) a person who takes fish with a line from the shore or with a spear shall not be required to obtain such a licence;*
- (b) the Minister may by regulation exempt any person from the necessity of possessing such a licence."*

Section 10(1) of the Act provides:

*"Any person who, being required to be the holder of a licence, takes or attempts to take fish in Fiji fisheries waters or is in possession of fishing apparatus in such circumstances as to satisfy the court before which he is tried that he intended to use the apparatus for the purpose of taking or destroying fish without being licensed under this Act shall be liable to imprisonment for three months or to a fine of \$500 or to both such penalties."*

Section 10(7) of the Act provides:

*“The court may order the forfeiture to the Crown of any vessel, apparatus or catch or the proceeds of sale on any catch detained ..... employed in the commission of, or derived from any act proved to be an offence under this Act or any regulation thereunder.....”*

Section 5(3) creates an offence for both a person carrying on the trade or business of a fisherman and for any employee of such a person. Clearly, both the owner or charterer carrying on the fishing business and the master of the transgressing vessel can be prosecuted under this section. Only the master was prosecuted, although the owner could easily have been prosecuted also, since the owner was a Fijian registered company.

Yet s.10(7) affects the owner or charterer of the vessel, regardless of - the owner or the master - is prosecuted. It says nothing about the right of the owner to be heard on any application for forfeiture. The Court has no doubt that natural justice gives the owner and/or charterer the right to be heard on whether or not the Magistrate should exercise the discretion to forfeit a fishing vessel to the State under s.10(7). A *fortiori*, the right of the owner and/or charterer to be heard on any appeal by the prosecution against refusal by a Magistrate of an forfeiture order is beyond argument. Section 28(1) of the Constitution gives a general right of access by convicted persons to an appellate process.

Although the criminal proceedings against Mr Paek are now moot, it may still be possible, within the framework of those proceedings, for the Court to entertain an appeal to this Court, despite the fact that it is really an appeal by the owner and not by the master. The DPP did not object to the change in the name of the appellant to that of the owner, Deep Sea Fishing Corporation Limited. An order is made accordingly.

When consideration is given by the Legislature to amending the fisheries legislation, section 10(7) of the Act should be amended to clarify the rights of the owner and charterer of the vessel. The subsection contains no guidelines as to how the discretion to order forfeiture is to be exercised by the Magistrate. Legislation in some other jurisdictions, creates a presumption of forfeiture which can be rebutted on proof by the owner of 'special circumstances' or some other similar formula, which places the onus of showing why

forfeiture should not occur on the owner. A Charterer may be affected by a forfeiture order, as well as the owner, depending on the terms of any charter.

### **The errors of law alleged**

The Magistrate's refusal to consider and rule upon submissions for and against the prosecution's application for forfeiture of the vessel is unfortunate. Persons against whom such an order is made are entitled to a first-instance hearing of the application for an order and a considered decision on the application. If there is an appeal, then they are entitled to another proper hearing and considered decision. In this case, the owner received only the latter. It now finds its right of appeal to this Court circumscribed by s.22(1A) of the Court of Appeal Act as noted earlier.

### **High Court Judgment**

In the judgment under appeal, Shameem, J. referred to penalties imposed under a cognate statute, the Marine Spaces Act (Cap.158A). Section 16 of that Act creates an offence for unlicensed foreign vessels fishing in Fiji's exclusive economic zone. The maximum fine under that Act is \$100,000 not the \$5,000 under the Fisheries Act.

The Judge held, rightly, that the tariff for fines under the Marine Spaces Act could not be applicable to the present case. She was unsure whether the value of the catch ought to be considered when exercising the discretion to order forfeiture. She rejected, again quite rightly, a submission that s.10(7) applied only to foreign - registered vessels.

The Judge cited Australian decisions on the aim and purpose of fishery control legislation. These include the needs:

- (a) to protect the nation's fishing grounds and
- (ii) to send a persuasive message to potential wrongdoers through the penalty of forfeiture of vessels.

Shameem, J considered this case one of systematic flouting of the law, particularly when there had been a licence issued for the preceding year. The size and value of the catches on each occasion showed that the owner had benefited from the illegal fishing.

Dealing with mitigating submissions made by counsel for Mr Lee, the Judge said:

“A supplementary affidavit of Company Director Lee Kyung Sang dated 6<sup>th</sup> June 2003, and which was filed in the Magistrates’ Court states that he is a member of an association called “Prison Fellowship Korea.” He said he worked on the rehabilitation of Fijian ex-prisoners and that the Company Deep Sea Fishing Company Ltd. operated the Sun 5 to help these ex-prisoners to find employment. Annexures to his affidavit include a letter from the Fiji Prison Fellowship stating that Mr Lee Kyung Sang is a regular visitor to the prisons where he conducts counselling and Bible study classes, a newspaper cutting showing that he donated a mirror to the Women’s Prison with a promise to donate more in the future.

I accept that Mr Lee Kyung Sang has been doing commendable work in the prisons of Fiji. I also accept from the material filed that he knew that the licence to fish in Fiji waters had not been renewed. However I cannot accept that the philanthropic work of one of the directors of the company can justify a decision not to forfeit the vessel and its fishing apparatus. On no less than 10 separate occasions, the vessel took part in unlawful fishing activities. If the crew is indeed made up of ex-prisoners, these illegal activities are hardly likely to encourage rehabilitation and respect of the law.

In this case, the deliberate flouting of the law, and the persistent nature of the offending must lead to an order for forfeiture. In 2003 alone, the Suva High Court has dealt with 3 cases of illegal fishing in Fiji waters. I am not aware if the other courts have experienced such a sudden surge of offending under the Marine Spaces Act and the Fisheries Act. Finally, the fact that this is a locally registered vessel, does not persuade me that it ought not to be forfeited. The vessel is clearly intended for commercial use and the owners of the boat (despite the charges payable after detention) have benefited from the illegal fishing activity.”



## Decision

It is unnecessary to consider the numerous points of law alleged in the notice of appeal because, in the Court's view, there has been a major defect in the process. The High Court Judge should not have entertained the appeal by treating it as an application for forfeiture in which she assessed the merits of such an application for the first time. Instead, she should have remitted the case to the Magistrate for a proper consideration of the DPP's application for a forfeiture order. Upon remission of the application, the Magistrate's Court should have heard evidence and submissions for and against the application and should have given a considered ruling. Either party would then have had the right to appeal that decision to the High Court on questions of fact and/or law. In that way, the owner's rights to proper process would have been achieved.

Accordingly, the Court decides to remit the prosecution's application for forfeiture of the vessel to the Magistrates Court for a proper determination after hearing evidence and submissions.

A similar order to that which this Court considers the High Court should have made in this case was made by Fraser, J. in the High Court of New Zealand in *Ministry of Agriculture and Fisheries v. Schofield*, [1990] 1 NZLR 210. Under the New Zealand legislation then in force, forfeiture of the fishing vessel on conviction for various fisheries offences was mandatory unless the District Court "for special reasons relating to the offence thinks fit to order otherwise."

Because of the manner in which the case was conducted (a summary of facts by prosecuting counsel and submissions in mitigation by the fisherman's counsel) there was insufficient material before the District Court for a proper finding of 'special reasons' to be made. Fraser J. on appeal from the District Court considered that the question of "special reasons" had not been 'fully explored' and that the appeal should not be disposed of simply by finding that the reasons stated in the Court below were not 'special reasons.'

The legislation differed in that, in New Zealand, there is a presumption of forfeiture unless the owner shows 'special reasons.' In Fiji, there is no presumption of forfeiture either way. However, the principle derived from Schofield's case is clear. Applications for forfeiture should be treated extremely seriously by the Magistrate's Court. On the one hand, the owner stands to lose a valuable asset – the vessel here is worth \$250,000 according to a valuation obtained by the DPP or \$465,000 if the purchase price is any guide. On the other hand, it is of vital importance to the economy of the nation, that its fish stocks be not plundered by unlicensed operators.

Fraser J. offered some helpful comments on how applications of this nature might be heard by lower Courts on whom such an important and onerous obligation is vested by the legislation. He said at p.223:

*"I respectfully agree with and adopt the comments made by Gault J in the judgment referred to but would add, in the light of the way this case developed, that, in my opinion, when a prosecuting authority such as the Ministry of Agriculture and Fisheries is represented by counsel and an issue such as that here arises, the prosecutor and its counsel are under an obligation to assist the Court. If necessary an adjournment should be applied for and a fixture sought for the purpose of enabling the matter to be fully dealt with. That does not mean to say that the prosecutor must invariably oppose any such application tooth and nail. There may well be situations where matters can be properly conceded to material facts admitted. There may be other cases where it is proper for the prosecutor to take a neutral position but even then counsel for the prosecutor ought to assist the Court by seeing that all relevant material and any applicable authorities are placed before it.*

*Proper assistance and presentation will facilitate a judgment which either records admitted facts or finds facts after hearing evidence, and then goes on to find and record what the special reasons are or, as the case may be that there are none."*

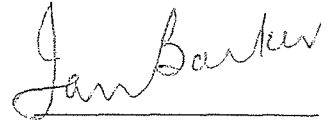
In this Court's view, regardless of whether it is the master or the owner who is charged, the prosecution ought to make a formal application to the Magistrate for forfeiture of the vessel accompanied by affidavits in support. The owner should be named as

respondent to this application and can file affidavits in response. At the hearing, deponents can be cross-examined on their affidavits.

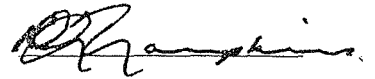
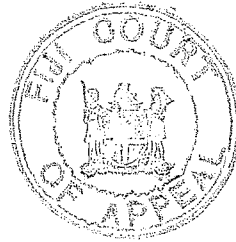
This Court discussed with counsel the provision of an undertaking from Mr Lee and his company that the vessel would not leave the Fijian exclusive economic zone until the determination of the application for forfeiture to the Magistrates' Court and any appeal therefrom. The Court's concern was that a consequence of allowing the appeal by ordering a rehearing must necessarily cancel the existing forfeiture order. The owner of the vessel could then, in theory, sail the vessel away. Counsel for the appellant were prepared to give an undertaking, the terms of which had been discussed with counsel for the DPP. The undertaking was produced to the Court on 24 November 2003 and will remain on file. Its terms have been agreed to by both parties.

**Formal Orders:**

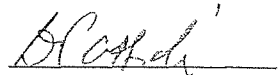
1. The appeal is allowed.
2. The State's application for forfeiture of the 'Star 5' is remitted to the Magistrates' Court at Suva for a rehearing on the merits before such Magistrate as the Chief Magistrate shall direct, other than the Magistrate who was previously seized of the application. This order is made pursuant to s.22(3) of the Court of Appeal Act (Cap.12).
3. The Chief Magistrate is requested to accord the application the utmost urgency. Most of the relevant facts have now been provided. Counsel for the appellant wished to file affidavits on alleged 'period of grace' allowed by the licensing authority. The parties are at liberty to file further affidavits if as they wish.



Barker, JA



Tompkins, JA



Pathik, JA ✓

Solicitors:

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Office of the Director of Public Prosecutions, Suva for the Respondent