

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 124 of 2018

BETWEEN : **FIROZ KHAN** of Gold link Crescent, Lautoka and Businessman.

AND : **THE COMMISSIONER OF POLICE** **PLAINTIFF**

1ST DEFENDANT

AND : **THE PERMANENT SECRETARY FOR FISHERIES**

2ND DEFENDANT

AND : **THE ATTORNEY-GENERAL OF FIJI**

3RD DEFENDANT

Appearances : **Mr. Salvin Nand for the plaintiff.**
Mr. Vishal Chauhan for the defendants.

Trial : **Monday, 21st October, 2019**

Written Submissions: **14th January 2020 (Plaintiff's)**
04th December 2019 (Defendants')

Judgment : **Wednesday, 22nd April 2020.**

J U D G M E N T

(A) INTRODUCTION

- (01) The action concerned the seizure by the defendants of a fiber glass fishing boat, named FOZU II.
- (02) By writ issued on 20th June 2018, the plaintiff claimed damages from the defendants alleging that the first and second defendants on 24-03-2018 wrongfully seized and detained the fishing boat named FOZU II without reasonable cause.
- (03) It is common ground on the pleadings that the defendants seized and detained the boat. In the statement of defence the defendants pleaded that the fishing boat was seized since there was a reasonable suspicion that the boat was employed in the commission of an act

which is punishable under the **Fisheries Act, Cap158**. It was further pleaded in the statement of defence that the fishing boat was seized and detained lawfully in accordance with the **Fisheries Act, Cap 158**.

(B) THE FACTUAL BACKGROUND

(01) The statement of claim which is as follows sets out sufficiently the facts surrounding this claim from the plaintiff's point of view as well as the prayers sought by the plaintiff.

1. *THE Plaintiff is and was at all material times the owner of a (23) twenty three footer fiber glass boat with a new 75 horsepower Yamaha Outboard motor, registered under the name of FOZU II (hereinafter referred to as FOZU II).*
2. *ON or about the month of February, 2018 the Plaintiff leased the said FOZU II to a licensed fisherman by the name of Jone Cakautavatava at the rate of \$80.00 (Eighty Dollars) per day.*
3. *ON or about the 24th March, 2018, the Defendants officers jointly and severally without reasonable cause seized the said FOZU II from the said Jone Cakautavatava*
4. *THE Defendants, their Servants and Agent continue to unlawfully detain the said FOZU II at the Lautoka Wharf.*
5. *THE said FOZU II together with said outboard 75 horsepower outboard motor is worth \$33,000.00 (Thirty Three Thousand Dollars).*
6. *THE Plaintiff is suffering loss of income from hire of the said FOZU II at the rate of \$80.00 (Eighty Dollars) per day from the date of the unlawful seizure.*
7. *THE Plaintiff has demanded of the Defendants for the immediate release of the said FOZU II and the Defendants refuse so to do.*
8. *THE Defendants have also falsely represented to the Plaintiff that a Criminal Case is pending in the Magistrate's Court at Lautoka against the said Jone Cakautavatava which representation was proved to be false upon a search of the Criminal Cause List in the Magistrate's court at Lautoka from the 24th March, 2018 to date of filing of this Writ.*
9. *IN the premises the Plaintiff has been put to loss and expense and suffered damages.*

(02) The plaintiff claims from the defendants:

- (i) *An Order that the fiber glass boat called FOZU II with the new 75 horsepower outboard motor be forthwith released to the Plaintiff.*
- (ii) *Loss of income at the rate \$80.00 (Eighty Dollars) per day from the 24th day of March, 2018 to date of release.*
- (iii) *Alternative to prayer (i) the sum of \$33,000.00 (Thirty Three Thousand Dollars) being the replacement cost of FOZU II and the 75 horsepower outboard motor.*
- (iv) *General damages for wrongful seizure and prolonged detention without cause.*
- (v) *Costs on a Solicitor/Client indemnity basis.*
- (vi) *Any other relief which in the opinion of this Honorable Court is just and equitable.*

(3) The defendants in their statement of defence pleaded *inter alia*:

1. *In response to the contents of paragraph 1 of the Claim, the Defendants stated that the vessel named FOZU II was registered on 27 February 2017 in the Division's Master Register of Licensed Fishermen ('Register') with the Vessel Registration No. WL141 ('the Vessel').*
2. *In further response, the Defendants state that under the Register, Mr Jone Cakautavatava ('Mr Cakautavatava') is registered as the owner of the Vessel.*
3. *In response to the contents of paragraph 2 Claim, the Defendants do not have knowledge of the same as no record or evidence of such agreement was made known to the Defendants.*
4. *In response to the contents of paragraph 3 of the Claim, the Defendants state that a joint operation was conducted on 24 March 2018 by the Defendants as part of operations to undertake enforcement activities on illegal fishing activity. The Defendants further state that the Vessel was identified to have been fishing without a license and its captain which is a breach of the Fisheries Act 1941 ('Act') and as a result the Vessel was seized lawfully by the Defendants in accordance with section 7 of the Act.*
5. *The Defendants deny the contents of paragraph 4 of the Claim and further state the Vessel is lawfully detained by the Defendants in accordance with section 7 (1) (c) of the Act.*

6. *In response to the contents of paragraphs 5 and 6 of the Claim, the Defendants do not have knowledge of the same except to state that the Defendants have no record or evidence of any agreement for hire.*
7. *In response to the contents of paragraph 7 of the Claim, the Defendants state that the Vessel is being held as evidence under Criminal Case No. 567/18 whereby the accused persons were charged with two counts of breaches of the Act.*
8. *The Defendants deny the contents of paragraph 8 of the Claim as no such representation was made to the Plaintiff. The charges were subsequently endorsed by the Lautoka Magistrate on 16 July 2018.*
9. *The Defendants deny the contents of paragraph 9 of the Claim and state that the charges laid under Criminal Case No. 567/18 are still pending whereby the accused persons will be presented before the Lautoka Magistrates Court on 17 September 2018 for first call.*
10. *Except as expressly admitted above, each and every allegation of facts in the Claim against the Defendant are denied, including the particulars, as if they were fully set out in this defense and specifically traversed.*

(4) Therefore, the defendants pray:

- (a) *That the Claim be dismissed in its entirety;*
- (b) *Costs be awarded against the Plaintiff and in favor of the Defendants; and*
- (c) *Any other relief that this Honorable Court deems just and necessary in the circumstances.*

(5) The plaintiff's reply to defence is as follows:

1. THE *Plaintiff joins issue with paragraph 1 of the Statement of Defense.*
2. THE *Plaintiff joins issue with paragraph 2 of the Statement of Defense and further says that the alleged "Mr. Cakautavatava" has no proprietary interest in FOZU II.*
3. THE *Plaintiff joins issue with paragraph 4 of the Statement of Defense and puts the Defendants to strict proof of the same.*
4. THE *Plaintiff joins issue with paragraph 5 of the Statement of Defense.*
5. THE *Plaintiff joins issue with paragraph 7 of the Statement of Defense.*
6. THE *Plaintiff joins issue with paragraph 8 of the Statement of Defense.*

7. *THE Plaintiff joins issue with paragraph 9 of the Statement of Defense.*
8. *THE Plaintiff prays that the Defendants' Defense be dismissed with Costs on a Solicitor/Client indemnity basis.*

(C) **PRE-TRIAL CONFERENCE MINUTES**

AGREED FACTS

1. *THE vessel named FOZU II was registered on 27th February, 2017 in the Division's Master Register of Licensed Fishermen with the Vessel Registration No. WL 141.*
2. *ON 24th March 2018 a joint operations was conducted by the Defendants and the Vessel FOZU II was seized from a licensed fishermen Jone Cakautavatava.*

AGREED ISSUES

3. *Whether the Plaintiff is and was the registered owner of the Vessel FOZU II?*
4. *Whether the Plaintiff had leased Vessel FOZU II to a licensed fisherman by the name of Jone Cakautavatava?*
5. *Whether the Defendants seizure of the Vessel FOZU II was done so without reasonable cause and unlawful?*
6. *Whether the Plaintiff suffered loss of income from hire of the Vessel FOZU II at the rate of \$80.00 (Eighty Dollars) per day from the date of the seizure of the said vessel by the Defendants?*
7. *Whether as a result of the seizure of Vessel FOZU II, the Plaintiff has suffered loss, expense and damages?*
8. *If it is proved that the seizure of FOZU II by the Defendants was unlawful, whether the Plaintiff should be entitled to general damages for wrongful seizure and prolonged detention without cause?*
9. *Whether the vessel FOZU II had been identified to have been used for illegal fishing?*
10. *If yes, whether the Defendants seizure of the vessel FOZU II was in accordance with the Fisheries Act 1941.*

(D) THE WITNESSES

Plaintiff's Case

Firoz Khan (the plaintiff)

Defendants' case

- (1) Mr.Aminiasi Tora
Fisheries Technical Officer
- (2) (Ms)Tarisi Toroca Shaw
Senior Fisheries Officer
- (3) DC 5355 Mosese, Lautoka Police station.
- (4) ASP Samisoni Naqica
Lautoka Police Station

(E) DOCUMENTARY EVIDENCE

Plaintiff's List of Exhibits

<i>Date</i>	<i>Exhibit No.</i>	<i>Description of Exhibits</i>
<i>21/10/19</i>	<i>PEX 1</i>	<i>Receipts from Safeway Marine dated 24/8/17, 4/10/17 and 28/6/19</i>
<i>"</i>	<i>PEX 2</i>	<i>Receipt from Asco Motors dated 21/8/17</i>
<i>"</i>	<i>PEX 3</i>	<i>MSAF Official Receipt dated 5/10/17 TIN # 60-41829-0-4</i>
<i>"</i>	<i>PEX 4</i>	<i>MSAF Official Receipt dated 25/1/19</i>
<i>"</i>	<i>PEX 5</i>	<i>Application for Registration for Ship Owner dated 5/10/2017.</i>
<i>"</i>	<i>PEX 6</i>	<i>Fiji Revenue Receipt #180781 dated 5/10/17</i>
<i>"</i>	<i>PEX 7</i>	<i>Fishing License No. 61678 of Jone Cakautavatava dated 27/02/2017.</i>
<i>"</i>	<i>PEX 8</i>	<i>Fiji Revenue Receipt #889904 dated 13/3/17</i>
<i>"</i>	<i>PEX 9</i>	<i>Court Order on Criminal Case No. 567 of 2018 dated 20/11/18 – State –v- Filipe Kinisi & Others.</i>

Defendants' List of Exhibits

<i>Date</i>	<i>Exhibit No.</i>	<i>Description of Exhibits</i>
21/10/19	DEX 1	Master (Record) Register
"	DEX 2	Statement of Mr. Tora A (DW 1)
"	DEX 3	Report dated 23/3/18
"	DEX 4	Statement of Ms. Tarisi Shaw (DW2) dated 24/3/18 (Police Statement)
"	DEX 5	Statement of DC 5355 Mosese (DW 3)
"	DEX 6	Charge Sheet CR:567/18 dated 16/7/2018
"	DEX 7A	Lautoka UB 18/03/18 Statement Form – Lautoka CR 110/03/18 of A/SGT Alike Taria dated 24/3/18
"	DEX 7B	Record Interview of Filipe Kinisi dated 24/3/18
"	DEX 7C	Record of Interview of Eroni Masi dated 24/3/18
"	DEX 7D	Record of Interview of Vanavasa Qarau dated 24/3/18.
"	DEX 7E	Record of Interview of Maciu Tiko dated 24/3/18

(F) CONSIDERATION AND THE DETERMINATION

- (01) The complaint of the plaintiff is two-fold. First, the first and the second defendants wrongfully seized the plaintiff's fishing boat. Secondly, there was a prolonged detention of the fishing boat without cause. (See, paragraph (3) and (4) of the statement of claim).
- (02) In their defence, the defendants pleaded that; (reference is made to paragraph (4) and (5) of the statement of defence)

(*) *In response to the contents of paragraph 3 of the Claim, the Defendants state that a joint operation was conducted on 24th March, 2018 by the Defendants as part of operations to undertake enforcement activities on illegal fishing activity. The Defendants further state that the Vessel was identified to have been fishing without a license and its captain which is breach of the Fisheries Act 1941 ('Act') and as a result the Vessel was seized lawfully by the Defendants in accordance with Section 7 of the Act.*

(*) *The Defendants deny the contents of paragraph 4 of the Claim and further state the Vessel is lawfully detained by the Defendants in accordance with Section 7(1) (c) of the Act.*

(03) I will consider the issues in that order.

Whether the plaintiff's fishing boat was wrongfully seized by the first and the second defendants?

(04) The evidence in this case revealed that on 24-03-2018, a joint operation to undertake enforcement activity on illegal fishing was carried out by the first and the second defendants at the Marine Drive at Lautoka. The following officers headed the enforcement operation that was conducted in the morning on 24-03-2018.

(* (Ms) Tarisi Shaw – Senior Fisheries Officer, Ministry of Fisheries
[Defence witness no. 2].

(* Mr Aminiasi Tora – Fisheries Technical Officer, Ministry of Fisheries [Defence witness no. 01].

(* Detective Constable 5355 Mosese, Lautoka Police Station
[Defence witness no. 3].

(05) (Ms.) Shaw and Mr. Tora's evidence was that around 5.30am on 24-03-2018, the team (clad in civilian clothes) surveyed the area at the end of Marine Drive, Bekana Island landing point and the vicinity adjacent to the creek adjoining the Fiji Ports and FSC foreshore area. The Senior Fisheries Officer, (Ms.) Shaw in testifying under oath told Court that at about 5.45am, the carrier truck (Registration no. DE - 057) having grey tarpaulin covers arrived and parked near the end of the cement pavement near the creek. At about 6.15am, a man with spectacles and clad in khaki pants walked towards the truck and talked with the driver of the truck. About 10 minutes later, a fiber glass fishing boat (**imprinted with a fishing license registration no- WL 141 with FOZU II on the side of the boat**) entered the mouth of the creek. The captain and the crew was about to offload dive tanks to the truck from the fishing boat. Upon seeing this, the Officers boarded the boat. **Upon boarding the fishing boat, the Fisheries Enforcement Officers found on board catch of fish and underwater breathing apparatus.** The Fisheries Enforcement Officers questioned the boat captain and the four crew members since **there was a reasonable suspicion that the fishing boat was reasonably believed to be engaged in fishing in Fiji waters with the underwater fishing apparatus therein.** They could not produce a valid Fishing License issued by the Fisheries Department to fish in Fiji waters. The boat captain and the crew were arrested **primarily** for fishing in Fiji waters without a valid license to fish issued by the Fisheries Department. The underwater fishing apparatus such as scuba diving tanks (sixteen), a fish finder, diving vests (four) and diving masks (four) were found in the fishing boat. **Secondarily**, the captain and the four crew members were taken into custody since they did not have a valid license issued by the Fisheries Department; (1) to be in possession of underwater breathing apparatus for the purpose of collecting, taking and diving for fish and also (2) for operating underwater breathing apparatus for collecting, taking and diving for fish. **There was a reasonable suspicion that underwater breathing apparatus may have**

been used for the purpose of collecting , catching and diving for fish. (Ms) Shaw and Mr. Tora after referring to Fisheries Department Master (Record) Register (DEX 1) said in no uncertain terms that Fishing License no- 61678 has been granted to one Jone Cakautavatau to fish by way of business who is captain of fishing vessel no- WL-141. **Their evidence was that Jone Cakautavatau was not on board at the time of detection.** The boat and the crew were taken to the fisheries wharf and the person who claimed to be the boat captain took to his heels at the wharf while Aminiasi Tora trying to land the boat. The remaining four suspects were taken to the Lautoka Police Station for questioning. The catch of fish was sold by the State and proceeds kept by it. The catch of fish had been worth about \$296.70.

- (06) The remaining four suspects, the fishing boat and the underwater fishing apparatus were produced before the Magistrate of Lautoka. The four suspects have been charged in the Magistrate Court of Lautoka for (i) illegal use of fishing apparatus (2) taking fish without License. [Lautoka Magistrates Court Criminal Case No. 567/18]. An investigation report on surveillance on enforcement operation conducted at Marine Drive on 24/03/2018 was tendered to Court as DEX -3 by witnesses (Ms) Tarisi Shaw and Mr Aminiasi Tora. The investigation report clearly indicates that the fishing boat named FOZU II was imprinted with fishing vessel no-WL -141 on the side of the boat. **The boat had on board catch of fish and five diving tanks and other underwater breathing apparatus.**
- (07) The statement of claim alleged that the seizure of the fishing boat is without reasonable cause.
- (08) The evidence revealed that the fishing boat entered the creek at 6.25am on 24-03-2018 and at the same time the truck moved closer to the fishing boat for offloading. The Fisheries Enforcement Officers then boarded the fishing boat and found catch of fish and underwater breathing apparatus on board. **Therefore, there was a reasonable suspicion that** (1) the five persons on board may have had fished in Fiji Waters **by employing fishing boat named FOZU II** (2) they may have had used underwater breathing apparatus for the purpose of collecting, taking and diving for fish. The Fisheries Enforcement Officers interrogated the five persons on board. The five persons on board failed to produce (1) a valid license to fish in Fiji waters issued by the Fisheries Department (2) a valid license to use underwater breathing apparatus for catching, taking and diving for fish issued by the Fisheries Department.
- (09) **The transcript of (Ms.) Shaw's evidence in chief contains this; (Page 60 and 61 of the transcript of evidence)**

Q: Do you recall what happened specifically on, let me bring you to the specific date, on 24th March, 2018? Do you recall what happened on the 24th March, 2018?

A: On the 24th of March, 2018 we had a joint Surveillance Operation between Ministry of Fisheries and the Fiji Police Force. Prior to that we were doing Surveillance work in terms of illegal fishing and we had some person or vessels of interest. So, on the 24th of March in the early morning we had a

debrief with the Fiji Police Team and we undertook a on Surveillance of Operation with the Waterfront area.

Q: Please elaborate to this Court exactly what transpired on that day?

A: The Surveillance Operation consisted of myself and three other Fisheries Officers and Two Police Officers. We had a debrief at the Shelly Park Police Post. And our actual operation took place at half past 5 in the morning. We did Surveillance around the area and about 5.45 a truck registered DE057 came near the landing. And so by 6.15 there was another man dressed in neat khaki shorts with spectacles that came in another car and they were conversing with the driver of the vehicle. We had also issued a caution to the Registered vehicle driver on the 20th of March. And so my Lord, by 6.25am, we saw a vessel which came into the mouth of the creek near Waterfront adjacent to the Fiji Sugar Corporation area. It came in and then I alerted the three Officers to which they came in, wore their vests, their Fisheries and Possum vests and Police enforcement vests and the vessel was starting to offload dive tanks to the registered vehicle. And so, a team came in and started questioning and my Fisheries colleague Mr Tora boarded the vessel and they proceeded with the questionnaires started from then. I alerted the two Fisheries Drivers to which they came and also assisted with the apprehending of the dive tanks and the catch and all the items that were used for the activity. Mr Tora actually took the vessel from Waterfront to the Fisheries Port. And then we departed from the vicinity, went straight to the Police Station. We went there and we did our Statements and also handing over of the List of Items. And that's where the questionnaires started between the Police and the alleged. Thank you, my Lord.

Q: Can you identify which vessel or the name of the vessel that you had apprehended on that particular day?

A: The vessel registration on the side of the vessel, on the side of the boat was WL141 with the vessel on FOZU 2.

Q: FOZU?

A: FOZU 2.

Q: Why did you apprehend that vessel FOZU 2?

When being questioned to produce their License, the boat Captain or the members of the crew, could not produce a valid Fishing License. So, they had actually breached the Fisheries.

(10) **The transcript of Mr. Tora's evidence in chief contains this : (Page 30 and 31 of the transcript of evidence)**

Q: Do you happen to recall what happened on the 24th March, 2019 to be accessed?

A: Yes, on the 24th of March, it was early morning; we had planned it on the 23rd to conduct surveillance and enforcement. We planned it on the 23rd, we arranged it with the Police Department. I asked the Operations, Police in charge of Operations if we could have two (2) Policemen the next day, that was on the 24th. So, on the 24th early in the morning, we all met at the Police Post at Shelly Park, myself, one of my colleagues Tarisi, and two (2) Police Officers. So, at 5.30 in the morning, when we met I just briefed the Police that we were going to just do surveillance around the waterfront area because that's where the suspected fishing boats that were doing illegal activities always come and unload their fish.

Q: So, if you can just elaborate to the Court, the event that transpired and you had witnessed on that particular day?

A: It was 5.30 when we came across to the Waterfront, we were just walking and then at around 6.00 o'clock, we saw this fishing boat approaching, it was coming through the creek that goes through to the FSC Mill. The boat was approaching and then there was a carrier that came and parked near the area the place where the boat came. So, just as they were about to, when the boat just came close to the shore and myself and the two (2) Police Officers, we boarded the boat. When we boarded the boat there were four (4) of them. We board the boat and we asked for their Fishing License and they could not produce any Fishing License and we saw inside the boat there was diving tanks and the boy controlling the device, all these scuba gears and spear guns for fishing and there was a good amount of fish in the boat.

Q: So, can you inform the Court which vessel was this, that you had seen?

A: The boat was, the name was FOZU 2 and registration number WL141 was written on the side of the boat.

Q: So, who was the Captain of the boat? Are you aware of the name of the Captain of the boat?

A: Sir, the Captain of the boat was according to our records, WL141 was licensed to Mr Jone Cakautavatava.

Q: And can you further explain what happened when you saw this, all these gears, fishing gears on the boat? What happened next?

A: When we saw those gears, we were suspicious that they had caught those fish using that scuba and it was illegal to use under the Legal Notice 17 of the Fisheries Act. The use of underwater breathing apparatus for catching fish. So, we told the Fishermen that they are arrested because of the illegal fishing, suspicious of illegal fishing they have done. So, we confiscated all their fishing gears, all the fish, all their diving equipment like masks, snorkels, the fins and the fish and we loaded it into our vehicle and we ask them to also board our vehicle and myself and the Captain of the vessel, we took the boat to the other side, to the Fisheries wharf. When we reached the Fisheries wharf, the Captain the guy who was driving the boat, he fled from the boat.

But the boat was there and so we took all those, confiscated items and the Fishermen and we took it to the Police and we told the Police that the boat was at the wharf and they asked us to put it in our compound for safe keeping.

(11) **The following exchanges took place in the course of the cross –examination of Mr. Tora by Mr. Nand;(Reference is made to page 49 and 50 of the transcript of evidence)**

Q: *And that you saw some items that were not supposed to be on the boat?*

A: *Yes Sir.*

Q: *You also agreed that the fish that was caught was legal to catch, correct?*

A: *Yes.*

Q: *You mentioned that the method that they used was illegal?*

A: *Yes Sir.*

Q: *What was the method that they used to catch the fish?*

A: *They were using underwater breathing apparatus. Scuba gears.*

Q: *How do you know that?*

A: *Because it was in the boat and they had the fishing spear guns and their flippers and their diving gears on board.*

Q: *You only saw the gears on the boat, correct?*

A: *Yes Sir.*

Q: *You never saw them using to catch the legal fish that they caught, correct?*

A: *Yes Sir.*

Q: *You never saw them?*

A: *Yes Sir.*

Q: *The fish that they caught was legal?*

A: *Yes Sir.*

Q: *So, if you look at us, this is a match to light cigarette.*

A: *Yes Sir.*

Q: *Me keeping the match in this Court, does it mean that I'm going to light the Court on fire? Does that mean?*

A: *Under*

Q: *Question, answer my question? Does it mean that me keeping this match in my pocket, that I have lit the fire, the next Court No. 2 or I'm going to light Court No. 3? Does it meant that?*

A: *No Sir.*

Q: *Pardon? What is your answer?*

A: *That's not a match.*

Q: *Assume this is a match. Does it mean, me keeping a match, I'm going to or I have destroyed the Court No. 2. Yes or No?*

A: *No, Sir.*

Q: *So, is it correct now, that you finding items that were there in the boat, doesn't mean that they used the item to catch legal fish that you have agreed to, yes or no? Yes or No?*

A: *Under suspicion Sir, we can.*

Q: *My question is very clear, did you see them? You said no. So, does it mean the items that you believe to be illegal were used to catch those fish?*

A: *Under suspicion Sir, we can conduct.*

Judge: *On suspicion?*

Q: *Even if you had suspicion?*

A: *Yes Sir.*

Q: *But you never saw them actually using it?*

A: *Yes Sir.*

Q: *And you said all the fish that were caught was legal? You answered that. So, on what basis did you seize the boat?*

A: *If they were using illegal gears, then the fish will be illegal also.*

(12) The following exchanges took place in the course of the cross –examination of (Ms.) Shaw by Mr. Nand ; (Reference is made to page 72 of the transcript of evidence)

Q: *So Madam, when you went and confiscated the boat, the License number was depicted on the boat and big bold letters WL141, correct?*

A: *Yes, my Lord.*

Q: *So, at the material time Jone had the License on the boat written, correct? You answered that already, I'm asking you in a different way now?*

A: *Would you repeat the question?*

Q: *My question is; when you confiscated the boat, the License WL141 was on the boat that you confiscated?*

A: *The registered number was on vessel, when we confiscated.*

Q: *Thank you. In your examination in chief, you mentioned that you want Jone did not give you his boat License, correct?*

A: *Mr Jone Cakautavatava was not on board, they produce a license, a valid fishing license.*

Q: *How many people must have License to fish, in a particular boat?*

A: *There is [0.36.07.2] (not clear).....Licensee with his registered number of crews.*

Q: *Where was Jone when the boat came?*

A: *He was not on board, my Lord.*

Q: *He was not on board?*

A: *Yes my Lord.*

Q: *You said that he fled the scene?*

A: *It was not Mr Jone Cakautavatava, it was another person which we did not know.*

(13) Testimony can be direct or circumstantial. The evidence of Mr. Tora and (Ms.) Shaw is circumstantial. The following mentioned items of circumstantial evidence deposed to by Mr. Tora and (Ms.) Shaw have created a reasonable suspicion that an offence has been committed in relation to Fishing in Fiji Waters and that the provisions of the Fisheries Act and the 1997 Regulations of the Fisheries have been contravened.

- (*) That around 5.30am on 24-03-2018, the team (clad in civilian clothes) surveyed the area at the end of Marine Drive, Bekana Island landing point and the vicinity adjacent to the creek adjoining the Fiji Ports and FSC foreshore area.
 - (*) At about 5.45am, the carrier truck (Registration no. DE 057) having grey tarpaulin covers arrived and parked near the end of the cement pavement near the creek.
 - (*) At about 6.15am, a man with spectacles and clad in khaki pants walked towards the truck and talked with the driver of the truck.
 - (*) About 10 minutes later, a fiber glass fishing boat named FOZU II (imprinted with a fishing vessel no- WL -141 on the side of the boat) entered the mouth of the creek.
 - (*) The captain and the crew was about to offload dive tanks to the truck from the fishing boat.
 - (*) The Fisheries Officers boarded the boat. Upon boarding the fishing boat, the Fisheries Enforcement officers found on board catch of fish and underwater breathing apparatus such as scuba diving tanks (16), a fish finder, diving vests (4) and diving masks (4) .
 - (*) The Fisheries Enforcement Officers questioned the person who claimed to be the captain of the boat and the four crew members.
 - (*) They could not produce a valid Fishing License issued by the Fisheries Department to : (1) fish in Fiji waters employing fishing boat named FOZU II (2) to be in possession of underwater breathing apparatus for the purpose of collecting, catching and diving for fish (3) to use underwater breathing apparatus for the purpose of collecting, catching and diving for fish
- (14) Whilst Mr. Tora and (Ms.) Shaw were in the witness box, not one single question has been directed either to the credit or to the accuracy of the **above items of highly incriminatory circumstantial evidence** they have deposed to. **No suggestion was made to the witnesses in cross - examination that the above was not the case.** The above items of highly incriminatory circumstantial evidence they have deposed to, has been let go unchallenged as far as the conduct of the plaintiff's case is concerned. By itself it does prove that the plaintiff's counsel, Mr. Nand did not have reasonable grounds to suspect the above mentioned items of circumstantial evidence. In other words, the absence of any grounds for suspicion has been provided by Mr. Nand. It must be accorded weight.

- (15) It should be firmly stated that if a witness is not cross-examined in relation to a particular matter upon which he has given evidence, that circumstance would often be a very good reason for accepting the evidence of that witness upon that matter. For example, in Cross on evidence (2nd Australian edition 1979) the authors state (at para 10.50)

“ Any matter upon which it is proposed to contradict the evidence in chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, a failure to do this be held to imply acceptance of the evidence in chief”

See, Phipson On Evidence (12th edition, 1976) at para 1593.

- (16) It will now be convenient to set out the relevant sections of the Fisheries Act, Cap 158. The relevant sections are sections 5(3), 7(1) and 10(1) and (2) of the Fisheries Act, Cap 158.

- (17) **Section 5 (3) is in these terms;**

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 authorized by a license 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 license;*
- (b) *the Minister may by regulation exempt any person from the necessity of possessing such a license;*

- (18) **Section 7 (1) is in these terms;**

Power of examination and detention

7.(1) *Any licensing officer, police officer, customs officer, honorary fish warden and any other officer empowered in that behalf by the Minister, may, for the purpose of enforcing the provisions of this Act:-*

- (a) *require any person engaged in fishing to exhibit his license, apparatus and catch;*

- (b) *go on board any vessel reasonably believed to be engaged in fishing and search and examine any fishing apparatus therein;*
- (c) *where there is reasonable suspicion that any offence has been committed, take the alleged offender, the vessel, apparatus and catch, without summons, warrant or other process, to the nearest police station or port. The vessel and apparatus may be detained pending trial of the offender and the catch may be sold and the proceeds of the sale detained pending such trial; and thereafter any vessel, apparatus or money so detained shall, unless forfeited under the provisions of subsection (7) of section 10, be returned to the person from whom the same was taken.*

(Emphasis added)

(19) **Section 10 (1) and 10 (2) are in these terms;**

Offences

10.(1) *Any person who, being required to be the holder of a license, 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 five hundred dollars or to both such penalties.*

(2) *Any person who:-*

- (a) *being the holder of a license under this Act, fails to comply with any of the conditions of his license; or*
- (b) *commits any offence against this Act for which no special penalty is provided; or*
- (c) *contravenes or fails to comply with the provisions of any regulation made hereunder,*

shall be liable to imprisonment for three months or to a fine of five hundred dollars or to both such penalties.

(20) It is also critical to note Section (4) and (5) of **Fisheries (Registration on use of underwater breathing apparatus) Regulations 1997.**

Restriction of use of underwater breathing apparatus

4. (1) *Subject to regulation 5, no person shall:*

- (a) *in any way collect, take, or dive for fish using underwater breathing apparatus.*
 - (b) *be in possession of underwater breathing apparatus for the purpose of collecting, catching and diving for fish.*
- (2) *Any person who contravenes the provision of this regulation shall be liable to a fine of four hundred dollars or imprisonment for a term of six months or to both fine and imprisonment.*

Exemption

5(1). *The Permanent Secretary or any person appointed by him in writing, may upon a written request by any person, exempt that person by writing under his hand, from the provisions of regulation 4(1) if, that person holds a valid license to fish issued by the Fisheries Department and in addition, the person has satisfied the Permanent Secretary or the person appointed by him in that behalf that the person –*

- (a) *holds a valid license issued by the Fisheries Department to operate underwater breathing apparatus;*
 - (b) *holds a certificate of safety in regulation to the underwater breathing apparatus to be used, issued by the Ministry of Labour and Industrial Relations;*
 - (c) *is a certified being diving operator being so certified by a reputable diving instructor, and*
 - (d) *fish stock and traditional fishing rights in the area of operation will not be adversely affected.*
- (21) Mr Tora gave evidence to the effect that every licensed fisherman owning or operating any fishing vessel shall register such vessel annually with a licensing officer at the Department of Fisheries. Such registrations are recorded in the Divisions Master Register of Licensed Fisherman (**Register – DEX-1**). The Register contains record of the details of the vessel used for fishing along with details of the captain and owner of the vessel. The Register was tendered as evidence by the defendants whom showed that the fishing license no- 61678 was granted to Jone Cakautavatava who is captain of fishing vessel no WL- 141. The defendants highlighted that the fishing vessel no –WL- 141 was not registered in the name of the plaintiff's vessel (FOZU II) with the Department of Fisheries. It was further revealed in evidence that the fishing vessel no- WL-141 belongs to one Suliasi.

(22) **The transcript of (Ms.) Shaw's evidence in chief contains this; (Page 62 and 63 of the transcript of evidence)**

Q: Ms. Shaw, what else you did as part of your investigations?

A: As part of the investigations, we had to look back on the Licensee's folder and also refer back to our Fishing License Master Register. The vessel was registered to a Mr Jone Cakautavatava who was not on board during the fishing operation, fishing activity. The owner of the vessel was registered to Mr Suliasi, used in the registered Fishing vessel number, WL141. And that is within the Fishing License Master Register with all the details being the addressee, the receipt numbers, the permit numbers, the fishing ground numbers, even vessel description which was different to the vessel that we apprehended and the list was handed over to Fiji Police Force as part of their investigation.

Q: My Lord, if the witness can be shown the Master Register?

Judge: Yes.

Q: Ms. Shaw, can you confirm is this the Master register that you speaking of?

A: Yes my Lord.

Q: And you can confirm the details to this Court as provided in the Register? Can you please elaborate to this Court?

A: The general description of the vessel registered within the Fishing License Master Register is a 25 footer and 5 foot beam Fiber glass vessel with a 40hp Yamaya Outboard Motor.

Q: So that WL141, who did it belong to, as per the Master Register?

A: Registered to Licensee Mr Jone Cakautavatava and the owner is Mr Suliasi Vunibakarua.

Q: So, a Captain must register their boat whilst if they intend to use it for fishing?

A: Yes my Lord.

Q: So, what can you say about the vessel FOZU 2 that you had apprehended on March 24, 2018 not being registered in the Master Register? What can you say about that?

A: The Ministry does not have any records of the registration being done within any of our Fisheries Stations so, I would say that it was illegally using the vessel registration number from our Ministry and also using it for illegal fishing purposes, my Lord.

(23) **The transcript of Mr. Tora's evidence in chief contains this ; (Page 31 to 34 of the transcript of evidence)**

Q: Thank you. In terms of your processes in wharf to procure what are the procedures involved as you mentioned you are a Fishing License Officer, what are the procedures involved in prosecuting a Fishing License?

A: The process of obtaining a Fishing License, first of all, the Fisherman has to go to the, all our fishing areas are divided into customary fishing grounds. So, fisherman have to go to the customary fishing right owner, get a consent from them and then they have to go to the Roko Tui for the repercussion from the iTaukei Affairs and they go to Commissioner Western, who issues the permit. After they obtain the permit then they'll come to Fisheries. And when in Fisheries, when they bring their permit, they'll have to bring it with other requirements. So, with the permit they have to bring an ID, birth certificate, they have to bring two passport sized-photos. They have to bring, if they are, if they will be using a vessel, they have to bring survey certificate of the vessel from the Maritime Safety Authority of Fiji and a Registration Certificate and confirmation from MSAFF that they already surveyed the fishing vessel. With all those requirements they will process, then you'll process a fishing license then we'll issue them with a number like WL and certain numbers and then we'll ask them to show us the number. They'll have to write their number on the boat and when we have sighted the number then we can issue the License to the Fisherman.

Q: So, where is all these information recorded?

A: Yes, we have a Master register that we enter the details of all the Fisherman that have License.

Q: So, that means Captain must register all the details in the Master Register?

A: Yes.

Q: My Lord, with the leave of the Court, may I show the Master Register. It is annexed in our bundle of documents as 1.. My Lord, I'm also giving you an enlarged version of the document that is, of in our annexure for the Court's benefit.

Q: If you could just please inform the Court what document is before you?

A: This a copy from our Master Register of Fishing License.

Q: Can you please inform the Court of the information that is in the document?

A: In this Master Register we record the date when the vessel was registered with us. We also record the vessel registration number and the name of the Captain or the owner, the address, the fishing licence number that was issued, the description of the vessel, the type of vessel, the outboard engine, the number of, the phone numbers, their private number, their revenue receipt number, the fishing area and the fishing method that they use.

- Q: In this Master Register, has the name, the Vessel FOZU 2 been recorded or as the information with the Fisheries Department what can you inform the Court?*
- A: In our Master Register, we don't write the name of the vessel because that's the registration by, we always keep it in our file record but we don't write it in our Master Register because FOZU 2 is registered under MSAFF but for us Fisheries we register the number WL 141.*
- Q: So. WL141 which was identified by you that's being used that you had apprehended with the Police Department, what information can you relate to this Court based on your Master Register?*
- A: For this Master Register, we don't have the number FOZU 2.*
- Q: Why not?*
- A: Because according to our records, in our file when they registered Jone Cakautavatava it was registered under another vessel.*
- Q: So, Jone Cakautavatava did not come to the Registry Department to register the vessel that was confiscated by the Fisheries Department?*
- A: Yes, he did not come and register in 2018.*
- Q: So, is that the breach of the Act itself?*
- A: Yes. That shows that boat wasn't licenced while it was fishing on that day.*
- Q: Nut he used WL 141 in someone else's boat?*
- A: Yes. 141 was written in the FOZU 2 without our knowledge. The Captain has to come to us to re-endorse that number with the other boat.*
- Q: And what procedures does that have to follow with the registration of the Fishing licence? Does the Captain brings with all other documents? What else?*
- A: The boat owner has to come to us for us to change the registration from the previous vessel o the next vessel.*
- Q: Was this information that you have related had been done in this case?*
- A: It was not done Sir.*
- Q: Just for the record's benefit, what does WL 141 means?*
- A: WL 141 means Western Lautoka.*
- Q: And 141?*
- A: 141 is the number, series of numbers.*
- Q: In the Master Register, if you can just inform the Court, who the description as to the Captaincy. What's the name of the WL 141*
- A: 141 under the Master Register has to be Captain by Jone Cakautavatava.*

Q: And it is in this record?
A: Yes.

Q: And what else is in this record?
A: We also have the name of the boat owner written underneath, Suliasi.

Q: So, the description does not match the Vessel FOZU 2?
A: Yes.

(24) The boat, its apparatus and the crew had not been licensed to fish in Fiji waters. The highly incriminatory circumstantial evidence (See, paragraph 13 above) creates **a reasonable suspicion** that five people on board may have been involved in employing fishing boat named FOZU II in fishing in Fiji waters without license and may have collected, caught and dived for fish using underwater breathing apparatus. Having arrested the boat, its apparatus and having sold the catch of fish, the charges were laid. [Lautoka Magistrate's Court Criminal Case No. 567/18].

(25) It is pertinent to note Section 7(1)(c) of the Fisheries Act, Cap 158 which provides;

"Any licensing officer, police officer, custom officer, honorary fish warden and any other officer empowered in that behalf by the Minister, may, for the purpose of enforcing the provisions of this Act-

(c) **where there is reasonable suspicion that any offence has been committed, take the alleged offender, the vessel, apparatus and catch, without summons, warrant or other process, to the nearest or most convenient police station or port. The vessel and apparatus may be detained pending trial of the offender and the catch may be sold and the proceeds of the sale detained pending such trial; and thereafter any vessel, apparatus or money so detained shall, unless forfeited under the provisions of Section 10(7), be returned to the person from whom the same was taken"**.

(Emphasis added)

(26) **I find that** under section 7(1) (c) of the Fisheries Act, the defendants are empowered to **take or seize** the fishing boat because the **circumstantial evidence** of Mr. Tora and (Ms.) Shaw created a **reasonable suspicion** that the following offences have been committed by the five persons on board.

- Employing boat named **FOZU II** in taking fish from Fiji fisheries waters without licence ; contrary to Section 5(3) to be read with section 10 (1) of the Fisheries Act, Cap 158.
- Collecting, taking or diving for fish using underwater breathing apparatus without licence ; contrary to section 4 (1) (a) of the Fisheries (Registration

on use of underwater breathing apparatus) Regulations , 1997 to be read with Section 10(2)(c) of the Fisheries Act, Cap 158

- (27) **I conclude that** the seizure by the first and the second defendant of fishing boat named FOZU II, underwater breathing apparatus and the catch of fish is lawful and in accordance with Section 7(1)(c) of the Fisheries Act.
- (28) **I conclude that** the fishing boat named “FOZU II” was seized by the first and the second defendants on 24-03-2018 pursuant to Section 7(1) (c) of the Fisheries Act, Cap 158 since the **circumstantial evidence** of Mr. Tora and (Ms.) Shaw created a **reasonable suspicion** that the fishing boat named **“FOZU II” has been employed** to take fish from Fiji fisheries waters without licence ; contrary to Section 5(3) to be read with section 10 (1) of the Fisheries Act, Cap 158. Furthermore, there was a **reasonable suspicion** that the five persons on board may have used underwater breathing apparatus (without license) to collect, catch and dive for fish contrary to Regulation (4) (1) (a) of Fisheries Regulations 1997 read with Section 10(2)(c) of the Fisheries Act, Cap 158.

Whether there was a prolonged detention of the plaintiff’s fishing boat without cause by that first and the second defendants?

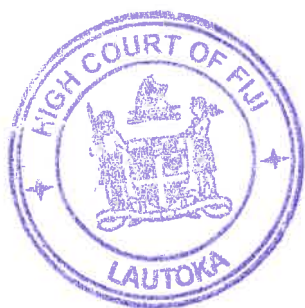
- (29) The defence witness No. 4, ASP Mr Naqica told Court that he had directed Detective Constable Moses (defence witness no. 3) to escort four alleged offenders to the Lautoka Police Station for questioning. The four alleged offenders were caution interviewed and charged by the police. The four alleged offenders namely Filipe Kinisi, Maciu Tiko, Eroni Masi and Vanavasa Qarau were each charged with one count of taking fish without license and one count of illegal use of fishing apparatus. The charge sheet and the record interview were tendered to Court as evidence. (Exhibit DEX - 6 and DEX 7A to 7E).
- (30) Section 10(7) of the Fisheries Act Cap 158 provides that the Court may order forfeiture of any vessel, apparatus or catch or the proceeds of sale of any catch, if such vessel or apparatus was employed in the commission of an act “*proved to be an offence under this Act*”.
- (31) As stated in paragraph 26 and 28 above, the highly incriminatory circumstantial evidence creates a reasonable suspicion that the fishing boat named FOZU has been employed to take fish from Fiji Waters without licence and therefore, the fishing boat FOZU is the subject matter in the criminal proceedings in the Lautoka Magistrates Courts. An order for forfeiture of the plaintiff’s fishing boat can be made by the Court after finding of guilt. Forfeiture of the boat is one of the penalties provided for if there is a conviction. On conviction the Court has discretion to forfeit the fishing boat under Section 10(7) of the Fisheries Act, Cap 158.
- (32) **As I understand Section 7(1) (c) of the Fisheries Act, the first and second defendants are empowered to detain the fishing boat named “FOZU II” pending the trial in Lautoka Magistrate Court Criminal Case No. 567/18. The criminal trial is still pending in the Lautoka Magistrate Court.**

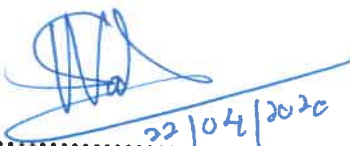
- (33) **Therefore, I find that the detention of fishing boat named “FOZU II” by the first and second defendants is lawful and in accordance with Section 7(1) (c) of the Fisheries Act.**
- (34) I note that the Magistrate of Lautoka has made an Order on 21-11-2018 to release the boat to the plaintiff pending trial. The plaintiff alleges that the first and second defendants neglected to return the boat until 31-01-2019. The plaintiff is claiming loss of income for 80 days from the date of seizure by the first and second defendants, i.e, 24-03-2018. It is important to bear in mind that the Magistrates Court of Lautoka took the boat into courts custody on 25-03-2018. Since then, the fishing boat was in the custody of the Magistrates Court.
- (35) As stated above, the fishing boat was seized on 24-03-2018. The fishing boat is the subject matter in the proceedings in Lautoka Magistrates Court Criminal case No. 567/18. Pursuant to Section 7(1) (c) of the Fisheries Act, the first and the second defendants have powers to detain the fishing boat named “FOZU II” until the conclusion of the hearing in the criminal case pending in the Lautoka Magistrates Court. The forfeiture of the fishing boat is one of the penalties provided for if there is a conviction. (See, Section 10 (7) of the Fisheries Act.) **On a conviction, the Magistrate Court has discretion to forfeit the fishing boat. Whether it does or does not forfeit, it is for the Criminal court to decide. If the first and the second defendants release the fishing boat pending the hearing of the criminal case in the Lautoka Magistrates Court, then such an act would be restraint on the exercise of the powers of the Criminal Court.**
- (36) It is critical to note that there is no link between the fishing boat “FOZU II” and the plaintiff since the plaintiff failed to produce the registration certificate. The fishing boat is not registered with the plaintiff to date. Generally, the **registration certificate** acts as proof of ownership. It is true that the plaintiff has lodged an application for registration on 05/10/2017. But no certificate of registration has been issued to date. The plaintiff does not have a required legal standing to seek damages for the loss of income without showing the proof of ownership. Put another way, the plaintiff could not establish that his name is on the title of the Fishing boat “FOZU II” to seek damages for the loss of income.
- (37) The plaintiff says that in February 2018 he leased the boat named “FOZU II” to a **licensed fisherman by the name of Jone Cakautavatava** at the rate of \$80.00 per day. (Ms) Shaw, the defence witness told Court that Jone Cakautavatava was not on board at the time of the detection. (See, page 62 of the transcript of hearing). According to plaintiffs exhibit PE-7, the fishing License No. 61678 had been issued to Jone Cakautavatava who is the Captain of the fishing vessel no. WL-141. As per the Master (record) Register (DEX-1,) one “Suliasi” is the owner of the vessel registered No. WL-141. The model of vessel registered no WL-141 is R5 x 5, 40HP. The model of vessel FOZU II is E75BMHOL, 75 HP, two distinct fishing boats.

That being the case, the fishing boat "FOZU II" had no fishing licence and it involved in an unlawful removal of Fiji's precious resources for commercial purpose. I consider this offending to be serious.

(G) ORDERS

- (1) The plaintiff's claim is dismissed.
- (2) The plaintiff is ordered to pay costs of \$2,000.00 to the defendants within 14 days from the date of this judgment.




.....
Jude Nanayakkara
[Judge]

22/04/2020

At Lautoka
Wednesday, 22nd April, 2020