

PAEK KYEONG YEOL v STATE

HIGH COURT — MISCELLANEOUS JURISDICTION

5 SHAMEEM J

26 September, 1 October 2003

[2003] FJHC 216

10 **Practice and procedure — applications — application for stay of execution of forfeiture order — whether forfeiture order can be stayed pending appeal — whether applicant has shown exceptional circumstance to justify grant of stay — Court of Appeal Act (Cap 12) ss 20(1)(e), 22, 22(7).**

15 Applicant, after pleas of guilty, was convicted and was sentenced to 10 counts of Taking Fish Without Licence from Fiji waters. Applicant's licence for 2003 had not yet been processed. The magistrate did not rule on prosecution's application for the forfeiture of the vessel. The fines were upheld on appeal but the vessel together with the fishing apparatus was forfeited. Applicant sought appeal against the order and to stay the order pending appeal.

20 **Held** — (1) A forfeiture order can be stayed pending appeal since it was a sentence for the purpose of the Court of Appeal Act, and there is a right of appeal in respect of it. (2) Applicant has not shown exceptional circumstances to justify the grant of a stay since the vessel had no valid fishing licence.

25 Application refused.
Cases referred to

Apaitia Seru v State Crim App No AAU 41 and 42 of 1999; *Mitchell v Abas* (1998) 100 A Crim R 103; *R v Dorset Quarter Sessions*; *Ex parte Randall* (1967) 51 Crim App R 33; *R v London Sessions*; *Ex parte Beaumont* [1951] 1 KB 557, considered.

30 *Pinson v Pinson* (1991) 5 PRNZ 177; *S Karan Construction Co Ltd v State* Misc Act No HAM 23 of 2001S, cited.

S. Valenitabua and *K. Vuataki* for the Applicant.

35 *P. Ridgeway* for the State.

Shameem J. This is an application for the stay of a forfeiture order in respect of a vessel, pending appeal. It is made under the inherent jurisdiction of the High Court, and by motion and the affidavit of Lee Kyung Sang, a Director of Deep Sea Fishing Corporation Ltd.

40 The history of the case is summarised in my judgment of 12 September 2003. On the 5 June 2003 after pleas of guilty, the Applicant was convicted on 10 counts of Taking Fish without Licence from Fiji waters, contrary to ss 5(3) and 10(1) of the Fisheries Act. The facts outlined in the Magistrates' Court were that the vessel "Sun 5" had entered Fiji waters on 10 separate days and fished there
45 without a valid licence. The prosecution said that the total value of the catch was \$20,261.30 but the defence said that it had only been worth \$17,000. The proceedings also revealed that the Applicant had been licensed to fish in Fiji waters in 2002 and that although an application had been made for 2003, it had not been processed. The prosecution made an application for the forfeiture of the
50 vessel, but the learned magistrate did not rule on it. He sentenced the Applicant to \$250 on each count.

On appeal the fines were upheld but I ordered forfeiture of the vessel, and its fishing apparatus. The Applicant now purports to appeal against my order and asks me to stay the order pending appeal. The orders applied for are as follows:

- 5 1. Execution of the order for forfeiture of the fishing vessel “Sun 5” made in this Honourable Court on the 12th of September 2003 be stayed pending final determination in the Fiji Court of Appeal, of the appeal against that Order.
2. The Master and/or Owner of the fishing vessel “Sun 5” be allowed to sell its catch, if any, upon return from the current fishing trip for the owner’s use to pay the crew’s wages and fishing expenses, among other things.
- 10 3. The fishing vessel “Sun 5” be allowed to continue fishing in the high seas, selling its catches and utilising the proceeds thereof pending final determination of the said appeal.

15 In his submissions, counsel for the Applicant agreed that there was no specific statutory provision allowing this court to stay a forfeiture order pending appeal, but submitted that there was an inherent power to make such an order. He further submitted that a refusal of such a stay would render the appeal nugatory because the forfeiture of the boat would lead inevitably to its sale by the State. He also submitted that the appeal was likely to succeed because it was a locally registered
20 vessel and because the present owner of the boat had only perfected the purchase after the offences were committed. He agreed that he had failed to draw this second matter to my attention at the hearing of the State’s appeal. Lastly he said that the sum of \$17,000 could be paid into court pending the appeal, but that the owner of the vessel were in no position to pay the market price of the boat
25 (\$400,000) into court. He said that despite this, the boat was unlikely to leave Fiji waters except for the purpose of fishing on the high seas.

Counsel for the State said that the Applicant had no standing in respect of the appeal because he was not directly affected by the forfeiture order. He said that the owner of the boat, Lee Kyung Sang was the person against whom the
30 forfeiture order was made, but that he was not a party to the appeal. He said that an appeal in the criminal jurisdiction of the Court of Appeal was not the correct procedure for the appeal and that it was therefore incompetent.

In any event, he said that Lee Kyung Sang had known about the illegal fishing activities and had already paid 70% of the purchase price when the offences were
35 committed. He also said that the State had filed a motion to strike out the appeal in the Court of Appeal and that it was listed for hearing before the Chief Justice on the 18th of November 2003.

Power to grant stay of forfeiture order.

40 Section 22 of the Court of Appeal Act (Cap 12) provides that any party to an appeal from the Magistrates’ Court to the High Court may appeal against the decision of the High Court to the Court of Appeal “on any ground of appeal which involves a question of law only (not including severity of sentence)”. There are no powers given to the High Court judge to stay orders made pending
45 appeal. Section 22(7) provides that a judge of the High Court “may in his discretion grant bail to any convicted person who is a party to such appeal”.

In *S Karan Construction Co Ltd v State* Misc Action No HAM0023 of 2001S, I considered these provisions in respect of an application for the stay of a payment of a fine. I decided that this court, and the Court of Appeal had powers to regulate their own processes to prevent abuses of them. I referred to the
50 decision of Smellie J in *Pinson v Pinson* (1991) 5 PRNZ 177 and held that I had powers to suspend any sentence pending an appeal against it.

In *Apaitia Seru and Anthony Frederick Stephens v State* Crim App No AAU0041-42 of 1999 Tikaram P considered his powers to stay a criminal trial in the High Court pending appeal to the Court of Appeal. It was agreed by all parties that the Court of Appeal Act did not give a single judge of appeal the power to
5 make a stay order. It was argued however that the court could either use its powers under its civil jurisdiction to stay execution of any order, or its inherent jurisdiction. The State submitted that there was no right of appeal from a preliminary ruling refusing stay because it was not a “final judgment of the High Court” for the purposes of s 121(2) of the Constitution. His Lordship held that he
10 had no power to stay a trial pending appeal, and that s 20(1)(e) of the Court of Appeal Act in relation to the stay of civil orders, had no application in a criminal appeal. He further held that the inherent jurisdiction of the court could not be invoked because it was the clear intention of the legislature not to give to the single judge the power to stay a trial pending appeal.

15 This latter case is not strictly on point, but it does illustrate that the inherent powers of a court should be exercised sparingly and that they must not offend the general statutory purpose of the appellate Act.

20 There is no provision in the Court of Appeal Act which suggests that sentences generally should not be stayed pending appeal. Further, where a sentence has a finality in execution, any appeal against it will be frustrated unless it is stayed. A stay may therefore be necessary to regulate and protect the appellate process.

25 In this case, State counsel submitted that a forfeiture order is not a sentence and cannot therefore be stayed. He referred me to *R v Dorset Quarter Sessions; Ex parte Randall* (1967) 51 Crim App R 33 and *R v London Sessions; Ex parte Beaumont* (1951) 1 KB 557 to support his submissions.

30 In *Randall* the applicant was ordered to pay compensation and was sentenced to Borstal training. He applied for certiorari to quash the sentences on the ground that he had already been sentenced to a compensation order. It was held by the Divisional Court that the order for compensation was not an order and that an order on conviction amounts to a sentence only when there is an express statutory provision to that effect. Under the Magistrates’ Court Act 1952, a “sentence” did not include any order of the court made on conviction.

35 In *Beaumont* the defendant pleaded guilty to a charge of obstructing a highway. The magistrate fined him, and because she believed that there was a risk of future similar behaviour, ordered him to enter into his own recognisance to be of good behaviour. It was held on appeal that the order was not one made as a result of conviction but was derived from general preventative powers given to magistrates and that therefore there was no right of appeal from it. In the course
40 of judgment the court considered what was “an order made on conviction” for the purpose of the definition of “sentence” under the Criminal Justice Act 1948. At 560, Lord Goddard said:

45 The words “any order made on conviction” mean in my opinion, an order made as a consequence of a conviction; and *Rex v London Sessions; Ex parte Metropolitan Police Commissioner* laid down in the clearest terms that an order for sureties was not a conviction and that there did not have to be a conviction for any offence to enable a justice to make such an order. As has been pointed out not only by Blackstone but in many cases, the order is in the nature of preventative justice. It is not a penalty for the offence for which the defendant was brought before the magistrate: the penalty for the
50 offence in the present case was the fine, but the magistrate before whom the defendant appeared, being satisfied that there was a likelihood of his repeating the offence, called on him to provide sureties against the repetition. She could have required sureties

although he was not charged with any offence, or had him brought up on another occasion for this purpose. In my opinion the orders against which the section contemplates that an appeal may be brought are those which a statute allows to be imposed as a consequence of conviction, such as orders disqualifying a person from holding a driving licence or a firearm or forfeiting goods which have been seized.

The Criminal Procedure Code allows appeals from “any judgment, sentence or order” of the Magistrates’ Court to the High Court. Section 308(7) of the Code provides that “an appeal may be brought under this section in respect of a sentence or order which includes an order for compensation, restitution, forfeiture, disqualification, costs, binding over, absolute or conditional discharge, probation or community service”.

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”.

An order for forfeiture under the Fisheries Act can only be made after a finding of guilt. It is therefore a sentence or penalty. There is a right of appeal from such an order from the Magistrates’ Court to the High Court, by virtue of s 308(7) of the Criminal Procedure Code. It is of course arguable that a refusal to make such an order is not appealable. However the State chose to appeal against such a refusal in this case, and presumably agrees that it was subject to the appellate process.

I find therefore that a forfeiture order is a sentence for the purpose of the Court of Appeal Act, and that there is a right of appeal in respect of it. It follows that it can be stayed pending appeal.

State counsel also submitted that the Applicant is not the owner of the “Sun 5” and that therefore he does not have the required standing to appeal the order. He informed me that he would be asking the Court of Appeal to strike the appeal out on this basis on the 18th of November this year. Since this is a matter already filed before the Court of Appeal for its determination, I consider that I should not decide on the question of standing. Instead having found that the order for forfeiture is a sentence, I now proceed to consider whether it ought to be stayed in this case.

The relevant principles are that there must be exceptional circumstances justifying stay, that there are some prospects of success and whether on a balance of convenience a stay ought to be granted. Counsel for the Applicant said that the owner of the vessel had bought it after the offences were committed and that he was therefore being unfairly penalised. He further said that the appeal had merits because I had failed to take into account the fact that the vessel was not a foreign-owned vessel. Finally he said that the appeal would be rendered nugatory if the forfeiture was not stayed. He said that the owner was unable to deposit into court the market value of the vessel but was prepared to deposit \$17,000, the price of the illegal catch.

I find these submissions less than compelling. The papers filed before the Magistrates’ Court failed to disclose the facts now being disclosed about the ownership of the vessel. A letter annexed to the affidavit of Lee Kyung Sang (LK2) shows that by 2 February 2003, Mr Lee had already paid 70% of the purchase price. The offences were committed between 26 May 2003 and the 11 March 2003. On the 2 February Mr Lee knew that the vessel had no valid fishing licence. As Brennan J said in *Mitchell v Abas* (1998) 100 A Crim R 103, at 6.6:

The forfeiture of things by which offences are committed goes back to the law of deodands, but the modern statutes which provide for the forfeiture of property owned by an innocent person are justified on the footing that the liability to forfeiture enlists the owner's participation in ensuring the observance of the law and precludes future use of the thing forfeited in the commission of the crime.

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The affidavit of Lee Kyung Sang is silent on the steps he took to ensure that the vessel did not fish in Fiji waters. At the hearing of the appeal, counsel failed to tell me of the change of ownership on the 13th of March 2003. However, given the contents of the letter dated "LK2" which Mr Lee wrote before the change of ownership, I do not consider that this new information would have made any difference to my decision to make an order for forfeiture. I do not consider that the Applicant has shown exceptional circumstances to justify the grant of a stay. On the balance of convenience I agree that the appeal may be frustrated without the stay order. However if the appeal is unsuccessful, and the vessel has left our shores and has not returned, what of the State's interests? The vessel is worth about \$400,000. The master wishes to take the vessel on fishing trips and keep the proceeds of any catches pending the hearing of the appeal. The only offer made by counsel is that \$17,000 can be deposited into court. This sum is clearly inadequate. If counsel had been in a position to agree to depositing \$400,000 into court, I would have been minded to order a stay in order to preserve the status quo until the Fiji Court of Appeal hears the appeal and/or the striking out application in November. However, counsel is not in a position to deposit that amount.

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In all the circumstances this application for stay of execution of the forfeiture order is refused.

Application refused.

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