

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBM 44 of 2018

BETWEEN : THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND : KUNAL EDWIN PRASAD

RESPONDENT

Counsel : Applicant: Ms. M.Khan
: Respondent: In Person
Date of Hearing : 18 February, 2019
Date of Judgment : 1st March, 2019

JUDGMENT

Catch Words

Non Conviction Base Forfeiture- Tainted Property- Sections 19E, 19C ; 4, 72, of Proceeds of Crime Act 1997, Civil Evidence Act, 2002

INTRODUCTION

1. This Application is for civil confiscation of money, kept as a production in regard to Magistrate's court action where the Plaintiff was discharged. The discharge of the Respondent, was due to main witness who was a foreign citizen, not being present in the court on the date of trial. Civil Confiscation is sought on non- conviction basis in terms of Section 19 E of Proceeds of Crime Act, 1997. The money that is subjected to this application was recovered from a third party in pursuant to statements made by Respondent and third party. Facts of this case are not disputed except the statement of the Respondent, which according to the Respondent was made involuntarily.

FACTS

2. The Respondent was charged for Damaging Property contrary to Section 369(1) of the Crimes Decree Number 44 of 209 and also for Theft contrary to Section 291(1) of the Crimes Decree Number 44 of 2009. The charges relate to breaking into a vehicle and stealing money inside it, while it was parked at Aquatic Centre.

3. The Particulars of the offences are given in the copy of the Charge filed in the Magistrate's Court in Case No 740 of 2012.
4. The alleged offences were committed on or around 30th April, 2012.
5. In pursuant to a statement made by the Respondent certain items were recovered and one such is money from a third party who had also made a statement.
6. According to the statement of third party, made to the Police he had obtained money from Respondent in early May, 2012 for a sale of his vehicle which was offered for sale some time.
7. The Respondent had paid \$3,900 to the third party in exchange of the vehicle and this amount was recovered as proceeds of crime and it is kept in the custody of Police, though the Respondent was discharged. Before the transfer of the vehicle was finalized it was recovered from the Respondent and had handed over the vehicle to third party and money paid by Respondent was recovered.
8. Applicant is seeking confiscation of \$3,900 despite Respondent being discharged in criminal action in Magistrate's Court. The Application is made in terms of Section 19E of the Proceeds of Crime Act, 1997.
9. The Respondent is claiming said \$3,900 and state that that was his 'honest income and savings earned as a Taxi driver', in his affidavit in opposition.
10. There is no evidence of Respondent being employed as a Taxi driver at any time and or any lawful employment at any time.
11. Search warrants issued to Banks in Fiji revealed that he did not have bank account. At the hearing Respondent stated that there is no law that require citizens to operate bank accounts and they are free to keep any amount of money.

ANALYSIS

12. This is an action based on Non Conviction Based Forfeiture (NCBF). Article 54 of United Nations Convention Against Corruption(UNCAC) obliges the parties to the convention to provide mutual assistance in regard to property acquired or involved in the commission of an offence and Article 54(1)(c)

'Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.'

13. Fiji is a signatory to UNCAC. Section 7(1) (b) of the Constitution of Republic of Fiji allows application of international law in relation to rights enshrined in Bill of Rights. So interpretation of provisions contained in relation to NCBF can take in to consideration international law as well as best practice in other jurisdictions. Sections 12 and 27 of the Constitution of Republic of Fiji deals with unlawful seizure of

property and unlawful acquisition of Property Rights, respectively.

14. It should also be noted that number of international treaties contain provisions for forfeiture¹, of proceeds of crime. Even before UNCAC there were provisions for confiscation of proceeds of crime including UK and USA.
15. European Human Rights Commission, No. 12386/1986 determined that NCBF is consistent with the presumption of innocence and also with property rights enshrined in European Human Rights Convention.
16. *Attorney General of Ontario v. Chatterjee* [2007] ONCA 406 Ontario Court of Appeal held that NCBF does not violate property rights. On appeal to Canadian Supreme Court the decision was upheld (see *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624. In this case there was no criminal action filed due to lack of evidence. In an arrest relating to another offence, the appellant was found having possession of items associated with drug (Marijuana) trade and cash and they were confiscated under NCBF.
17. There are two rationales for forfeiture. One is that no person involved in unlawful activity should derive benefit from the illegal activity. Second, victims of crime should be compensated adequately by either restoration of property or payment to the amount that is equal to the loss. There are two types of forfeitures and they are criminal and civil forfeitures.
18. For a Criminal Forfeiture it is imperative to obtain a conviction and for a civil forfeiture (NCBF) it is not necessary to obtain a conviction or even to charge for an offence.
19. An action for criminal forfeiture is an action *in personam* and civil forfeiture is action *in rem*. An action for civil forfeiture can be made when there is a criminal prosecution. NCBF is not depended on criminal action or conviction. The burden of proof is balance of probability. (see sections 19E and 72 of Proceeds of Crime Act, 1997).
20. NCBF is possible when the accused is dead, or fugitive or even cannot be found. It may also be applied when there is insufficient evidence for prosecution beyond reasonable doubt or after discharge or acquittal. This is possible because in a NCBF is an action against the property not the person. The proof required is that is a tainted property.
21. Section 19 E of the Proceeds of Crime Act, 1997(The Act) states as follows:

"Non conviction based forfeitures order for tainted property"

19E (1) Subject to subsection (2), where the Director of Public Prosecutions

¹ United Nations Convention against Transnational Organized Crime (2000; UNTOC), United Nations See Article 14, Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988; Vienna Convention)

applies to the court for an order under this section and the court is satisfied on a balance of probabilities that the property is tainted property the court may order that the property, or such of the property as is specified by the court in the order, be forfeited to the state such of the property as is specified by the court in the order, be forfeited to the State.

(2) Where a person claiming an interest in property to which an application relates satisfies the court that the person

(a) has an interest in the property;

(b) did not acquire the interest in the property as a result of any serious offence carried out by the person and

(i) had the interest in the property;

(ii) acquired the interest for fair value after the serious offence occurred and did not know or could not reasonably have known at the time of the acquisition that the property was tainted property.

The court shall order that the interest shall not be affected by the forfeiture order and the court shall declare the nature and extent of the interest in question.

(3) _____

(4) The validity of an order under subsection(1) is not affected by the outcome of criminal proceedings of an investigation with a view to institute such proceedings in respect of an offence with which the property concerned is in some way associated.

(5) Section 7, 8, 11(2), (3), (4), and (5), 12, 13, 16 and 17 shall apply with the appropriate modifications as are necessary to an application for a forfeiture order under this section." (emphasis added)

22. In order to obtain a forfeiture of property Applicant should satisfy that the property is 'tainted property' on the balance of probability.

23. The word 'tainted property' in relation to serious offences or a foreign serious offence' is defined in Section 4 of the Act as follows as:

"(a) property used in, or in connection with, the commission of the offence;

(b) property intended to be used in, or in connection with, the commission of the offence;

(c) proceeds of crime;"

24. In terms of the said definition the Applicant needs to prove either the money recovered from the third party which the Respondent claims as his, is either 'proceeds of crime' or 'property used in or in connection with, the commission of the offence'.

25. The Applicant states \$3,900 is proceeds of crime. This amount was recovered in pursuant to statements made by the Respondent and also from whom the money was recovered. The criminal action No 740/12 before Resident Magistrate, did not proceed as the main witness who was a foreign national had left the jurisdiction and did not turn up for trial.

26. The words 'proceeds of crime' is defined in Section 4(1A) of the Act, which reads;

(1A) In this Act, in relation to serious offence or a foreign offence, "proceeds of crime" means property or benefit that is –

- (a) Wholly or partly derived or realised directly or indirectly by any person from the commission of a serious offence or a foreign serious offence;*
- (b) Wholly or partly derived or realised from a disposal or other dealing with proceeds of a serious offence or foreign serious offence; or*
- (c) Wholly or partly acquired proceeds of a serious offence or a foreign serious offence, and includes.....*

27. The Applicant needs to prove on balance of probability that the sum of \$3,900 was wholly or partly derived or realised directly or indirectly by any person from the commission of a serious offence or that it was *'wholly or partly derived or realised from a disposal or other dealing with proceeds of a serious offence.'*

28. This application for confiscation of property is made in terms of Section 19C of Proceeds of Crimes Act, 1997.

[PC 19C] Application for a non-conviction based forfeiture order for tainted property

19C The Director of Public Prosecutions may apply to a Court for an order forfeiting to the State all or any of the property that is tainted property.

29. There is no dispute as to Respondent purchasing a motor vehicle for cash payment of \$3,900 from a third party around first week of May, 2012.

30. The alleged offence contained in the Charge was committed on 30th April, 2012. The Respondent was discharged from that offence, but that is not a bar for an application made in terms of Section 19E of the Act. The discharge of the Respondent was due to non availability of evidence. In *Assets Recovery Agency v. Woodstock*, [2006] EWCA Civ 741 the Court of Appeal of UK held that NCBF can be made ordered after the main witness recanted, and accused was acquitted.

31. According to the Charge one of the offence was regarding theft of cash. Cash can be readily converted, as the most liquid asset in the hand of a person who receive.

32. It is an admitted fact that Respondent paid \$3,900 to a third party to purchase a vehicle on the first week of May, 2012. This close to the charged offence of theft of money. There was no evidence of Respondent ever having a vehicle prior to this and or how he collected this amount.

33. In an application for NCBF the Respondent's economic background is relevant. Considering that amount the he had kept with him without depositing in a bank account, also needs an explanation.
34. In Fiji depositing such an amount in a commercial bank would also require disclose of source of funds under anti money laundering disclosure requirements, by financial institutions. The low threshold of disclosure of funds at the point of deposit not fulfilled, and Respondent had failed to prove that funds were from legitimate source.
35. On the balance of probability there is proof that money paid for purchase of vehicle, shortly after the date of offence in the Charge, had derived from the offence as there was no explanation as to the source of funds on the balance of probability.
36. The Respondent was unemployed and there was no evidence of Respondent having such an amount as savings with him. He had not adduced any evidence to prove that he was a Taxi driver. If he was employed as a Taxi driver he could easily state that to the Police in his statement and in his affidavit he could have at least stated the number of the taxi he drove or that he held a valid driving licence prior to 30.4.2012. In the absence of that there is no proof of that. By the same token, if he had a valid licence to operate a Taxi he could say so. If not, he needs to say who employed him.
37. The Respondent needs to prove on the balance of probability that money he paid to purchase a motor vehicle was not derived from a serious offence, considering that \$3,900 was paid shortly after 30.4.2012 and there was no permanent and or temporary employment for the Respondent and there is no source of funds.
38. According to Civil Evidence Act, 2002 hearsay evidence is admissible in civil proceedings. The investigating Police personnel who had deposed an affidavit had recovered this money from a third party. Respondent admit this fact and there is no dispute as to the purchase of a vehicle soon after 30.4.2012
39. In HER MAJESTY'S ADVOCATE, APPLICATION BY, FOR A CONFISCATION ORDER IN TERMS OF THE PROCEEDS OF CRIME ACT 2002 AGAINST COLIN COATES [2017] ScotHC² HCl 89 (15 November 2017) held,
- 'The judge would not be limited to information concerning the offence or offences of which the defendant had been convicted. Whilst there was undoubtedly the need in confiscation proceedings for very considerable flexibility, conversely they would be areas where strictness was appropriate. A fair outcome to all parties did not require a statutory straight jacket, more suitable for a trial, governing the admissibility of hearsay at that stage of confiscation proceedings.*
40. In order to prevent criminal activities the criminals should be brought to justice through punishment and also proceeds of crime should be confiscated. The fact that Respondent was not convicted due to non availability of main witness is not a reason to release funds recovered to Respondent.

² [https://www.baillii.org/scot/cases/ScotHC/2017/\[2017\]_HCl_89.html](https://www.baillii.org/scot/cases/ScotHC/2017/[2017]_HCl_89.html)

41. Respondent stated that his statement to the Police is not voluntary and his confession to the Police cannot be admitted in High Court. He had stated so in his affidavit in opposition.
42. I do not have to rely on his confession for NCBF. The fact that Respondent had bought a substantial asset soon after 30.4.2012 is admitted. He could not explain the source of funds on the balance of probability. He could not prove that he had any employment to save such an amount. On the circumstantial evidence it proves on the balance of probability that the sum of \$3,900 was tainted property and can be subject to NCBF.

CONCLUSION

43. The facts of Respondent paying \$3,900 to a third party in order to purchase a vehicle is admitted. This had happened soon after 30.4.2012. Respondent did not have even a bank account hence he needs to prove source of funds and there is no proof of that. On the balance of probability the Applicant had proved that \$3,900 retained in the custody of Raiwaqa Police station in relation to Magistrate's Court action 540/12 is tainted property and it is forfeited to the state. Considering circumstances I am not ordering any cost.

FINAL ORDERS

- a. \$3,900 retained in the custody of Raiwaqa Police station in relation to Magistrate's Court action 540/12 is forfeited to state.
- b. No costs.

Dated at Suva this 1st day of March, 2019.



Amul
Justice/Depth Amaratunga
High Court, Suva