

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

HIGH COURT MISCELLANEOUS CASE

NO. HAM 061 of 2014

BETWEEN : **MAHENDRA PAL CHAUDHRY**

Applicant

AND : **THE STATE**

Respondent

BEFORE : **HON. MR. JUSTICE PAUL MADIGAN**

Counsel : Mr. P. Bodor Q.C. with Mr. M. Hutchings for the
applicant

Mr. C. Grossman S.C, Q.C. with Ms. E. Yang &
Mr. M. Korovou for the respondent

Date of hearing : 31st March 2014

Date of Ruling : 01st April 2014

RULING

(Admissibility)

1. The applicant seeks to have excluded from the evidence in his trial all documents seized by the Police in divers locations pursuant to search warrant, on the basis that the search warrants were defective and not authorised by the Minister as stipulated in the Exchange Control Act. As such, he says, they were ultra vires the Act, and the documents seized on their purported authority are therefore inadmissible.
2. In addition he seeks to have officers of Fiji Customs & Revenue Authority prohibited from giving evidence on any matters pertaining to the tax documents on the basis that s.52(3) of the FRCA act 1998 (as amended) prevents officers from giving such evidence.
3. The application being two-fold is overlapping because the bulk of the evidence is duplicated and coming to the Court if allowed by two avenues. First through what the applicant claims is the illegal seizure by the Police and secondly by production of the tax records which he would deny taxation officers the right to produce.

The Search Warrant Question

4. Section 39(4) of the Exchange Control Act address the authority needed to apply for a search warrant. It reads:

“(4) The competent authority (in actual fact the Minister) may to such extent and subject to such restrictions and conditions as he may think proper, delegate or authorise the delegation of any of his powers (other than any power to make orders or to give authority to apply for a search warrant) to any person, or class or description of persons, approved by him, and references in this Act shall be construed accordingly”.

5. The search warrants used to seize the documents relating to Mr. Chaudhry's financial affairs were not authorised by the Minister and then to that extent they were invalid.
6. Goundar J. being aware of this defect nevertheless found in his ruling of 25 July 2012 (HAM 34.2011) that there was no abuse of process by not having the Minister's signature on the premise that the search warrants were also used for seizure of materials under the Proceeds of Crime Act and the Penal Code.
7. The State submits that this ruling of Goundar J is determinative of the question and any attempt to re open it must be denied on the principle of *res judicata*. This Court would agree but to placate counsel who is persistent in pressing the point and denies that the matter is *res judicata* the Court would develop the matter further in the interest of justice being seen to be done in fairness to all parties.
8. The learned authors of Cross on Evidence (7th Australian edition) say (at para 27230) that "*the general rule is that all evidence is admissible and the fact that it was obtained illegally is immaterial so far as the case before the Court is concerned*". This Court accepts that the position is different in England and Australia, Australia placing more emphasis on the discretion to exclude but the English authorities (which Fiji would follow) dictate that illegally obtained evidence (unless it was obtained by theft or a trick) is admissible evidence despite the fact that it was obtained by improper means.
9. In **Kumara v. R** [1955] AC 197 (P.C.) Lord Goddard said :

"The test to be applied in considering whether evidence is admissible is whether it is relevant to the matters on issue. If it is, it is admissible

and the Court is not concerned with how the evidence was obtainedthere can be no difference in principle for this purpose between a civil and a criminal case. No doubt on a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accusedif for instance, some admission of some piece of evidence for example a document had been obtained from a defendant by a trick, no doubt the Judge might properly rule it out”.

Later the House of Lords said in **D.P.P. v. Sang** [1980] AC 402 per Diplock L.J.

“save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after Commission of the offence ...(the criminal trial Judge) has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper and unfair means”.

10. The Court accepts that the “Minister” should have authorised the search warrants pursuant to s.39(4) of the E.C.A. That does indeed make the warrants defective. However in the interests of justice and in its discretion exercised in the public interest, the Court would allow the documents seized to be admitted. In accordance with Goundar J.’s earlier ruling and in accordance with the English authorities they may be used at trial.

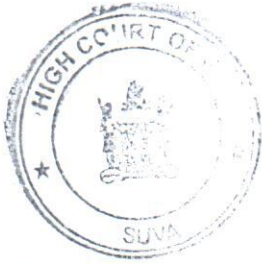
The Fiji Revenue and Customs Question

11. Section 52(3) of the Fiji Revenue and Customs Authority Act (as amended) reads:

“s.52(3)— subject to subsection 4(b), no revenue officer can be required to produce in the Tax Tribunal or any Court any document or divulge to the Tribunal or any Court any information that has come into the officer’s possession or knowledge in the performance of the officer’s duties under a revenue law, except as may be necessary for the purpose of carrying into effect the provisions of a revenue law as in order to bring or assist in the course of, a prosecution for any offence in relation to tax”.

This section is included with others under the heading “*secrecy*”.

12. It is the submission of the applicant that this legislative restriction would prevent the State from having any revenue officer producing the records. However this is not what the State is seeking to do. They are neither asking their FRCA witness(es) to “*divulge information*” nor to produce any new tax document. They already have the documents, they have the information produced by the Police — they merely ask to have these documents interpreted or explained. Given that this is not a surreptitious attempt to lift the FRCA veil and to get new information contrary to its “*secrecy*” safeguards, there is no reason why a revenue officer would not be called to explain the documents already before the Court. That is in the interests of both parties and the documents are no longer “*secret*”.
13. I allow FRCA witness(es) to be called to speak to the documents.



P. K. Madigan

P.K. Madigan
Judge

At Suva
01st April 2014