

**IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION**

Civil Action HBM No. 152 of 2014

Between:

**The Director of Public Prosecutions**  
Applicant

And:

**ISIKELI TAMANI;  
AMENA ARAIBULU**

Defendants

**Date of the Ruling:** 24<sup>th</sup> June 2015

**Counsel:**

Ms. Janita Prasad for the State

Ms. C . Choy for 1<sup>st</sup> Defendant  
2<sup>nd</sup> Defendant in Person

**RULING**

[1] The Director of Public Prosecutions, by his application dated 28<sup>th</sup> November 2014 supported by an affidavit of a Senior Investigator of the Criminal Investigations

Department, **Inspector Aiyaz Ali**, moves this Court for an order to “forfeit to the State the sum of \$ 8338.85 which is in the Director of Public Prosecutions Westpac Bank account number 9802034075.”

- [2] Upon receipt of the said application by the DPP, this Court issued Notice of Mention on the two Defendants named therein, for 1<sup>st</sup> Call on 8<sup>th</sup> December 2014. Both Defendants were present on the date of 1<sup>st</sup> Call and Court made order on the Prison Authority to escort them to the office of the Legal Aid Commission.
- [3] On 5<sup>th</sup> May 2015, when this matter was mentioned before this Court, the 1<sup>st</sup> Defendant, indicated that he intends to contest the application of the DPP and sought a period of one month to tender his response. He was granted time till 5<sup>th</sup> June 2015.
- [4] However, on the same day; the 2<sup>nd</sup> Defendant appearing in person informed this Court that he does not wish to contest the application by DPP and tendered acknowledgement of service, indicating his position in writing. The Court then enquired from the 2<sup>nd</sup> Defendant whether he understood the nature of the consequences of his statement that he does not wish to contest the application; he answered in the affirmative. In addition, it was enquired from the 2<sup>nd</sup> Defendant by Court, whether he needed time to seek legal advice. He responded by informing Court that he does not require assistance of a legal practitioner in this matter.
- [5] Thereupon, learned State Counsel moved this Court to make an order as prayed for by the DPP, in forfeiting \$ 300.00 from the total sum of \$ 8,338.85 that had been restrained by this Court, in exercising its criminal miscellaneous jurisdiction in case No. HAM 265 of 2010 and by order dated 2<sup>nd</sup> December 2010.
- [6] Upon the said application, the matter was fixed for ruling on the 2<sup>nd</sup> Defendant on 5<sup>th</sup> June 2015. However, on that day, ruling of the Court in respect of the 2<sup>nd</sup> Defendant was not pronounced as this Court noted that the facts of the matter are so interconnected and it would be more appropriate to pronounce a common ruling applicable to both Defendants, having heard the 1<sup>st</sup> Defendant’s objection. The 1<sup>st</sup> Defendant tendered his affidavit in response and the State moves for time to respond to it. The State undertook to tender its response to Registry. Thereafter an adjournment was granted for the 1<sup>st</sup> Defendant, until 19<sup>th</sup> June 2015, to consider his position.
- [7] On 19<sup>th</sup> June 2015, when the matter was mentioned in Court, Counsel for the 1<sup>st</sup> Defendant informed that her client does not wish to contest the application by the DPP. Upon this submission, the State moved for a ruling on both the Defendants.
- [8] That being the progress of the matter since its institution, it is helpful to refer to the chronology of factual events in brief; as stated in the affidavit of **Inspector Aiyaz Ali**, which are relevant in determining the application by the DPP.

- [9] It is revealed from the affidavit of **Inspector Aiyaz Ali** and relevant annexures to it, that the 1<sup>st</sup> Defendant was charged for the importation of controlled chemical, namely pseudoephedrine hydrochloride weighing approximately 2.680 kilograms without lawful authority on 6<sup>th</sup> January 2010 into Fiji. The 2<sup>nd</sup> Defendant was also charged by the DPP for aiding and abetting the 1<sup>st</sup> Defendant.
- [10] The illegally imported controlled chemical was concealed in a tricycle and was shipped from China, and addressed to one Jack Wilson of 77 Malau Place, Vatuwaqa. The parcel containing the said tricycle was detected at Carpenters FEDEX Bond at Nadi International Airport. Then the Customs and Police have delivered this parcel under their supervision to Carpenters Shipping Bond Yard. On 6<sup>th</sup> January 2010, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were arrested by the officers at the Carpenters Shipping Bond Yard, Edinburgh Drive, Suva, when they tried to clear the parcel containing the tricycle which had in turn contained controlled chemical substance; concealed in it.
- [11] High Court of Fiji at Suva tried the case against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and convicted them as charged by its judgment in case No. HAC 059/2011, dated 2<sup>nd</sup> October 2013. It later imposed a sentence of 8 years of imprisonment each on 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
- [12] **Inspector Aiyaz Ali**, in his affidavit further states that it was revealed during investigations that the 1<sup>st</sup> Defendant has received \$ 9000.00 to “receive this parcel and deliver”. It also revealed that \$ 300.00 was given to the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant at the time of clearing the parcel on 6<sup>th</sup> January 2010, out of the said \$ 9000.00. On the same day the Police recovered \$ 8,038.85 from the possession of the 1<sup>st</sup> Defendant subsequent to a search conducted on him. Of this \$ 8,038.85, there were eighty bills of 100 dollar denomination. Similarly among the cash recovered from the 2<sup>nd</sup> Defendant upon a search, amounting to \$ 344.70, there were three bills of \$ 100 dollar denomination.
- [13] It is in these sets of circumstances, the DPP moves this Court to make order for the forfeiture of \$ 8038.85 recovered from the 1<sup>st</sup> Defendant and also the \$ 300.00 recovered from the 2<sup>nd</sup> Defendant; under the provisions of the Proceeds of Crime Act 2007.
- [14] In view of the application by DPP, this Court must examine the relevant provisions of the said Act, in order to verify whether it could cloth itself with the legal authority to make an order of forfeiture against the assets of 1<sup>st</sup> and 2<sup>nd</sup> Defendants. This becomes a relevant consideration in view of the Article 12(1) of the Constitution, which guarantees the right of an individual against “unreasonable seizure of property”. According to the provisions of Article 12(2) such seizure is not permissible “otherwise than under the authority of the law.”
- [15] Section 6 of the Proceeds of Crime Act 2007 has conferred the High Court of Fiji with the “jurisdiction to make a forfeiture order irrespective of the value of the property”. In addition, section 11(1) of the said Act provides;

“Where the Director of Public Prosecutions applies to the Court for an order under this section against property in respect of a person’s conviction of an offence and the Court is satisfied that the property is tainted property in respect of the offence, 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.”

- [16] It is clear from the above provisions that this Court has the power to make an order of forfeiture “if it is satisfied”, upon application of the DPP, that the “property is tainted property in respect of the offence”. It is also clear that the above provisions will apply only if there is a “conviction of an offence”.
- [17] **Inspector Aiyaz Ali**, in his affidavit states that 1<sup>st</sup> and 2<sup>nd</sup> Defendants were convicted by this Court on 2<sup>nd</sup> October 2013 and was sentenced on 4<sup>th</sup> October 2013. A copy of the judgment of this Court in convicting 1<sup>st</sup> and 2<sup>nd</sup> Defendants is annexed to the affidavit, marked as AA16. This Court could take cognisance of the fact of the conviction of 1<sup>st</sup> and 2<sup>nd</sup> Defendants, as per section 9(1) of the said Act as it can have “regard to the transcript of any proceedings against the person for the offence” in determining such an application.
- [18] Before this Court commences its inquiry of satisfying itself whether the property, in respect of which this application is made by the DPP, is tainted; it might be prudent to examine the relevant legislative provisions in this regard, particularly of the terminology used in these sections. In examining relevant sections of the said Act, we come across references to terms such as “proceeds of crime”, “tainted property” and “property”.
- [19] The term “tainted property” is defined in section 3 of the Act providing interpretation as;
- (a) property used in, or in connection with, the commission of the offence; or,
  - (b) proceeds of the offence.

It further clarifies that the term “offence” is used to denote or to mean a serious offence. A “serious offence” is one, which carries a maximum penalty of death or imprisonment for not less than 12 months.

- [20] It could also be seen from this section, that proceeds of a serious offence has also been termed as “proceeds of crime”. The term “proceeds” too has been defined thus; “any property that is derived or realised, directly or indirectly, by any person from the commission of the offence.”
- [21] The term “property” includes money or any other property, real or personal, things in action or other intangible or incorporeal property.
- [22] Section 11(2) of the said Act, allows the court to infer that property is tainted –

“where the evidence establishes that the property, and in particular money, was found in the person’s possession or under the person’s control in a building, vehicle, receptacle or place during the course of investigations conducted by the police before or after the arrest and charge of the person for the offence of which the person was convicted – that the property was derived, obtained or realised as a result of the commission by the person of the offence of which the person was convicted.”

- [23] In applying the above quoted statutory provisions and definitions provided by the Act to the factual circumstances as averred by **Inspector Aiyaz Ali** in his affidavit and its annexed documents, this Court is well satisfied that \$ 8038.85 which has been recovered from 1<sup>st</sup> Defendant is tainted property and or proceeds of a serious offence and therefore could be forfeited by this Court. This Court is satisfied that \$ 300.00 recovered from the 2<sup>nd</sup> Defendant is also tainted property and or proceeds of a serious offence and therefore could be forfeited by this Court.

The reasons for the above conclusion are as follows;

- (i) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants were charged and convicted for offences which obviously are serious offences as it carried a sentence of imprisonment for life.
- (ii) The property in respect of which forfeiture is sought is part of \$ 9000.00 given to 1<sup>st</sup> Defendant by the consignee of the parcel containing controlled chemical.
- (iii) 1<sup>st</sup> Defendant was given \$ 9000.00 by the consignee to “receive and deliver” the parcel and he had impersonated the consignee “Jack Wilson” to clear the parcel from the customs.
- (iv) The 1<sup>st</sup> Defendant has admitted that he had received \$ 9000.00 to “receive and deliver” the parcel containing illegal substance as he

“was desperate need of money” in his caution statement. This statement was later admitted as evidence by the High Court with its ruling after a *voir dire* on 4<sup>th</sup> October 2013.

- (v) 1<sup>st</sup> Defendant also admitted that he had given \$300.00 out of \$ 9000.00, which he received to “clear and deliver” the parcel containing illegal substance to 2<sup>nd</sup> Defendant.
- (vi) The 2<sup>nd</sup> Defendant clearly admitted in his caution statement that it was the 1<sup>st</sup> Defendant who gave him \$ 300.00 and attributed it for the reason that it was given for “the parcel to be cleared”.
- (vii) These circumstances lead to the strong inference that the reason for the payment of \$ 9000.00 to 1<sup>st</sup> Defendant, by the consignee was clearing and delivery of the parcel containing illegal substance and therefore could clearly be termed as “proceeds of crime” and for the same reason “tainted property”.
- (viii) Contrary to the position taken up by the 2<sup>nd</sup> Defendant in his caution statement; the learned High Court Judge in his judgment, convicting 2<sup>nd</sup> Defendant on the charge of abetment, has held;

*“Second accused knowing very well that 1<sup>st</sup> accused is not Jack Wilson produced documents in the name of Jack Wilson to Jonetani and Josua Valau to clear a parcel which contained illicit drugs. Even he introduced 1<sup>st</sup> accused as Jack Wilson to Jonetani and Josua. Second accused very well knew 1<sup>st</sup> accused’s real name as he was his neighbour and helped him several times to clear parcels from customs. All the documents which he submitted to Jonetani to clear the parcel were in Jack Wilson’s name. He had tried to bribe Jonetani and Josua to clear the parcel. Further he had not taken any endeavour to inform this to police or customs.”*

- (ix) The above quoted conclusion was reached by the learned trial judge upon the perusal of the evidence before him. I also have considered the material placed before this Court by **Inspector Aiyaz Ali** in his affidavit and its annexed documents. I am in full agreement with the above quoted conclusions reached by the trial judge as to the culpability of the 2<sup>nd</sup> Defendant.
- (x) The 2<sup>nd</sup> Defendant has clearly admitted, in his caution statement, that \$ 300.00 in fact was recovered from him by the Police and that too at the time of his arrest.

(xi) The 2<sup>nd</sup> Defendant was arrested along with the 1<sup>st</sup> Defendant when they attempted to clear the parcel containing illegal substance.

- [24] The effect of section 11 of the Act, which allows the Court to draw inferences, is that once tainted property is found in the possession of an offender, such property is considered as a proceed of crime unless the offender proves to the contrary on a balance of probabilities. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants opted not to contest the application by the DPP and thereby failed to adduce any evidence. Therefore the inference drawn under section 11(2)(b) of the Proceeds of Crime Act, remains unchallenged.
- [25] In view of the section 11(4), this Court, in making a forfeiture order, may consider the rights or interests of any third parties in the property, the gravity of the offence, any hardship resulting from the order and the use to which the property is usually put.
- [26] It is clear from the material contained in the affidavit of **Inspector Aiyaz Ali**, the 2<sup>nd</sup> Defendant was given \$ 300.00 by the 1<sup>st</sup> Defendant, having received \$ 9000.00 from the consignee, just before their attempted clearing of the parcel containing illegal substance and their arrest at the Carpenters Warehouse and no innocent third party was involved. It appears that the consignee was aware of the contents of the parcel and had employed these Defendants without exposing himself to clear it.
- [27] The offences committed by the two defendants are serious in nature as it attracted life imprisonments. No hardship would result as a consequence of forfeiture as the property under consideration is some cash received by the Defendants; as a result of their involvement, in the commission of offences they were charged with.
- [28] The Court is mindful of the effect of its order of forfeiture as per the section 12(1) of the said Act where a forfeiture order is made, the property vests absolutely in the State.
- [29] In considering the relevant statutory provisions and the factual position placed before this Court, I have no hesitation in making order of forfeiture of the monies amounting to \$ 8338.85, which is held in the Director of Public Prosecutions Westpac Bank account number 9802034075.

### Conclusion

- [30] I grant a forfeiture order in terms of the application of the Director of Public Prosecutions dated 28<sup>th</sup> November 2014, in accordance with section 11 (1) of the Proceeds of Crime Act, 2007.

[31] The State may dispose of the property on the expiry of the appeal period.



A handwritten signature in blue ink, appearing to read "Achala Wengappuli".

**Achala Wengappuli**  
**JUDGE**

At Suva

**Solicitors :**

Director of Public Prosecutions

Ms. C . Choy for 1<sup>st</sup> Defendant  
2<sup>nd</sup> Defendant in Person