

STATE v MANOJ KUMAR and Anor

HIGH COURT — MISCELLANEOUS JURISDICTION

5 SHAMEEM J

22 April, 13 May 2003

[2003] FJHC 206

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Practice and procedure — applications — restraining order — whether a restraining order involving a foreign property can be granted in Fiji — whether the definition of property under the Fiji Proceeds of Crime Act includes foreign property — whether the Mutual Assistance Act provides for a restraining order to be enforced in a foreign country — Mutual Assistance Act 1997 ss 29, 29(c) — Proceeds of Crime Act 1997 ss 2, 34, 35, 39, 42.

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The Director of Public Prosecutions (DPP) applied for a restraining order in respect of money held in the bank accounts of the two Respondents. The High Court granted the application. The DPP filed a further application to restrain money held in a New Zealand bank account in the name of the brother of the 1st Respondent. The grounds for both applications are that they used the money to defraud their employer. The counsel for Respondents objected to the order of restraint on the ground that such order cannot be granted to a foreign property. He submitted that the application should be a foreign restraining order in the jurisdiction where the property was found. The counsel for the director argued that the latter can either apply for a restraining order in Fiji or make an application in the foreign jurisdiction.

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Held — (1) The Fiji statute appears deliberately to omit reference to property abroad in its definition section which suggests that under s 34(1) of the Act, a restraining order can only be made in respect of property in Fiji. The DPP cannot either apply for a restraining order of a foreign property in Fiji or in the foreign country.

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(2) The Mutual Assistance Act does not grant the High Court of Fiji to issue restraining orders in respect of foreign property. The section which enables the High Court to issue restraining orders is s 34 of the Proceeds of Crime Act. That section fails to provide for extra-jurisdictional orders, and the definition of property does not include property found abroad.

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(3) The Director of Public Prosecutions may make an appropriate application in New Zealand under s 60 of the New Zealand Mutual Assistance in Criminal Matters Act (1992). If it was indeed the intention of the State law offices to give the Fiji Courts the same powers which have been given to the New Zealand and Australian Courts, then consideration must be given to the amendment of the definition of “property” in s 2 of the Proceeds of Crime Act to correspond with the New Zealand and Australian definitions.

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Application dismissed.

Cases referred to

Pepper v Hart [1992] 3 WLR 1032, not followed.

State v Ross William MacArthur HBM Case No 10 of 2002, considered.

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P. Bulamainivalu for the Applicant.

G. O’Driscoll for the Respondents.

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Shameem J. On the 11th of April, 2003, the Director of Public Prosecutions applied, under ss 34 and 39 of the Proceeds of Crime Act 1997, for a restraining order in respect of money held in the bank accounts of the two Respondents.

There were three bank accounts, held in the Westpac Bank, and Colonial Bank in Fiji. I granted the application on the 15th of April, but ordered that the papers be served on the Respondents for further hearing on the 30th of April.

5 The Director of Public Prosecutions then filed a further application, this time to restrain money held in a New Zealand bank account in the name of the brother of the 1st Respondent, one Hemant Kumar. The account is at the ANZ Bank in Papatoetoe, Auckland in the sum of NZ\$169,000. The notice of motion (filed on the 16th of April 2003) also seeks to restrain all property in the name of the 1st Respondent. The grounds for both applications are set out in the affidavit of
10 Detective Inspector Luke Navela. It states that the Respondents have both been charged with Fraudulent Conversion contrary to s 279 of the Penal Code. The charge alleges that the Respondents, between December 1999 and December 2002 wrote false cash cheques to the total value of \$330,309.91 and used that sum for their own use, thus defrauding their employer, Carpenters Shipping Ltd.

15 The affidavit also states that the 1st Respondent operated two bank accounts at the Westpac Bank in New Zealand in his own name, and that between January and April 2002, he withdrew the proceeds of the false cheques alleged in the charge from his Colonial (Fiji) Bank Account, and deposited the proceeds into his
20 New Zealand Westpac Bank Account. He then allegedly withdrew a total of NZ\$169,000 on the 7th of April 2003 and deposited that sum into the account of his brother at the ANZ Bank, Papatoetoe Branch in New Zealand. The account number is 01 0234 0033083-55.

It is in respect of this account that the restraining order is sought.

25 Section 34 of the Proceeds of Crime Act provides as follows:

34(1) Where a person (in this Division called the “defendant”):

- (a) has been convicted of a serious offence, or
- (b) has been, or is about to be, charged with a serious offence,

30 the Director of Public Prosecutions may apply to the Court for a restraining order under subsection (2) against any realisable property held by the defendant or specified realisable property held by a person other than the defendant.

(2) An application for a restraining order may be made *ex parte* and shall be in writing and accompanied by an affidavit stating:

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- (a) where the defendant has been convicted of a serious offence — the offence of which the defendant was convicted, the date of the conviction, the court before which the conviction was obtained and whether an appeal has been lodged against the conviction;
 - (b) where the defendant has not been convicted of a serious offence — the
40 offence with which the defendant is, or is about to be, charged and the grounds for believing that the defendant committed the offence;
 - (c) where the defendant is about to be charged with a serious offence — the grounds for believing that the defendant will be charged with a serious offence within 48 hours;
 - 45 (d) a description of the property in respect of which the restraining order is sought;
 - (e) the name and address of the person who is believed to be in possession of the property;
 - (f) where the application seeks a restraining order against property of the
50 defendant — the grounds for the belief that the property is tainted property in relation to the offence or the defendant derived a benefit directly or indirectly from the commission of the offence; and

- (g) where the application seeks a restraining order against property of a person other than the defendant — the grounds for the belief that the property is tainted property in relation to the offence or is subject to the effective control of the defendant.

5 Section 35 provides:

(1) Subject to this section, where the Director of Public Prosecutions applies to the Court for a restraining order against property and the Court is satisfied that:

- 10 (a) the defendant has been convicted of a serious offence or has been charged with a serious offence or will be charged with a serious offence within 48 hours,
- (b) where the defendant has not been convicted of the offence — there are reasonable grounds for believing that the defendant committed the offence,
- 15 (c) where the application seeks a restraining order against property of the defendant — there are reasonable grounds for believing that the property is tainted property in relation to the offence or that the defendant derived a benefit directly or indirectly from the commission of the offence, and
- (d) where the application seeks a restraining order against property of a person other than the defendant — there are reasonable grounds for believing that the property is tainted property in relation to the offence or that the property is subject to the effective control of the defendant, the Court may make an order:
- 20 (e) prohibiting the defendant or any person from disposing of, or dealing with, the property or such part thereof or interest, except in the manner specified in the order; and
- (f) at the request of the Director of Public Prosecutions, where the Court is satisfied that the circumstances so require — that the Attorney-General to take custody of the property or such part thereof and to manage or otherwise deal with all or any part of the property in accordance with the directions of the
- 25 Court.

(2) An order under subsection (1) may be made subject to conditions as the Court thinks fit and, without limiting the generality of this section, may make provision for meeting, out of the property or a specified part of the property:

- 30 (a) the person's reasonable living expenses (including the reasonable living expenses of the person's dependants (if any)) and reasonable business expenses;
- (b) the person's reasonable expenses in defending a criminal charge and any proceedings under this Act; or
- 35 (c) other specified debt incurred by the person in good faith; but the Court shall not make such provision unless it is satisfied that the person cannot meet the expenses or debt concerned out of property that is not subject to a restraining order.

(3) In determining whether there are reasonable grounds for believing that property is subject to the effective control of the defendant the Court may have regard to the matters referred to in subsection 25(2).

(4) Where the Attorney-General is given a direction under paragraph (1)(f), the Attorney-General may do anything that is reasonably necessary for preserving the property and for this purpose may exercise any power that the owner of the property could exercise and do so to the exclusion of the owner.

45 (5) Where the Director of Public Prosecutions applies to the Court for an order under subsection (1), a witness shall not be required to answer a question or to produce a document if the court is satisfied that answering the question or producing the document may prejudice the investigation of, or prosecution of a person for, an offence.

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Section 29 of the Mutual Assistance Act 1997 provides:

Fiji may request an appropriate authority of a foreign country to make arrangements for the enforcement of —

- 5 (a) a forfeiture order made in Fiji against property that is believed to be located in that foreign country,
- (b) a confiscation order made in Fiji where some or all of the property available to satisfy the order is believed to be located in that foreign country, or
- 10 (c) a restraining order made in Fiji against property that is believed to be located in that foreign country, if the order was made in respect of a serious offence.

10 Counsel for the Respondents objects not to the restraining order already made in respect of the Fiji bank accounts, but to the granting of a restraining order in respect of a New Zealand bank account. His objection is that the Proceeds of Crime Act does not provide for restraining orders to be granted in respect of
15 foreign property. Instead he submits, the Attorney-General must apply for a foreign restraining order in the jurisdiction where the property was found. He further submits that since Hemant Kumar is not charged with any offence, an order cannot be made in respect of his property.

20 Counsel for the Director, in both written and oral submissions, argued that the Director could either apply for a restraining order in Fiji, in respect of property abroad, or make an application in the foreign jurisdiction. He said that this was possible because s 29(c) of the Mutual Assistance Act provides for the enforcement in a foreign country (subject to a reciprocal arrangement) of “a
25 restraining order made in Fiji against property that is believed to be located in that foreign country, if the order was made in respect of a serious offence”. There is no dispute that the Respondents are charged with a serious offence, as defined in s 3 of the Proceeds of Crime Act. There is dispute as to whether the money held in the New Zealand bank account has been shown to be “tainted property” within the meaning of both the Proceeds of Crime Act and the Mutual Assistance
30 Act. As for this latter objection, s 34 of the Proceeds of Crime Act allows an order to be made in respect of any specified realisable property whether it is held by the defendant or some other person. There is therefore no substance in this objection, particularly when the affidavit of Luke Navela shows a clear link between the “tainted property” in Fiji, and the bank account in New Zealand.

35 I asked counsel to assist me by referring me to similar provisions in countries with which Fiji has reciprocal arrangements, which have been used by judges to issue restraining orders in respect of property held in foreign countries. Counsel for the State referred me to the Australian Proceeds of Crime Act (1987) and the New Zealand Proceeds of Crime Act (1991) saying that both pieces of legislation
40 gave New Zealand and Australian courts jurisdiction to grant restraining orders in respect of property abroad (subject to enforcement procedures and reciprocal arrangements). He also referred me to *State v Ross William MacArthur Ex parte HBM Case No 10 of 2002* in which the Supreme Court of New South Wales granted a restraining order in New South Wales which was then enforced on the
45 application of the Australian Attorney-General, in Fiji. On the basis that Fiji must have reciprocal arrangements, State counsel submits that the Fiji courts have similar powers to grant extra-jurisdictional restraining orders in respect of property abroad.

50 A perusal of the documents annexed to State counsel’s submissions, shows that the application in the *MacArthur* case was not for the enforcement of a restraining order made in NSW in respect of monies held in a bank account in

Fiji, but was for a restraining order in respect of property in Fiji which was alleged to be tainted property in respect of a serious offence committed in NSW.

Under “Orders Sought”, the affidavit of Josaia Naigulevu states:

5 A Restraining Order is therefore sought against the defendant Ross William MacArthur in respect of the realisable property set out in the schedule of property contained in paragraph 8 herein and such other accounts in his name.

The “Request for Assistance in a Criminal Matter” made by the Australian Government there is reference to the *enforcement* of a restraining order made by
10 the NSW Supreme Court in respect of the property of Ross William MacArthur. However the order itself refers to “all the property of Ross William MacArthur” and the schedule to the order makes reference only to property in Australia. Further, s 43 of the Australian Proceeds of Crime Act allows the Supreme Court to make restraining orders in respect of all property of the defendant, the
15 definition of “property” being wide enough to include foreign property.

In the Australian Act, “property” is defined as follows:

... real or personal property of every description, whether *situated in Australia or elsewhere* and whether tangible or intangible and includes an interest in any real or
20 personal property. [My emphasis.]

In New Zealand, the High Court, under s 42 of the Proceeds of Crime Act may make a restraining order against any property. “Property” is defined in s 2 of the Act. The definition is as follows:

25 “Property” means real or personal property of any description, whether *situated in New Zealand or elsewhere* and whether tangible or intangible; and includes an interest in any real or personal property. [My emphasis.]

In comparison, the Fiji Proceeds of Crime Act defines “property” as follows:

30 “property” includes money or any other property real or personal, things in action or other intangible or incorporeal property.

While it is therefore quite correct that the provisions for making restraining orders are the same or similar in New Zealand, Australia and Fiji, the Fiji statute (it appears deliberately) omitted reference to property abroad in its definition section which suggests that under s 34(1) of the Act, a restraining order can only
35 be made in respect of property in Fiji. I therefore cannot accept that the DPP may either apply for a restraining order (in respect of foreign property) in Fiji or in the foreign country. I read s 29(c) of the Mutual Assistance Act to refer to the enforcement of a restraining order made in Fiji in respect of property which is later found to be located in a foreign country. Section 29(c) allows the
40 Attorney-General to then make an application in the foreign country for enforcement of that order because the property is subsequently found in the foreign country. I do not consider that s 29(c) enables the High Court of Fiji to issue restraining orders in respect of foreign property. The section which enables the High Court to issue restraining orders is s 34 of the Proceeds of Crime Act.
45 That section fails to provide for extra-jurisdictional orders, and the definition of property does not include property found abroad.

The result of my finding is that while the Australian and New Zealand courts have powers to make orders in respect of property abroad, the Fiji courts do not. Instead, the Fiji Attorney-General must, as the law currently stands, make an
50 application under the law of the foreign country for restraining orders in respect of property in that country.

State counsel submitted that I should give to s 34 of the Proceeds of Crime Act, a purposive interpretation, which would give effect to the need to have uniform, reciprocal arrangements in the region. He referred me to *Pepper v Hart* (1992) 3 WLR 1032, a decision of the House of Lords. In that case, the Inspector of Taxes had decided that school-teachers in a public school, whose sons were educated at the school at a special price, were liable to be taxed on the concessions received in respect of the fees paid. The Appellate Committee of the Court of Appeal referred to the House of Lords the question whether the general rule excluding Hansard to assist in statutory interpretation should be relaxed. It was held that the rule excluding Hansard should be relaxed to assist in statutory interpretation where legislation was ambiguous or obscure or led to an absurdity, where Hansard contained statements by the minister promoting the Bill and where the statements in Hansard were clear. It was held that the school teachers were assessable on the benefits, that the relevant legislation was ambiguous and reference could be made to clear Ministerial statements, to clarify the ambiguities and that Hansard confirmed that the purpose of the statute was to assess “in-house” benefits concerning education for teachers’ children on the costs to the employer (which were marginal).

I do not consider that this decision assists counsel. Section 34 of the Proceeds of Crime Act is clear and unambiguous. It does not provide for restraining orders in respect of property abroad. Extra-jurisdictional powers must be provided for specifically. The definition of “property” does not refer to property out of Fiji. The Mutual Assistance Act provides a mechanism for the enforcement of restraining orders where the property shifts subsequent to the order made. Fiji can also apply for a restraining order directly in the New Zealand Court under the New Zealand legislation. My reading of s 34 of the Proceeds of Crime Act does not hamper the operation of the Act nor does it lead to an absurdity, nor has State counsel referred me to any Hansard reports suggesting that Parliament intended some other interpretation of the section.

The Director of Public Prosecutions may make an appropriate application in New Zealand under s 60 of the New Zealand Mutual Assistance in Criminal Matters Act (1992). Further, if it was indeed the intention of the State law offices to give to the Fiji courts the same powers which have been given to the New Zealand and Australian courts, then consideration must be given to the amendment of the definition of “property” in s 2 of the Proceeds of Crime Act, to correspond with the New Zealand and Australian definitions.

This application fails and is dismissed in respect of the first item of the orders sought.

As to the second, which seeks a restraining order in respect of all property of Manoj Kumar, I have already issued a restraining order in respect of all known bank accounts of Manoj Kumar. The affidavit of Luke Navela fails to specify details of any other property he owns which may be tainted property. I believe that this order would have been a “catch-all” order allowing the DPP to apply for enforcement in New Zealand. In the circumstances, for the reasons I have already given, I do not consider that I have the powers to make such an order. If there is any other property in Fiji belonging to the Respondents, or belonging to some other person but shown to be proceeds of the serious crime with which the Respondents are charged, the DPP must make further application.

The restraining orders granted on 15 April 2003 are extended for 6 months from today. The orders will lapse if in the meantime the Respondents are acquitted or the charges are withdrawn or a confiscation order is made in respect

of the property within the 6-month period. If the DPP seeks further extension of the orders, he must make an application under s 44(2) of the Act.

Application dismissed.

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