0300284

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

CRIMINAL APPEAL N0.AAU0027 OF 2005
[High Court Cr. Appeal N0.HAC041 of 2004]

BETWEEN:

CHINA NATIONAL FISHERIES CORPORATION
1ST Appellant

CHINA FISHERIES (FIJI) HOLDINGS CO.LTD
2ND Appellant

YANG SHUI XING

3RD Appellant

A N D:

T H E S T A T E

Respondent

Coram: Ward, President
Smellie, JA
Penlington, JA

Counsel: S. Valenitabua for appellants
A. Driu for respondent

Hearing: 21 November 2005

Judgment: 25 November 2005

JUDGMENT OF THE COURT

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[1] The first appellant is a company incorporated in, and owned by, the People's Republic of China and the second appellant is its subsidiary company incorporated in Fiji. The third appellant is an employee of the first appellant and was the master of a fishing vessel, Zhong Shui 607, owned by the first appellant.

[2] The master was charged on two counts of "being master of an unlicensed foreign fishing vessel used for the purpose of fishing within Fiji's EEZ: contrary to section 16(1) of the Marine Spaces Act, Cap 158A."

[3] The particulars of offence in the first count were:

Yang Shiu Xing, on the 5th day of July, 2004 within the Exclusive Economic Zone of Fiji within the meaning of the Marine Spaces Act was the master of a Foreign Fishing Vessel which was used for the purpose of fishing within the said Exclusive Economic Zone the same not being licensed so to do."

[4] The second count was identical except that the dates charged were between the 26 and 30 July 2004.

[5] Section 16 (1) provides:

"(1) If any foreign fishing vessel that is not licensed under the provisions of section **14** is used for the purpose of fishing within the exclusive economic zone, the owner and the master of the vessel are each guilty of an offence and liable on conviction to a fine not exceeding one hundred thousand dollars each."

[6] An additional power is granted to the sentencing court under section 18:

"18. On conviction of the owner, master or licensee of an offence under section **16**, the court may also order the forfeiture to the State of the fishing vessel and any fish, fishing gear, apparatus, cargo and stores found therein or thereon."

[7] The master appeared before Shameem J in the High Court on 26 November 2004 and pleaded guilty to both counts. The facts were outlined by prosecuting counsel from a prepared summary from which we have taken the relevant facts.

[8] The Zhong Shui 607 entered the EEZ on 5 July 2004 and undertook fishing operations within Fiji fisheries waters on that date. The vessel departed Fiji fisheries waters on or about 6 July but returned and re-entered on 16 July 2004 and again conducted fishing operations continuously from 16 to 20 July. The vessel arrived in Suva on 22 July 2004.

[9] The vessel was at all material times equipped with a precise navigational system which included a satellite-based Global Positioning System in conjunction with the Vessel Monitoring System. These systems provide a continuous and highly accurate display of the position of the vessel.

[10] The vessel maintained a fishing log. The total recorded weights of catch for the days were:

5 July	880kg
16 July	296kg
17 July	210kg
18 July	1202kg
19 July	655kg
20 July	535kg

The aggregated value of the fish taken illegally was valued by the prosecution at approximately F$25 – 30,000 out of a total catch unloaded on 22 July 2004 of F$68,000.

[11] The prosecution told the High Court that it was seeking an order of forfeiture of the vessel and gear which together had been valued at F$362,500.

[12] The record shows that the prosecution addressed the court on forfeiture at the end of the summary of facts. The master admitted the facts but challenged the accuracy of the figures of the catch.

[13] Following conviction of the accused, Mr Valenitabua handed in six pages of mitigation and added to them orally. There followed a brief prevarication about

the plea to the second count and then the record shows the court heard submissions from both counsel about the appropriate penalty including forfeiture. The hearing was then adjourned over the weekend for sentence.

[14] In a carefully explained judgment, Shameem J imposed a fine of $5,000.00 on each count and ordered that the vessel, its apparatus, fishing gear, cargo and stores should be forfeit under section 18.

[15] This is an appeal against that sentence on four grounds:

1. The learned judge erred in law in entertaining the State's application for forfeiture without a formal application by the State supported by affidavits with the owners named as respondents who can then file affidavits in response.
2. That the learned judge erred in law in not calling the owners to the court for examination by the court and counsel.
3. That the learned judge erred in fact and law in holding the there were "no special mitigating circumstances in this case which might justify non-forfeiture" of the vessel.
4. That the forfeiture order made by the learned judge was too harsh and severe in all the circumstances of the case and that a severe fine against the owners would have been appropriate and sufficient deterrent for illegal fishing in Fiji waters by the owners of the Zhong Shui 607 and the owners of other foreign fishing vessels operating out of Fiji.

These grounds overlap.

<u>Grounds one and two</u>

[16] Mr Valenitabua's submission is that the procedure the court should have followed would have been to hear mitigation on the accused's behalf and then sentence in terms of the fine. The prosecution should then, he suggests, have been advised to file a proper application for forfeiture supported by affidavits and the master and owner in particular given time to file affidavits in reply. A hearing on forfeiture could then have been held.

[17] He bases his submission on the decision of this Court in *Deep Sea Fishing Corporation Limited v The State*; AAU 30/03S, 26 November 2003 in which the master of a fishing vessel had been sentenced for an offence of taking fish without a licence contrary to section 5 (3) of the Fisheries Act. Section 10 (7) of that Act provides a power to order forfeiture similar to that given in the Marine Spaces Act. The magistrate fined the master but, when counsel for the State asked to be heard on the issue of forfeiture, declined to hear him. On appeal by the prosecution to the High Court, the judge imposed an order for forfeiture. It was an appeal against that order which was dealt with in this Court.

In dealing with section 10 (7) the Court said, at p 6:

> "Only the master was prosecuted, although the owner could easily have been prosecuted also, since the owner was a Fijian registered company.
>
> Yet section 10(7) affects the owner or charterer of the vessel, regardless of [whether] 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 section 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 a 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 [the master] 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. An order is made accordingly."

[18] This was clearly a very different case to the present appeal. It was first tried in the Magistrates' Court with the master as the defendant. The appeal to the High Court was by the prosecution and was against the magistrate's refusal to hear submissions on forfeiture. This Court, at p9, found that:

> "...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 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."

The Court allowed the appeal and remitted the case to the magistrate for a rehearing of the prosecution application for a forfeiture order on the merits.

[19] The Court relied heavily on the New Zealand case of *Ministry of Agriculture and Fisheries v Schofield* [1990] 1 NZLR 210 which was a case under New Zealand legislation whereby forfeiture of a fishing vessel is mandatory unless the District Court "for special reasons relating to the offence thinks fit to order otherwise". The matter was remitted to the District Court because the question of special reasons had not been fully investigated. Although this Court noted the lack of a presumption of forfeiture in the Fiji legislation, it adopted the principle in *Schofield's case* that applications for forfeiture should be treated extremely seriously by the Magistrates Court.

[20] We respectfully agree with that sentiment. However the Court, on the basis of *Schofield's case*, moved on to suggest the procedure in such cases:

> "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."

[21] Those remarks were effectively directions to the Magistrates' Courts as to how such cases should be considered in future. We consider it cannot have been directed to the High Court because the appeal judgment shows that there had clearly been affidavits by the owner filed which had been considered by the High Court judge.

[22] We feel we should point out that we have some reservations about the advice given in the *Deep Sea case*. It was, as we have mentioned, based on similar advice given by Fraser J in the *Schofield appeal* from the District court. Our attention was directed to an earlier case in the High Court of Australia; *Cheatley v The Queen* [1972] 127 CLR 291, which we note was not brought to the attention of the Court in *Deep Sea*. The Australian legislation was closer to our own and did not include the presumption of forfeiture which governed the approach of the court in *Schofield.*

[23] In *Cheatley's case* at 304, Menzies J addressed the submission of the respondents in the appeal:

> "The second argument advanced by counsel ... is that if the section does authorise the forfeiture of goods of persons not convicted of an offence, natural justice requires that no order for the forfeiture should be made without giving the owner an opportunity to be heard. This I

> cannot accept. If a law provides for the forfeiture of the goods not belonging to the person convicted ...and no provision is made for intervention by the owners of the goods liable to forfeiture in criminal proceedings to which they are not party, it seems to me that not only is there no duty resting upon the court to entertain the representations of such owners, but there is in truth no power to do so. ...
>
> In criminal proceedings ... I know of no procedure whereby any person other than the defendant may be joined to enable that third person to oppose either the prosecution or the making of any authorised order which might adversely affect that third person. There are, of course, many cases establishing and illustrating the rule that a party should be heard before a court or tribunal makes any order to his disadvantage. These cases have no application here where, as I read the legislation, the forfeiture of the property of persons who are not party to the proceedings is authorised"

[24] We consider the same principle applies to forfeiture under our section 18.

[25] However, we consider that grounds one and two should be disposed of on different considerations and we do not need to go in to the _Deep Sea case_ any further although it still assumes some significance in our decision.

[26] Any court in Fiji, when considering an application for a particular order when passing sentence, is free to seek such information as it considers necessary in order to reach a proper decision; section 306, Criminal Procedure Code. The record in this case shows that the Assistant DPP did make application for forfeiture. The application was perhaps not formal in the sense used in _Deep Sea_ but it was clear and was supported by a written submission. Had the defence been taken by surprise and made application for time to consider the application, we have no doubt that the learned trial judge would have allowed it. Equally, as in the _Deep Sea case_, affidavits could have been placed before the court including any the owners wished to give and they would also have been considered. We fail

to understand why it is suggested to be necessary in such a case to make the owner, who has not been charged, a party.

[27] We would venture to suggest that any defence counsel instructed in such a case should be well aware of the risk of forfeiture and of the likelihood that it would be requested by the prosecution. The Fisheries Act and the Marine Spaces Act are not the only statutes which include a power to forfeit. In any such case, the thing forfeited may belong to someone other than the convicted person. No doubt they would be given a chance to address the sentencing court if they wished but they do not need to be made a respondent and it is not clear to us any basis on which they could, or should, be added as a party in a criminal case unless charged. We agree with Menzies J and consider such a step would be a profound departure from present criminal procedure.

[28] At the outset of this appeal, counsel for the appellants was asked how the first and second appellants named had a right of appeal to this Court. He clearly interprets the statement set out above from the *Deep Sea case* as giving that right.

[29] Section 21 of the Court of Appeal Act gives the right of appeal in a criminal case tried by the High Court to a "person convicted". Where the appeal is from the High Court in its appellate jurisdiction (as was the situation in *Deep Sea*), section 22 allows appeal by "any party to an appeal from a magistrate's court to the High Court against the decision of the High Court".

[30] The first and second named appellants have no right of appeal under section 21 and we direct that their names should be removed from the appeal.

[31] In the present case, it is plain from the documents before us that Mr Valenitabua was not taken by surprise in the High Court. On the contrary, he had been given ample warning of the intention of the prosecution to seek forfeiture. It was pointed out by Ms Driu, and not challenged by Mr Valentitabua, that notice was given in the Magistrates' Court at the committal stage that the prosecution intended so to do. The defendant was represented by different counsel at that

hearing but it defies common sense that he was not advised of that warning when the case was passed to him.

[32] Mr Valenitabua told this Court that he had not had time to read the prosecution submissions on forfeiture before the trial in the High Court as he had only been given them that day. If that is the case we have little sympathy. He could have sought an adjournment but he chose not to do so.

[33] That he was well aware beforehand that there was a risk of forfeiture is apparent from the typewritten mitigation he handed to the court. It is dated 26 November but includes a number of documents which he had collected together for the court including copies of the judgments in three previous cases where forfeiture had been considered. The record also shows that oral submissions were made by both counsel about forfeiture.

[34] The first ground of appeal suggests the learned judge should not have considered forfeiture without a formal application by the State supported by affidavits and without the owners being joined as respondents as suggested in *Deep Sea*. We have already expressed our doubt about such a procedure and, in any event, he made no application for such a course to be followed. Counsel told us that he recalled the High Court judge mentioning that case but we can find no reference to it in the court record. However, we do note that Mr Valenitabua was counsel in the appeal in *Deep Sea* and so was well acquainted with the terms of that judgment.

[35] The second ground suggests that the learned judge erred by not calling the owners to the court to be examined by counsel. Had the judge wished to, she could have done so but it was clearly open to Mr Valenitabua to call anyone he wished. He referred to the possibility of hearing from the owners but never made such an application. Counsel told this Court that he was only representing the master and not the owners in the trial. The judge's notes suggest otherwise. Whilst mitigating, Mr Valenitabua is noted as saying:

"Accused has limited means but he is in a position to pay fines. That company here in Fiji is in a position to pay fines. He is remorseful – he has caused losses to the company
Vessel detained since the 23rd of July. One of 17 vessels owned by CNFC. Provided by China under MOU to fish in Fiji waters.
Fine is the penalty against the accused.
I believe this court should hear from the company

P. Ridgway *[counsel for the prosecution]*; He represents the company.

S Valenitabua; Yes I do and I am making submission on behalf of the company in relation to forfeiture."

[36] He then continued with his submissions largely directed at avoiding an order of forfeiture.

[37] If counsel when conducting a case, knowing he has the right to take a particular course, chooses not to pursue it, he will rarely be permitted to raise that issue on appeal. We are satisfied in this case that Mr Valenitabua was well aware of the suggestions of the Court in the *Deep Sea case*. He also was aware of the possibility of the owner being heard in any event on the question of forfeiture. He chose not to pursue the procedure from *Deep Sea*. No doubt he had reason to follow that course but, having chosen not to do so, he cannot now come to this Court and plead that it should have been done.

[38] The appeal is dismissed on the first and second grounds.

Ground three and four

[39] The appellant's contention is that there were a number of factors which were placed before the High Court in mitigation and the learned judge was wrong to find, as she did, that none of them justified non-forfeiture. The matters he

referred to were the fact that the fishing vessel was a long liner and only about one kilometre of a line totalling 35 kilometres was laid inside Fiji waters so the proportion of the catch that could be attributed to that section was not great. The master had only been in Fiji a few months. He had pleaded guilty and regretted his actions.

[40] The learned judge referred to those factors in mitigation of the fine. She dealt with a difference between the prosecution and defence estimates of the value of the catch and continued:

> "The defence says that this catch was only worth about $15,000. Even at the defence estimation, this value is a considerable sum and must be taken to be an unlawful removal of Fiji's precious resources for commercial purposes. I consider this offending to be serious and consider a fine of $6,000 to be an appropriate starting point. After adjusting for the guilty pleas, the good character, the co-operation with the authorities, the sale of the catch before apprehension and the detention of the vessel, I arrive at a fine of $5,000 (a total of $10,000) on each count ..."

[41] Having reached that conclusion, she then passed to consider forfeiture as a separate issue. That was the proper approach because, although forfeiture is a penalty provision, it needs to be considered separately.

[42] She addressed the accused and pointed out;

> "You are not the owner of this vessel. The owner is a company registered in China. ... Power of Attorney in relation to the company vests in the China Fisheries (Fiji) Holdings Company Limited. Counsel for the accused is also counsel for the owner of the boat and he urged me not to order forfeiture as it would be too harsh a penalty in the circumstances. I do not agree.

In Cheatley v The Queen, the High Court of Australia considered forfeiture of a foreign vessel under the Fisheries Act. Barwick CJ said that forfeiture, which was part of the penalty provisions of the section, was not inappropriate simply because a breach was accidental. However, a deliberate breach should lead inexorably to forfeiture."

[43] The judge then adopted the rationale expressed by Asche J in Chiou Yaou Fa v Morris [1987] 46 NTR 1 at 28:

> "The fishing industry can and often does yield large profits and there is always a temptation to those involved in it to go where the fish are plentiful, even if that means trespassing upon the fishing grounds of other nations. A nation desiring to protect itself from such depredations must make it very plain that the game is not worth the candle i.e. that the risk of heavy penalties if caught outweighs the profit that might be available. Fines, even heavy fines against individuals will not usually suffice, since the individual may either not have the wherewithal to pay or it may be difficult or impossible to follow such assets as he had into another company. In any event a heavy fine may work an injustice on an individual who will often be acting under orders. The real offender is usually the foreign owner who will almost certainly have no funds in this country to pay the fine imposed. Hence, save where there are special mitigating circumstances, forfeiture is the only effective way to see that the policy of the Act is carried out. Indeed, if it became known that Australian courts treated offences against this Act only by fines, this would be to a substantial degree counterproductive, since many more foreign ships would venture into Australian waters to the great detriment of the Australian fishing industry."

[44] It was following her adoption of those principles that the judge found that there were no special mitigating circumstances in the present case to justify her in not ordering forfeiture. She found that the fishing was not an isolated accidental breach caused by bad navigation and expressed the view that, when passing any such order, the deterrent effect was an important factor.

[45] We agree with her reasoning. Forfeiture not only deters companies from taking the risk but also ensures that the offence will not be repeated by that vessel. The comments made by Asche J in the last sentence in the passage quoted apply with even more force here. The limited resources of the island countries mean their ability to detect and apprehend illegal fishing is limited. If it is known that the case will frequently be dealt with by fine only, the lure of our fishing grounds will be all the stronger. This means that the protection of the country's fish stocks is an important part of the legislation and so the deterrence of others is a very important consideration in such cases. Equally, a court sentencing only the master, cannot simply raise the fine to very high levels on the basis, as was suggested should be the case here, that the company would pay. The level of fine must always be related to the convicted person's ability to pay.

[46] The inadequacy of fines alone has been referred to in numerous cases in Fiji and in our Pacific neighbours. In _Cheatley's case_ at 296, Barwick CJ sated;

> "The protection of the fishing grounds of the nation from foreign exploitation is somewhat akin to the protection of the country from smuggling. Drastic action in protection of the country's interests in each instance may be regarded as warranted, indeed, if not to be expected; each is an area where pecuniary penalties are unlikely to provide an adequate protection."

[47] In _R v Kakura and Sato_ [1990] 20 NSWLR 638 (quoted in _Mitchell and Abas_ [1998] A Crim R 103) Wood J (as he then was) ordered forfeiture of a vessel worth between A$3,000,000 and 4,000,000 and a catch worth A$1,000,000. The

defendants were sentenced on four counts of understating the catch by 30 - 40% in the reports required under his licence. The judge explained:

> "I accept therefore that forfeiture would be an occasion of serious hardship and substantial economic loss but against this must be weighed the need for substantial financial deterrence and the limited punishment involved in fines. Unless breaches attract forfeiture, there is a real danger of the legislation being subverted and becoming ineffective."

[48] Having found that fishing in this case was not accidental, the learned judge had good grounds to consider that forfeiture was appropriate.

[49] The appeal against sentence is dismissed.

G Ward

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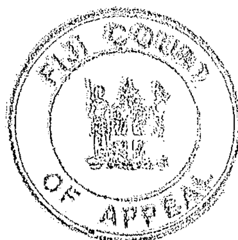
WARD, PRESIDENT



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SMELLIE, JA

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PENLINGTON , JA

Solicitors

Valenitabua S.R. Esq., 51 Ratu Mara Road, Nabua for the Appellants

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