

IN THE SUPREME COURT OF SEYCHELLES

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**Reportable**

[2023] SCSC 537

CM 66/23

**FARIMA NORTIRA BARBIER**

*(rep. Mr. Basil Hoareau)*

**Applicant**

**Versus**

**THE REPUBLIC**

*(rep. Mrs. Hashini Gurusinghe Naidu)*

**Respondent**

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**Neutral Citation:**

**Before:** Govinden CJ

**Summary:** Application for release of vessel confiscated by state in criminal proceedings.

**Heard:** Affidavit

**Delivered:** 14th July 2023

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**ORDER**

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**R. GOVINDEN CJ**

The Applicant has brought an application before court seeking the release of the vessel 'FV **Fish Finder**' and granting the Applicant custody of the vessel, as the owner and proprietor of said vessel.

[1] The application is made by way of notice of motion supported by the affidavit of Farima Nortira Barbier (the Applicant).

**FACTS OF THE APPLICATION**

[2] The affidavit in support of the application avers as follows:

- i. The Applicant avers that she is the owner of the vessel, which she purchased on the 12 January 2020 from one Kevin Tirant for the price of Seychelles Rupee Five Hundred and Eighty Thousand (SR 580,000.00). The Applicant attached a copy of the Bill of Sale document to the Application marked as exhibit **FB1**.
- ii. The Applicant further also provided a copy of the local fishing vessel license, with licence number 170895, which permitted the vessel to be used for semi-industrial fishing in Seychelles waters, marked as exhibit **FB2**.
- iii. Arsela Chaminda Eussuriyage, Srikanth Arjunan Iyakkanu, Nipuna Deshan Wicramasooriya, Janith Asanga Suse Mesthriyage, Anton Dinish Thushantha Silva Siku Patabndige and Nalin Prasanga Fernando Poruthotage (hereafter collectively referred to as ‘the Fishermen’) were employed by the Applicant to work on the vessel for the purpose of carrying out semi-industrial fishing.
- iv. On the 14 April 2023 the Fishermen were charged with the offence of killing and taking marine mammal, namely dolphins in Seychelles waters in violation of section 32 (4) of the Fisheries Act 20 of 2014 (Fisheries Act) and subsequently pleaded guilty to the charges against them.
- v. On the 14 April 2023 the Supreme Court ordered that the vessel be seized and taken into the custody of the Supreme Court. The court order is attached to the application as exhibit **FB3**.
- vi. The Applicant avers that she was not involved in nor did she participate in the commission of the offense for which the Fishermen were charged.
- vii. The Applicant also avers that she did not consent to the vessel being used for the commission of the offense and that the vessel was used without her knowledge and in breach of the employment contract of the Fishermen.

- viii. The Applicant avers that section 68 and 70 of the Fisheries Act is only applicable when the owner of the vessel has been involved and participated in the commission of the relevant offence under the Act.
- ix. Further the Applicant submits that if the provisions of section 68 and 70 of the Fisheries Act allow for the forfeiture of a vessel, despite the proprietor and owner of the vessel not having been involved and participated in the commission of the offence, then section 68 and 70 is in violation of the right to property of article 26 of the Constitution of the Republic of Seychelles (the Constitution).
- x. The Applicant brought the Application before court citing that the vessel cannot be forfeited in terms of section 68 and 70 of the Fisheries Act as the owner of the vessel was not involved in the commission of the offence and was not charged with the offence.

## LAW AND ANALYSIS

[3] Section 68 (1) of the Fisheries Act states:

*'Where an article in the custody of a court is not ordered to be forfeited, it shall be held until all fines imposed for any offence in the commission of which the article was used, or which was committed in respect of the article, and the costs and expenses due by the offender to the Republic have been paid.'*

[4] In respect of section 68, the section states that *'where an article in the custody of a court is not forfeited, it shall be held until all fines imposed for any offence in the commission of which the article was used, or which was committed in respect, and the costs and expenses due by the offender to the Republic have been paid'*. This section is not applicable to the application before court as the sentence judgment in respect of the criminal offence has not been delivered yet by the Supreme Court.

[5] Section 70 of the Fisheries Act states:

*'Where a person is convicted of an offence under this Act, the court may, in addition to any other penalty-*

- (a) Order the forfeiture of the fishing vessel, any gear or article used in the commission of the offence;*
- (b) Order the forfeiture of any fish caught in breach of this Act;*
- (c) Order that the master of the vessel shall be prohibited from operating or boarding any fishing vessel in Seychelles waters for a period of two years from the date of his or her conviction.'*

- [6] Section 70 of the Fisheries Act does not pertain to the ownership of property used in the commission of an offence but focuses on forfeiture of the property that was used in the commission of an offence. This section allows the court to make an order for forfeiture of property that was used in the commission of an offence.
- [7] Section 68 and 70 of the Fisheries Act makes no mention of ownership and is only concerned with whether the vessel was used in the commission of the offence. It is clear from the facts of the criminal offence that the vessel was used in the commission of the offence.
- [8] The Attorney failed to refer to section 153B of the Criminal Procedure Code which provides for the application that must be brought before court when property has been confiscated by the state where, the owner or lawful possessor thereof was not the person convicted of the offence.
- [9] Section 153 of the Criminal Procedure Code provides that *'In addition to any forfeiture specially provided for by this Code or any other law, the corpus delicti when it is the property of the offender and all the things produced by the offence or which may have been used or were intended to be used for committing an offence, shall on conviction of the offender become forfeited to the Republic'*.
- [10] The latter part of section 153 provides for property *'which may have been used or were intended to be used for committing an offence'*. This would imply that property used in the commission of the offence would also be subject to forfeiture on the conviction of the offender.

[11] In *De Souza & anor (MC 37/2020 arising from CO18/2020) [2020] SCSC 356 (30 June 2020)* the court held in para 8:

*‘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 the offender and was used for committing an offence.’*

[12] Further Section 153B of the Criminal Procedure Code provides for a person, whose property was confiscated or 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. Such an application can be made before an order for forfeiture has been given by the court or after the order for forfeiture was already made.

[13] Section 153B is very clear on the procedure that must be followed and what grounds must be proven for such an application to be made before court.

[14] Section 153 B (5) reads as follows:

*A person who, under this section, claims an interest in any property in respect of which an application for forfeiture has been made may-*

*(a) before the court makes an order of forfeiture, or*

*(b) when she has made an order of forfeiture, within 30 days after the order was made, apply to the court against the granting of the order, or, where the court has made an order of forfeiture, 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; or*

*(d) declaring that there is payable to the applicant by the Republic an amount equal in value to the value of the applicant’s interest declared under this section.*

[15] The section is very clear that the court can forfeit the property used in the commission of the crime regardless of the ownership of such property.

- [16] It is clear from the wording of this section that the intention of the legislature was to provide a procedure for an application to be made to the court where the owner of the property used in the commission of an offence could receive their property back. Such an application can only be made if the owner has proven to the court that he/she had no knowledge of the offence and did not receive any proceeds of such an offence.
- [17] Section 153B (10) further provides that '*A person who makes an application under (5) shall give notice to the Attorney-General and the Attorney General shall be a party to a proceeding upon application*'. Therefore, this section goes further and provides for the procedural steps that must be taken in which such an application must be brought before court.
- [18] The Fisheries Act does not provide such an application to be made and therefore the applicant must rely on Section 153B of the Criminal Procedure Code.
- [19] Section 153B (3) also provides for the consideration that the court must make when deciding whether an order for forfeiture is appropriate. This section provides that:

*'In considering whether it is appropriate to make an order under subsection (1) in respect of any particular property the court-*

*(a) May have regard to-*

- (i) The seriousness of the offence*
- (ii) Any hardship that may reasonable be expected to be caused to any person; and*
- (iii) Any information showing whether the victim of an offence has instituted or intends to institute civil proceedings against the offender in respect of loss or proceedings against the offender in respect of loss or damage sustained in connection with the offence;*
- (iv) Any other matter which the court considers appropriate;*

*(b) Shall have regard to any claim of interest made by any person, other than the person convicted of an offence.*

[20] The court may take into consideration the grounds as provided for in Section 153B (3), however it is still the within the discretion of the court, whether an order for forfeiture should be made.

## **ORDER**

[21] After careful consideration of the application before this court; the reply thereto and the above mentioned legal provisions, the court makes the following order:

- (a) In the circumstances the application is not brought before this court in the procedurally correct manner as provided for in the Criminal Procedure Code
- (b) On this basis the application is dismissed

Signed, dated and delivered at Ile du Port on 14<sup>th</sup> July 2023.



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R. Govinden

**Chief Justice**