

SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 356
MC 37/2020
(arising from CO18/2020)

In the matter between

DEGIRI MANESH SILVA DIWA DE SOUZA

and

LASANTHA KUMARA SILVA DIWA DALAGE
(rep. by Clifford André)

versus

THE REPUBLIC
(rep. by Joji John)

Neutral Citation: *De Souza & anor v R* (MC 37/2020 arising from CO18/2020) [2020] SCSC 356

(30 June 2020)

Before: Twomey CJ

Summary: Forfeiture of vessel under section 70 of Fisheries Act 2014 - application pursuant to section 153(B) 5 (b) of the Criminal Procedure Code

Heard: 30 June 2020

Delivered: 30 June 2020

ORDER

The application is unfounded and inadmissible and is therefore dismissed.

TWOMEY CJ

[1] On 1 June 2020, after the Second Applicant was convicted of the charge of using a foreign fishing vessel which is not licensed for fishing in Seychelles waters, he was sentenced to a fine of SR 1000 and the vessel in which he was fishing with all the fishing gear therein forfeited to the Republic of Seychelles.

[2] The present application is brought by the First Applicant who purports to be the owner of the forfeited vessel and the Second Applicant as the master of the vessel.

[3] In an affidavit supporting the application, the First Applicant depones that he is the owner of the vessel and that he is willing to pay a fine of not more than SR 400,000 so that his vessel can be released as he has a loan which is serviced from the proceeds of the vessel's activities and without which he will not be able to support his family. He further depones that he did not tell the Second Applicant to fish in Seychelles' waters and that he was not aware that the vessel was in Seychelles' waters. He prays for an order substituting the forfeiture of the vessel with a fine which he is willing to pay.

[4] The Second Applicant has also deponed that the First Applicant is the owner of the vessel and is requesting the Court to order a fine instead of forfeiture of the vessel.

[5] It is important at this juncture to bring to light the provision relied on by the Applicants for the substitution of a fine for the forfeiture as ordered by the Court. Section 153B(5)(b) of the Criminal Procedure Code (CPC) provides in relevant part:

“A person who, under this section claims an interest in any property in respect of which an application for forfeiture has been made may
...
(b) when the court has made an order for forfeiture, within 30 days after the order was made,
apply to the court ...for an order declaring the nature, extent and value of the applicant's interest and -
(c) directing the Republic to transfer the property to the applicant;
...”

[6] Mr. Joji John, learned State Counsel, has submitted that the application adopted by the Applicants is procedurally incorrect as the First Applicant's affidavit is not properly attested to. I agree. The Court cannot ascertain the veracity of the document which is only a photocopy of an affidavit without an apostille as is the supporting document of ownership of the vessel. It is therefore rejected.

[7] The only other document the Court can rely on for the application is the affidavit of the Second Applicant which although is properly attested to does not append any documents

showing proof of ownership of the vessel. The application therefore is inadmissible. Nevertheless, I am inclined to also comment on the merits of the application.

- [8] To contextualize the circumstances of the present application, it is useful to note that section 153 of the CPC provides for the forfeiture of the *corpus delicti* when it is the property of an offender and was used for committing an offence. Section 153 in general provides for the forfeiture of proceeds of crime. Section 153B (1) provides for an application by the Attorney General up to 90 days after the conviction of a person for an order for forfeiture in respect of the proceeds of the crime. Section 153B (5) provides for a person, whose property was forfeited, to apply to the court for an order declaring their interest in the same and directing the Republic to transfer the property to that person.
- [9] The conviction of the Second Applicant was made under section 58 of the Act in which provision both the master and the owner of the boat are liable to conviction for fishing without a licence. Section 70 provides the court with discretion to order forfeiture of the vessel in addition to any other penalty. Section 153 B of the CPC applies to forfeiture of proceed of crime. The question that arises is whether a forfeiture made under the Act can be set aside by section 153B(5)(b) of the CPC.
- [10] In this regard, learned State Counsel has submitted that section 153B cannot qualify the provisions of the Act as the latter provides for a special forfeiture regime and further that when the court made the forfeiture order on June 1 2020 it became *functus*. He submits therefore that the Court cannot vacate its order and substitute for it another.
- [11] Learned Counsel for the Applicants, Mr. Clifford Andre, has not advanced any submission why he considers section 153B applicable to forfeiture orders made under the Act.
- [12] It is clear from the facts of the offence as admitted by the Second Applicant that the vessel confiscated and forfeited was clearly not proceeds from crime as defined by section 153B (2) (a) and (b). It was a vessel used solely for the commission of an offence. Section 153B (5) b) is therefore not applicable to the vessel forfeited.

[13] In the circumstances, the application is unfounded and inadmissible and is therefore dismissed.

Signed, dated and delivered at Ile du Port on 30 June 2020

Twomey CJ