

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC
CM 103/23

FARIMA NORTIRA BARBIER
(rep. Mr. Basil Hoareau)

Applicant

Versus

THE REPUBLIC
(rep. Mrs. Hashini Gurusinghe Naidu)

Respondent

Neutral Citation: Farima Nortima Barbier Vs The Republic CM 103/2023

Before: Govinden CJ

Summary: Application for release of vessel forfeited to the Republic – Section 153B (5) of the Criminal Procedure Code

Heard:

Delivered: 8 November 2023

ORDER

R. GOVINDEN CJ

- [1] The Applicant before the court has brought an application in respect of the vessel ‘**Fish Finder**’ bearing registration **SZ 205850148870** (herein further referred to as ‘the vessel’) along with the articles and gears found on the vessel, that was forfeited to the Republic and that was used in the commission of a crime. The Application was brought in respect of section 153B (5) of the Criminal Procedure Code.
- [2] On the 14th July 2023, the Court dismissed the previous application made by the Applicant based on the fact the application was not brought before court correctly in respect of the

correct provision of law. The previous application was done in terms of section 68 and 70 of the Fisheries Act 20 of 2014 (Fisheries Act).

- [3] The current application is grounded in section 153B (5) of the Criminal Procedure Code against the Attorney General seeking to declare the Applicant the owner of the said vessel and directing the Republic to transfer the vessel along with the articles and gears found on the vessel to the Applicant.

FACTS OF THE APPLICATION

- [4] This application arises from the criminal case *The Republic v Asela Edussuriyage & Ors* (CR 22/2023) [2023] SCSC 664, where the vessel was seized by the Republic as it was deemed to be used in the commission of a criminal offense. The convicts in the criminal case were convicted in terms of Section 32 (4) of the Fisheries Act read with Section 22(a) of the Penal Code and punishable under Section 64 (1) of the Fisheries Act. The Convicts were also subsequently sentenced on the 14th July 2023 to each pay a fine of SCR 50 000.00 and the court also ordered that the vessel be forfeited to the Republic of Seychelles.
- [5] The Applicant, by way of Notice of Motion filed on the 10th August 2023, made an application to this court in respect of the return of the vessel and the articles thereof, to the Applicant. In support of this application, the Applicant provided that she is the owner and proprietor of the vessel and attached a copy of the bill of sale.
- [6] She further avers that the vessel is permitted for semi-industrial fishing in Seychelles and the convicts were employed by her to carry out semi-industrial fishing in Seychelles on board the vessel. The convicts pleaded guilty to the offence and were sentenced on the 14th July 2023.
- [7] The applicant further avers that she was not involved nor did she participate in the commission of the offence in any manner. The convicts used the vessel and the articles to carry out the said offence without the knowledge of the Applicant and was also in clear breach of their employment contract. The Applicant was also not charged with any crime in relation to the commission of the offence.

- [8] The Applicant submits in her affidavit that she has suffered hardship in that she has been deprived of the vessel and the articles without any fault and wrongdoing on her part. She also submits that the forfeiture of the vessel has caused a grave injustice to her. The value of the vessel is SR 580 000.00 and in addition the articles that have also been forfeited, amounts to a loss of over SR 600 000.00. It has also had an impact on her fishing business.
- [9] In respect of the submissions made by the Applicant in court, the attorney submitted that the Application is made in terms of section 153 B (5) of the Criminal Procedure Act. The Applicant submits that in respect of the reading of section 153 B, it provides that where there has been forfeiture in respect of the proceeds of a crime, a person can bring an application even after forfeiture has been granted, claiming an interest in said property and asking the court to made a declaration that the Republic will transfer the property back to that person.
- [10] The Applicant further avers that the court has the power under subsection 5 in respect of proceeds of a crime, then surely by implication the court will have the same power in respect of property that is not proceeds of a crime, but which has been merely used in the commission of a criminal offence.
- [11] The application was brought against the Attorney General in accordance with section 153B (10) of the Criminal Procedure Act.
- [12] The Applicant avers that the relief sought is as follows:
- a) An order declaring that the Applicant is the sole owner of the vessel and of the articles and gears found on the vessel
 - b) An order directing the Republic to transfer the vessel along with the articles and gears found on the vessel to the Applicant
 - c) The Applicant submits that the court takes into account any relevant factors and exercise its discretion judiciously.
- [13] The Applicant further submits that the first factor is that found in section 153B (3) of the Criminal Procedure Act, which provides that '*the court should take regard to the seriousness of the offence.*' In this case the Convicts had pleaded guilty to the offence of

killing and taking of Marine mammals namely dolphins from Seychelles waters contrary to Section 32(4) of the Fisheries Act. The Applicant argues that due to the fact that no custodial sentence is provided for in the Fisheries Act for this offence and that the maximum sentence SCR 450 000.00, the offence could be regarded as not very serious. This is further substantiated by the fact that the court imposed a sentence of SCR 50 000.00 on the convicts in the criminal case.

- [14] It is further submitted that the second factor that the court must take into consideration is if there is any hardship that may reasonably be expected to be caused to any person in respect of the forfeiture. It is uncontested that the Applicant is the owner of the vessel and this has been provided for in exhibit **FB1**, the bill of sale, confirming the applicant purchased the vessel on the 12th January 2020 for the sum of SCR 580 000.00. The Convicts were in possession of the vessel for the purpose of their employment and for conducting commercial fishing.
- [15] The Applicant avers that she does not own any other fishing vessels and that she has suffered a substantial loss due to the forfeiture of the vessel. Further, the Applicant is a good faith owner of the vessel and was not involved in the commission of the offence.
- [16] Further, the Attorney General did not provide a replying affidavit and does not contest any of the contents of the Notice of Motion made by the Applicant.
- [17] The Respondent filed a response to the Notice of Motion filed by the Applicant.
- [18] The Respondent confirms that the Applicant has brought this application before court under section 153B (5) of the Criminal Procedure Code. The Respondent further argues that section 153B (5) of the Criminal Procedure Code must be read with section 153 (1) of the same, which reads as follows:

“where a person is convicted of an offence and the court is satisfied that the offender has benefited from the offence or from the offence taken together with any other offence of which the offender is convicted in the same proceeding or when the court takes into consideration in determining the sentence of the offender, the court may, on the application of the Attorney-General or a person

authorised by the Attorney- General made not more than 90 days after the conviction of the person, make an order of forfeiture in respect of the proceeds of that offence"

- [19] The Respondent avers that it is clear from the law that section 153B in its entirety deal with proceeds of an offence. Section 153B (15) of the Criminal Procedure Code states as follows:

"proceeds of an offence" means any property that is derived or realised, directly or indirectly, by a person from the commission of a relevant offence"

- [20] The Respondent argues that the vessel was forfeited to the Republic in consideration of Section 70 of the Fisheries Act 2014, as the vessel was an instrumentality of the offence. Further, the Respondent avers that the Fisheries Act is a specific legislation and a more recently enacted, as compared to the Criminal Procedure Code. Forfeiture under the Fisheries Act, is in line with section 153 of the Criminal Procedure Code.

- [21] The Respondent argues that the application under section 153B (5) has no standing in the present proceedings. The Respondent also avers that the Applicant has appealed the decision made by this court in the case of *The Republic v/s Edussuriyage and Ors (CR 22/2023)* in relation to the intervening application CM 66/23.

- [22] In their submissions in court, the Respondent confirms that there is no factual contest in this matter and that the only dispute is regarding the legal provision that is applicable. The Respondent confirms that the Applicant has no knowledge of the offence and was no involved in the commission of the offence.

- [23] In respect of the dispute in law, the Respondent argues that the forfeiture was done in terms of section 70 of the Fisheries Act. In respect of section 153B (5), the Respondent argues that this section must be read together with section 153B (1). As a result, these sections only deal with the proceeds of a crime. The Respondent avers that there is a distinct difference between something that is used in the commission of the crime and the proceeds of the crime. Section 153B (15), as mentioned in the reply of the Respondent, provides a definition of the proceeds of a crime.

[24] The Respondent submits that the vessel was used in the commission of the crime and cannot be defined as the proceeds of the crime. Therefore, the application does not stand in light as section 153B (5) is only applicable to the proceeds of a crime and not property used in the commission of a crime.

[25] The Respondent therefore prays that the application be dismissed.

LAW AND ANALYSIS

[26] 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'*.

[27] 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.

[28] 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.'

[29] In respect of the current application before court, there are two issues on which the court must make a determination. Firstly, whether the application can be brought before court in terms of Section 153B (5) of the Criminal Procedure Code and Secondly, whether the Applicant has an interest in the property that was forfeited to the Republic.

[30] Section 153B (5) of the Criminal Procedure Act reads as follows:

'(5) 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 the court 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.'

[31] The first part of section 153B (5) provides that '*A person who, under this section, claims an interest in **any property** in respect of which an application for forfeiture has been made may*'. It is clear here that the legislation provides that an application can be made in respect of 'any property' and does not specifically provide solely for the proceeds of a crime. The section further provides for '*any property in respect of which an application for forfeiture has been made.*' It is clear from this wording that the legislature has provided a mechanism for a person with interest in any property that an application for forfeiture was made for, to make an application to court to retain the property or value thereof, back into their possession. This section further provides that such an application can be made even after the property was forfeited to the Republic.

[32] This section follows section 153B (4) that read as follows:

'4) A court shall not make an order of forfeiture under this section in respect of any property where the court is satisfied that the person, not being the person who was convicted, who is in possession of the property or purports to be owner acquired the property—

(a) for sufficient consideration, and

(b) without knowing and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time of its acquisition, property which was used in or in connection with the commission of an offence under this section or the proceed of the offence.'

- [33] Section 153B (4) once again refers to '**any property**' and further provides for ownership to be established in respect of the property for which an application for forfeiture was made. It is clear from the legislation that the intention was not to deprive a good faith owner, whose property was unknowingly used in the commission of a crime, of their property. This section provides for a good faith owner to make an application to the court in which they can retain their property back in their possession if the court is satisfied that the owner did not know or could reasonably suspect that the property was used in the commission of an offence.
- [34] If this section was only limited to the proceeds of a crime, the legislation would inadvertently deny the good faith owner of a *corpus delicti* a mechanism to apply to the court to receive their property back into their possession. This would lead to an injustice as the Criminal Procedure Code provides for the forfeiture of not only the proceeds of a crime but also the *corpus delicti* that was used in the commission of the offence.
- [35] Taking into consideration the above, section 153 B (5) provides for an application to be made in respect of any property for which an application has been made and is not solely limited to the proceeds of a crime. Therefore, the application has been brought correctly before court.
- [36] The European Council of Human Rights (ECHR) held that every natural or legal person is entitled to the peaceful enjoyment of their possession and that no one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by the general principles of international law.¹

¹ ECHR, supra note 48, Protocol, art. 1. The remainder of this article provides: "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[37] The court when making its decision shall not apply the law in isolation but must interpret the law in light of the Constitution of the Republic of Seychelles (the Constitution) and give consideration for international and regional law. Article 48 of the Constitution of Seychelles states that Chapter III of the Constitution which contains the Seychellois Charter of Fundamental Human Rights and Freedoms “*shall be interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall, when interpreting the provision of this Chapter, take judicial notice of—*

the international instrument containing these obligations;

(b) the reports and expression of views of bodies administering or enforcing these instruments;

(c) the reports, decisions or opinions of international and regional institutions administering or enforcing Conventions on human rights and freedoms;

(d) the Constitutions of other democratic States or nations and decisions of the courts of the States or nations in respect of their Constitutions.

[38] When considering the application before court and when interpreting the law, the court must also take into consideration the right to property of the Applicant. If this application was not permitted under section 153B (5) of the Criminal Procedure Code, this would create a situation where an innocent good faith owner would be arbitrarily deprived of their property that was used, without their knowledge, in the commission of a crime. The purpose of criminal forfeiture is the punishment of the convict and not the punishment of an innocent third party owner.²

[39] In the YDRA III Naftiki Eteria (Hydra III Maritime Company) v The Republic (SCA 4/1993) [1993] SCCA (YDRA III case) the court emphasises taking into consideration any possible injustices that might result if the owner of the ‘thing’ used in the commission of the offence, was not the offender or acting in complicity with the offender. The court further held that

² *Austin v. United States*, 509 U.S. 602, 610 (1993).

‘the resilience of the judicial process, in the absence of express statutory provision, may not be wanting in fashioning a relief for the innocent claimant.’

- [40] It is clear from the *YDRA III case* that the court shall give consideration to the innocent owner of the *corpus delicti* and shall also take into consideration any injustices that the owner of the property could suffer as a result of the forfeiture. The court has a duty to interpret section 153B (5) of the Criminal Procedure Code in light of the above case law.
- [41] In respect of the interest in the property, the Applicant has provided the court with a bill of sale that proves that she is the owner of the vessel. Further the Applicant has also indicated that she has suffered substantial hardship due to the vessel being forfeited and that she had no knowledge of the commission of the crime and was not charged in respect of the criminal offence. This was confirmed by the respondent and these facts have not been disputed.
- [42] It is clear from the circumstances of this case that the Applicant is the *bona fide* owner of the vessel and would suffer great hardship if the vessel is not returned in her possession. It would be within the interest of justice that her application be granted.
- [43] 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.
- [44] 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.

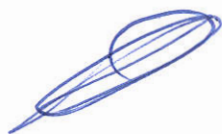
[45] On the Evidence led before me I am satisfied that the Applicant was not convicted for the offences and was an owner without knowledge of the crime and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time of its acquisition, property which was used in or in connection with the commission of an offence.

ORDER

After careful consideration of the application before this court and the applicable legal principles applicable in this case, the court makes the following order:

- (a) The application for the vessel '**Fish Finder**' bearing registration SZ 2058501488 along with the articles and gears found on the vessel to be returned to the possession of the Applicant is granted.
- (b) The Republic is ordered to return the vessel along with articles and gears found on the said vessel to the Applicant.

Signed, dated and delivered at Ile du Port on 8th November 2023.



R. Govinden

Chief Justice