

IN THE COURT OF APPEAL OF FIJI

APPELLATE JURISDICTION

CIVIL APPEAL No. ABU 90 of 2016

IN THE MATTER of an appeal from the High Court
at Suva in Criminal case No. HBM 138 of 2013.

BETWEEN : THE DIRECTOR OF PUBLIC PROSECUTION

APPELLANT

AND : APAKUKI KAUYACA VITUKAWALU

RESPONDENT

Coram : Chandra JA
Wati JA
Seneviratne JA

Counsel : Ms. J. Prasad for the Appellant
Mr. K. Maisamoa for the Respondent

Date of Hearing : 25th June, 2018

Date of Judgment : 6th August, 2018

JUDGMENT

Seneviratne JA

- [1] The appellant filed an Originating Summons seeking a Civil Forfeiture Order on the assets seized by the Police pursuant to sections 19C – 19E of the Proceeds of Crimes Act 1997 as amended.
- [2] The learned High Court Judge at the conclusion of the hearing in his judgment made the following orders:
- (i) Originating Summons dated 11 December 2013, and filed on 12 December 2013, is dismissed and struck out.
 - (ii) Applicant do arrange release of all the items listed in schedule attached to the Originating Summons to the Defendant forthwith.
 - (iii) Applicant do pay defendants costs assessed in the sum of \$1500.00.
- [3] Being aggrieved by the decision of the learned High Court Judge the appellant filed the present appeal on the following grounds:
1. That the learned Judge erred in law in declining to forfeit the properties subject to the Originating Summons after finding that properties were tainted;
 2. That the learned Judge erred in law in not considering sections 21 and 22 of the Illicit Drugs Control Act 2004 when considering the legality of the seizure of the properties;
 3. That the learned Judge erred in law in ordering costs against the applicant without considering section 73 of the Proceeds of Crimes Act.
- [4] The first ground of appeal is that the learned Judge erred in refusing to forfeit the property seized by the police in the course of their investigation after finding that they are tainted. The learned Judge refused to make an order forfeiting the seized property on the ground that the forfeiture order has not been made within 14 days as required by section 31(4) of the Proceeds of Crimes Act 1997 as amended.
- [5] Section 34(1) of the Proceeds of Crimes Act 1997 as amended provides as follows;
- (4) Where:

(a) A property has been seized under this Division, otherwise than because it may afford evidence as to the commission of an offence; and

(a) No forfeiture order has been made against the property within the period of 14 days after the property was seized and the property is in the possession of the Commissioner at the end of that period,

The Commissioner shall, subject to subsections (5) and (6), arrange for the property to be returned to the person from whose possession of the Commissioner at the end of that period.

[6] The properties sought to be forfeited were seized, according to the affidavit of Inspector Aiyaz Ali, on 03rd January, 2012. The Originating Summons seeking order for forfeiture was filed in the High Court on 11th December, 2013, which is nearly two years after the properties were seized. As correctly observed by the learned Judge the properties were not to be used in evidence and were seized and held by the Police Department in breach of the provisions of section 31(4) of the Proceeds of Crimes Act 1997 as amended. Therefore, the appellant is not entitled to forfeit the properties seized and in fact the Commissioner should have returned the properties seized to the respondent at the expiration of the period of 14 days prescribed by section 34(1) of the Proceeds of Crimes Act 1997 as amended.

[7] The second ground of appeal is that the learned Judge erred in law in not considering the provision of sections 21 and 22 of the Illicit Drugs Control act 2004. The learned Judge held that the seizure was illegal because the search was done without a warrant. The application for forfeiture was made pursuant to section 19(C) – 19(E) of the Proceeds of Crimes Act 1997 as amended. In the Originating Summons there is no reference to the provisions of the Illicit Drugs Control Act 2004.

[8] Section 22 of the Illicit Drugs Control Act 2004 provides:

A police officer may exercise any on the powers in section 21 without a warrant if the grounds for obtaining a warrant under that section exist and the officer believes on reasonable grounds that it is necessary to do so in order to prevent concealment, loss or destruction of anything connected with an offence against this Act.

[9] Section 21 of the Illicit Drugs Control Act provides that any goods reasonably suspected to have derived from an offence against the Act could be seized.

[10] The question is whether seizure without a warrant is illegal. It is common ground that the properties seized were connected with an offence under the Illicit Drugs Control Act 2004.

[11] Section 28 of the Proceeds of Crimes Act 1997 as amended provides:

(1) A police officer may apply to a Magistrate for a warrant to search premises for tainted property or terrorist property or property suspected of being tainted property or terrorist property in the same way as a police officer may apply for the issue of a search warrant under Part IV of the Criminal Procedure Code.

(1A) If the circumstances are such that an application on oath is not reasonably practicable, an application initially made-

(a) orally, including by telephone; or

(b) by electronic transmission;

and followed within 48 hours by the application made on oath, is deemed to be an application under subsection (1).

(2) Where an application is made under subsection (1), the magistrate may, subject to conditions, issue a search warrant under Part IV of the Criminal Procedure Code and, subject to this Division, the warrant may be executed in the same manner as if it had been issued under Part IV of the Criminal Procedure Code.

[12] The learned counsel for the appellant submitted that there was no sitting Magistrate in Kadavu to obtain a search warrant. In reply to this submission the learned counsel for the respondent referred to subsection 1A of section 28 of the Proceeds of Crimes Act 1997 as amended where it provides that an application for a search warrant can be made by electronic media. Therefore, the submission that there was no sitting Magistrate in Kadavu is without merit.

[13] The next question is whether the appellant could rely on the provisions in the Proceeds of Crimes Act 1997 as amended and Illicit Drugs Control Act 2004 simultaneously. The purpose of the Proceeds of Crimes Act 1997 as amended is to provide for pecuniary penalty of the proceeds of crime to deprive persons of the proceeds, benefits and properties derived from the commission of serious offences and to assist law enforcement authorities in tracing the proceeds, benefits and properties and for related matters.

- [14] Similar provisions are found in Illicit Drugs Control Act 2004 but these provisions are only applicable to offences relating to illicit drugs. In my view the provisions applicable to search and seizure of properties derived from the sale of illicit drugs are found in Illicit Drugs Control Act 2004 which are special provisions. However, the Illicit Drugs Control Act 2004 does not make provisions for the forfeiture of properties and an application for forfeiture must be made under the provisions of Proceeds of Crimes Act 1997 as amended, as was done in this case. The procedure that should be adopted in search and seizure is found in sections 21 and 22 of the Illicit Drugs Control Act 2004. When the special law is silent on a particular matter the court can fall back on the general law which is in this case the Proceeds of Crimes Act 1997 as amended. Therefore, the officers were entitled to conduct the search without a warrant provided they had reasonable grounds to believe that it was necessary to prevent concealment, loss or destruction of anything that is connected with the offence.
- [15] The learned counsel for the appellant submitted that there was, in fact, a warrant to search the respondent's premises. The search warrant is at page 128 of the appeal brief. The learned counsel for the respondent submitted that it has been signed by a Provincial Administrator and there was no evidence the he was a justice of the Peace. Whether he was a Justice of the Peace or not, was not a matter that can be raised for the first time in appeal. As per paragraph 9 of the Inspector Aiyaz Ali's affidavit dated 02nd November, 2013 (as I understand) the search on the respondent's property was carried out on 03rd January, 2012. The search warrant relied on by the appellant has been signed on 04th January, 2012. Therefore, it cannot be said that the officers who searched the plaintiff's property had a search warrant at the time of the search.
- [16] The third ground of appeal is that the award of costs by the learned High Court Judge is contrary to section 73 of the Proceeds of Crimes Act 1997 as amended provides:

Where:

- (a) a person brings, or appears at, a proceedings under this Act before a Court in order:
 - (i) to prevent a forfeiture, confiscation or restraining order from being made against property of the person; or
 - (ii) to have property of the person excluded from a forfeiture, confiscation or restraining order;
- (b) the person is successful in those proceedings; and

(c) the Court is satisfied that the person was not involved in any way in the commission of the offence in respect of which the forfeiture, confiscation or restraining order was sought or made,

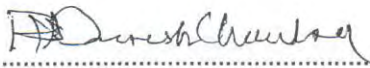
the Court may order the State to pay all costs reasonably incurred by the person in connection with the proceedings or such part of those costs as is determined by the Court.

[17] For the court to order costs against the state in these proceedings it must be satisfied that the person whose property was seized has been successful in the proceedings under section 73(a)(i) and (ii) and that he was not involved in the commission of the offence. In this matter the respondent was successful in obtaining an order to have the property released to him but the court found that the properties were tainted which means he was involved in the commission of the offence. Therefore, the appellant is not liable to pay costs to the respondent.

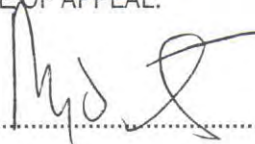
[18] For the reasons aforementioned the court makes the following orders:

1. The order of the learned High Court Judge awarding costs against the appellant is set aside.
2. The other orders made in the judgment of the High Court are affirmed.
3. The parties to bear their own costs of this appeal.
4. The appeal of the appellant is partly allowed.

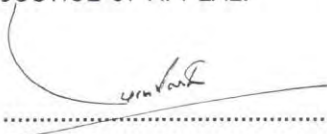



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Hon. Mr. Justice Suresh Chandra
JUSTICE OF APPEAL.


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Hon. Madam Justice Anjala Wati
JUSTICE OF APPEAL.


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Hon. Mr. Justice Lyone Seneviratne
JUSTICE OF APPEAL.