

HIGH COURT OF AUSTRALIA

Commissioner of the Australian Federal Police

Vs.

Qing Zhao & Anor.

[2015] HCA 5

(French CJ, Hayne, Kiefel, Bell and Keane JJ.)

12 .02.2015

ORDER

French CJ, Hayne, Kiefel, Bell and Keane JJ.

1. Proceedings were brought by the Commissioner of the Australian Federal Police ("the Commissioner") for the forfeiture of property of the respondents as proceeds of crime, at a time when charges were pending against the second respondent. The offence and the circumstances pertaining to it which are relevant to the forfeiture proceedings are substantially identical to what is in issue in the criminal proceedings. The second respondent's defence of the criminal proceedings may be affected if he is obliged to defend the forfeiture proceedings before his criminal trial is held. The question on this appeal is whether the Court of Appeal of the Supreme Court of Victoria applied a correct approach in deciding that the forfeiture proceedings should be stayed pending the finalisation of the criminal proceedings.

Factual background

2. On 2 July 2013 the second respondent, Xing Jin, was charged that between 8 February 2013 and 2 July 2013 he aided and abetted another, one Mae Ja Kim ("Kim"), to deal with money or property that was the proceeds of crime and was worth \$100,000 or more, contrary to ss 11.2 and 400.4 of the Criminal Code (Cth). The substantive offence from which the proceeds are said to have been derived is living on the earnings of sex workers contrary to s 10 of the Sex Work Act 1994 (Vic). The second respondent has been committed to stand trial for the offence of dealing with the proceeds of crime. The first respondent, Qing Zhao, is the second respondent's wife. She has not been charged with any offence, but is registered

as the proprietor of a residential property which is the family home of the respondents and is a subject of the forfeiture proceedings.

3. On the same day as the second respondent was charged, the County Court of Victoria made an order under s 19 of the Proceeds of Crime Act 2002 (Cth) ("the POC Act"), restraining the disposition of the respondents' home, a residential unit registered in the second respondent's name, and a motor vehicle ("the Restrained Property"), on the ex parte application of the Commissioner. On 24 July 2013 the Commissioner filed an application under s 59 of the POC Act, for forfeiture of the Restrained Property pursuant to s 49 of that Act.

4. In each of the proceedings brought for the restraining order and for an order for forfeiture, it is alleged that the property sought to be forfeited is the proceeds of the commission of the offence of dealing with proceeds of crime worth \$100,000 or more, contrary to s 400.4(1) of the Criminal Code. The underlying offence from which the proceeds arise is living on the earnings of sex workers contrary to s 10 of the Sex Work Act.

5. The offence specified as the basis for the forfeiture proceedings is therefore the same as that to be prosecuted in the criminal proceedings, save that in the latter the offence is stated with respect to a particular period in 2013. This difference does not mean that the matters which will be gone into in the two proceedings will not be the same, or substantially the same. The issue in the two proceedings is identical. It concerns the second respondent's dealings with Kim. Those dealings include, but are not limited to, the financing of the second respondent's purchase of the residential unit in 2011, which is the focus of the forfeiture proceedings.

6. The source of the evidence which was relied upon for the restraining order application argued by the Proceeds of Crime Litigation section of the Australian Federal Police ("the AFP"), and which was used by a criminal investigating officer of the AFP to prepare the Statement of Facts forming part of the criminal brief, which has been served upon the second respondent and other defendants charged, is information resulting from a police operation called "Operation Kitrino". At the time of the application by the respondents for a stay of the forfeiture proceedings, the Commissioner had not filed the evidence to be relied upon in those proceedings, but it may be taken that it will be substantially the same as that to be used in the criminal proceedings.

7. It is alleged in each proceeding, by reference to the information gathered during Operation Kitrino, that Kim, who is the second respondent's aunt, heads a syndicate the membership of which includes the second respondent and his mother, Moon Ja Kim ("Moon"), who is Kim's sister. Moon lives in the residential unit which is part of the Restrained Property. In the

proceedings for the restraining order an AFP officer said that she believes that Kim uses other people to hide her assets and money which are the proceeds of crime. She also said that the source of three substantial deposits made to a bank account in the name of the second respondent, which partly financed the purchase of the residential unit, were unknown. The officer did not believe that the mortgage repayments made by the second respondent with respect to the residential unit could be serviced from his legitimate income.

8. The syndicate headed by Kim is alleged to receive income from unlicensed dealings with sex workers connected to certain brothels in Melbourne. The second respondent and one Zhe Fang ("Fang") are both licensed as approved managers of licensed brothels and are alleged to work together for the syndicate. It is alleged that they used their positions to manage the brothels on behalf of the syndicate and that the second respondent assisted the syndicate by overseeing the activities of the sex workers in the brothels, collecting money earned in the brothels and providing it to Kim and, together with Fang, maintaining records for the syndicate which are false.

The application for a stay of the forfeiture proceedings

9. The respondents filed applications commencing proceedings for the exclusion of the two residential properties from the restraining order and from forfeiture, and for compensation ("the exclusion proceedings"). Thereafter, they made an application for a stay of the forfeiture proceedings and of the exclusion proceedings until the completion of the criminal proceedings against the second respondent. In his affidavit in support of that application, the second respondent said:

"I am concerned that if I have to make a detailed affidavit or be cross-examined regarding the purchase of the Restrained Property and source of any relevant funds that there is a real risk that any such evidence will prejudice my criminal case."

He also said:

"In properly presenting my case for these proceedings I would be necessarily required to address these matters in any affidavit filed; however to do so would require me to give evidence as to the purchase of the Restrained Property or ownership of any bank accounts I hold and the source of any funds into those accounts. These matters are directly relevant to the criminal charges. If I am to depose to these matters in an affidavit in these proceedings I will, in effect, by [sic] waiving my right to silence. I do not wish to do so. I also note that the charges against me relate to the period 8 February 2013 to 2 July 2013. If the civil proceedings are not stayed I am also very concerned that I will be cross-examined about other matters such as the origin of

particular funds and assets outside of this period and there is a real risk that this will prejudice my rights and that it may open up further investigation against me or others. If the civil matters are not stayed I will have to make a decision as to whether to waiver [sic] my privilege and right to silence. This would be at the expense of the civil proceedings."

The decision refusing the stay

10. It was common ground in the hearing before Judge Lacava, in the County Court of Victoria, that the Court had power to stay the forfeiture proceedings and the exclusion proceedings . His Honour refused the respondents' application, with costs.

11. His Honour accepted the Commissioner's submission that the POC Act established a scheme separate from the criminal justice system for the forfeiture of property and that its clear intention is to progress, rather than delay, the forfeiture of property. His Honour considered that there were a number of provisions of the POC Act which point to the strength of that submission. Judge Lacava concluded that it would frustrate the clear intentions and purposes of the legislation to stay the forfeiture proceedings and the exclusion proceedings.

12. As to the concerns expressed by the second respondent in his affidavit, about the risk of prejudice to him in his criminal trial if he were to give evidence and be cross-examined in the forfeiture proceedings or the exclusion proceedings, his Honour considered that it was necessary for the second respondent to give specific evidence that demonstrates just what the prejudice would be before an order for a stay of the forfeiture proceedings and the exclusion proceedings was warranted. His Honour accepted the Commissioner's submission that a mere statement as to the existence of a criminal proceeding, in which a person's defence might be prejudiced, is not a sufficient basis on which to order a stay and that cogent evidence of the prejudice must be provided. This was said to follow from s 319 of the POC Act, which provides:

"The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) is not a ground on which a court may stay proceedings under this Act that are not criminal proceedings."

13. In his Honour's view, the respondents were not prevented by the existence of parallel criminal proceedings from giving evidence that the Restrained Property was not acquired using the proceeds of crime and they were not compelled to give evidence in the forfeiture proceedings or the exclusion proceedings. If they chose to do so, and the second respondent gave evidence or was cross-examined and asked questions which might incriminate him, he could avail himself of the procedure provided for in s 128 of the Evidence Act 2008 (Vic).

The Court of Appeal

14. The Court of Appeal of the Supreme Court of Victoria (Nettle, Tate and Beach JJA) granted leave to appeal, allowed the appeal with costs, set aside the judgment and orders of the County Court and ordered that each of the proceedings in that Court be stayed until the hearing and determination of the criminal proceedings or further order . Although the circumstances warranting a stay did not directly affect the first respondent, the Court considered that a stay should also be extended to the proceedings concerning the first respondent, in order to avoid a multiplicity of proceedings .

15. The Court of Appeal considered that the primary judge was wrong to conclude that there was not evidence of how the respondents giving evidence in the forfeiture proceedings could result in a real risk of prejudice to the second respondent in the criminal proceedings. That evidence was provided by the affidavit of the second respondent on the application for the stay.

16. The Court of Appeal referred , with approval, to a decision of the Court of Appeal of the Supreme Court of Queensland , which concerned the application of s 319 of the POC Act where identical issues arose in forfeiture proceedings and in criminal proceedings. Regard was there had to the potential for advantage to be taken by prosecuting authorities of the evidence disclosed, and the high potential for the privilege against self-incrimination to be removed and the right to silence lost. Muir J in *Queensland v O'Brien* had said, "[w]hen one looks at this matter broadly, if the matter is stayed ... the respondent will suffer little in the way of prejudice but, on the other hand, if a stay is not granted, the potential prejudice to the applicant is quite grave."

17. In the present matter, the Court of Appeal considered that if the proceedings were not stayed, the prosecution would be informed, in advance of the second respondent's trial, of his defence because he could not realistically defend the forfeiture proceedings without telegraphing his likely defence. The result would be that the prosecution would be advantaged in a manner which fundamentally alters its position vis-a-vis the second respondent and renders the trial unfair. The Court of Appeal observed that in *Lee v The Queen* ("Lee No 2"), this Court had ordered that a conviction be quashed where this result had occurred .

18. It is necessary to observe that the circumstances in Lee No 2 differ substantially from those of the present case. Lee No 2 involved the wrongful release of evidence, which had been obtained by the New South Wales Crime Commission under its coercive powers given to it by the New South Wales Crime Commission Act 1985 (NSW), to the Director of Public Prosecutions, which was pursuing charges against Lee. The question was whether the

possession of that evidence by the prosecution caused a miscarriage of justice. This Court held that it did, because Lee had not had a trial for which our system of criminal justice provides, and which the New South Wales Crime Commission Act itself sought to protect, by a provision which, in effect, prohibited the release of such evidence. An important aspect of a criminal trial, which follows from a fundamental principle of the common law, is that the prosecution is to prove the guilt of an accused person and cannot compel a person charged with a crime to assist in the discharge of its onus of proof. It was in this context that it was said that Lee's trial was fundamentally affected because the position of the prosecution vis-a-vis the accused had been altered.

19. In this case the issue has arisen at an earlier point. The question is therefore whether the second respondent should be placed in a position where he must decide whether to prejudice his criminal trial or his defence of the forfeiture proceedings and his case in the exclusion proceedings. The Commissioner says that the scheme of the POC Act is that the forfeiture proceedings should continue.

The POC Act

20. The principal objects of the POC Act include depriving persons of the proceeds of, and benefits derived from, offences and to provide for restraining orders and confiscation orders. Section 6 states that the POC Act establishes a scheme by which it seeks to achieve the objective of confiscation of the proceeds of crime. Section 7 refers to the procedures for confiscation, which are found in Ch 2. They include restraining orders and orders under which property is forfeited to the Commonwealth. The proceedings for such orders are civil in nature.

21. Sections 17 to 19 make provision for restraining orders. Section 17 provides that a court having jurisdiction under the POC Act must, on the application of a proceeds of crime authority, order that property of a person who has been convicted of an indictable offence must not be disposed of or must be dealt with only in specified circumstances. If the person has been charged, or it is proposed that he or she be charged, with an indictable offence, the court must make the order if it is satisfied that an authorised officer suspects on reasonable grounds that the person committed the offence in question. Section 18 provides for the making of a restraining order where a person is suspected, on reasonable grounds, of having committed a serious offence. Section 19, under which the application for the restraining order was made in this case, is directed to property. A court must make a restraining order if there are reasonable grounds to suspect that the property is the proceeds of an indictable or other specified type of offence.

22. Section 59 provides that a proceeds of crime authority may apply for a forfeiture order. Sections 47 to 49 provide for the circumstances in which such an order is to be made.

23. Section 48 is the analogue to s 17 and provides that when a person is convicted of an indictable offence, a court must make a forfeiture order if satisfied that the property is the proceeds of one or more of those offences, or may make such an order if satisfied that the property is an instrument of one or more of the offences.

24. Sections 47 and 49 respectively follow on from ss 18 and 19. It is a necessary condition for the making of a forfeiture order under either s 47 or s 49 that a restraining order has been made covering the property and has been in force for at least six months . If this condition is satisfied, s 47 provides that a forfeiture order must be made where the court is satisfied that a person whose conduct formed the basis for the restraining order engaged in conduct constituting one or more serious offences.

25. Section 49 is relevant to this case and provides for the making of a forfeiture order where the court is satisfied that the property in question is the proceeds of one or more indictable offences or an instrument of one or more serious offences.

26. In determining whether to make a forfeiture order under s 49, the court is not required to find that a particular person committed any particular offence. An order can be based on a finding that some offence or other of the necessary kind was committed . A forfeiture order may be refused in specified circumstances, if it is in the public interest to do so . This provision does not assume any importance in these proceedings.

27. Section 80 was regarded by the primary judge as of some importance in the scheme of the POC Act. It provides that a forfeiture order made under s 47 or s 49 against a person in relation to an offence is not affected if the person, having been charged with an offence, is acquitted, or the person is convicted of the offence and the conviction is subsequently quashed.

28. A person might effectively resist a forfeiture order made under s 47 or s 49 by obtaining an order revoking the restraining order . Application may also be made under s 73 to exclude a specified interest in property from a forfeiture order. The application may be heard before or at the same time as the application for the forfeiture order or after such an order is made.

29. In any case, as the Commissioner points out, the person will effectively be compelled to put on some evidence, at least where the Commissioner's evidence is sufficient for the making of the order sought. Section 73(1) requires, for an order for the exclusion of property to be made, that the court be satisfied that the property is neither the proceeds of unlawful

activity nor an instrument of a serious offence on which the forfeiture order was, or would be, based. If the court orders a person to give evidence on the application, s 39A, in terms, abrogates the privilege against self-incrimination. The Court of Appeal considered it to be of some importance that the second respondent had not yet been required to give evidence in this case and therefore there had not yet been an abrogation of his privilege against self-incrimination .

30. Section 319, which is set out above, clearly contemplates that where criminal proceedings are brought with respect to an offence related to civil proceedings for restraining orders or forfeiture orders, an application for a stay may be brought. Its terms suggest that a person charged with an offence which is relevant to forfeiture or other civil proceedings brought under the POC Act must do more than point to the existence of criminal proceedings in order to obtain a stay of the civil proceedings.

31. Two further aspects of the POC Act need to be mentioned.

32. Chapter 3 contains provisions for orders for the examination of a person claiming an interest in property, or their spouse, when an exclusion order is sought. However, neither party identifies those provisions as relevant to the present matter.

33. Section 266A of the POC Act has the effect that evidence given by the respondents in the forfeiture proceedings may be provided inter alia for the purpose of the prosecution of the charge against the second respondent, although it may not be admitted into evidence against him. The Commissioner submits that the section is indicative of a scheme in which it is expected persons will give evidence. If that is not the case, the section may be one factor in favor of the grant of a stay.

The Commissioner's contentions

34. The Commissioner is correct to observe that the POC Act, in the provisions it makes both for restraining orders and for forfeiture orders, contemplates that such orders may be made regardless of whether a person is charged with an offence having some connection with the forfeiture proceedings. It may also be accepted that the civil proceedings under the POC Act are separate and distinct from any criminal proceedings and it is possible that they may be conducted regardless of the criminal proceedings. They are unaffected by the outcome of criminal proceedings. So much is evident from s 80. It follows that the fact that criminal proceedings have been brought may generally be considered not to be an impediment to the continuation of the forfeiture proceedings.

35. The assumptions upon which the POC Act is founded in this regard are not novel. They are reflected in s 319, but a provision of this kind is strictly unnecessary. Courts will not

grant a stay of civil proceedings merely because related charges have been brought against a person and criminal proceedings are pending. More is required. To warrant a stay of the forfeiture proceedings, it must be apparent that the person whose property is in question is at risk of prejudice in the conduct of his or her defence in the criminal trial.

36. Section 319 impliedly acknowledges what is in any case true: that the courts have the power to control their proceedings and to order a stay in an appropriate case. It will be appropriate to do so where the interests of justice require such an order. Section 319 is not expressed to refer specifically to a circumstance where the issues in the forfeiture proceedings and the criminal proceedings are substantially identical. The POC Act does not presume to say what a court should do in such a circumstance.

37. In aid of his argument that the POC Act may be taken to require that forfeiture proceedings continue regardless of whether criminal proceedings are pending, the Commissioner points to the position in which a person is inevitably put when an application for forfeiture is brought under s 47 or s 49. At least where the Commissioner has satisfied the evidentiary requirements of those provisions, so that the court could be satisfied that a serious offence of some kind has been committed or that the property in question is the proceeds or an instrument of crime, a person with an interest in the property will be faced with the choice of whether to defend the proceedings. This will invariably require that they provide evidence to counter that put forward by the Commissioner. In a sense, then, the POC Act puts the person to their election. So much may be accepted, but it does not follow that the POC Act may be taken to imply that every person in that position must proceed to make their choice, regardless of the risk of prejudice to their defence in the criminal trial. Whether the forfeiture proceedings continue is a matter for the court to consider in the interests of justice.

38. The Commissioner accepts that it may be going too far to say that, in every case where the issues in the civil and criminal proceedings are identical, the forfeiture proceedings should proceed regardless of the effect that their continuance may have on the person's defense of the criminal proceedings. The Commissioner is then obliged to limit his submission to one that the POC Act implies that, ordinarily, the forfeiture proceedings should continue. But the Commissioner has not explained how the POC Act can be said to imply this and for what reason, other than achieving efficiency, it would be necessary to forfeiture proceedings that they be pursued with such urgency.

39. It may be accepted that forfeiture proceedings should not be unduly delayed. No litigation should be delayed except for good cause, especially criminal proceedings. On the other hand nothing in the POC Act or in the nature of forfeiture proceedings under the Act

suggests that they must proceed at all costs. It could hardly be said, from any point of view, that they are more important than criminal proceedings and should be given priority.

40. Indeed, provisions of the POC Act point the other way. A proceeds of crime authority may apply ex parte for an order restraining the disposition of and dealings with property which will be the subject of an application for forfeiture, as the Commissioner did in this case. The evidentiary requirements for such an order are not onerous. The POC Act itself substantially reduces the risk that the property may be lost, which may otherwise be a proper concern of the Commissioner.

41. The scheme of the POC Act does not constrain the exercise of the court's discretion to grant a stay in the way for which the Commissioner contends.

Whether a stay should have been granted

42. The risk of prejudice to the second respondent if a stay is not granted in the forfeiture proceedings and the exclusion proceedings is plain. It is not necessary for the second respondent to say any more than he did on the application for a stay in order to identify that risk, given that the offences and the circumstances relevant to both proceedings are substantially identical.

43. The Commissioner contends, as the primary judge had held, that it was necessary that the second respondent state the specific matters of prejudice before a stay could be contemplated. However, to require the second respondent to do so would be to make the risk of prejudice a reality by requiring him to reveal information about his defence, the very situation which an order for a stay seeks to avoid. Similarly, the Commissioner's contention that the court should defer making an order for a stay until the parties have exchanged their evidence is beside the point.

44. The Commissioner suggests that protective orders could be made, which might maintain the confidentiality of evidence, and that evidence could be given in closed court. In the latter regard, the open court principle, to which the law adheres, now finds expression in s 28 of the Open Courts Act 2013 (Vic). The rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principle save in exceptional circumstances. Closing the court so that the Commissioner might progress forfeiture proceedings and receive the second respondent's evidence does not qualify as a proper reason for departing from the principle.

45. During the course of argument, at a point when the power given by s 266A of the POC Act to disclose to a prosecutor evidence obtained by compulsion was mentioned, the Commissioner was at pains to reassure the Court that he does not contend that s 266A

provides a licence to communicate information obtained in the civil proceedings to the prosecuting authorities. The Commissioner emphasised that the Proceeds of Crime Litigation section is not regarded as an arm of the prosecution, which appears to have been the perception of the New South Wales Crime Commission in Lee No 2.

46. Regardless of the conduct in Lee No 2, it would not be correct to approach a matter such as this on the basis that a wrong would be committed. However, s 266A would not render the provision of the second respondent's evidence to the prosecution unlawful. Even if it could not be used as evidence against him, its possession by the prosecution might affect his defence. The Court of Appeal's view, that protective orders would not suffice to remove the risk of prejudice to the second respondent's defence, is clearly correct.

47. The prospect that civil proceedings may prejudice a criminal trial and that such prejudice may require a stay of the civil proceedings is hardly novel. In some jurisdictions, procedures are provided for making an application for a stay in such circumstances . The risk of prejudice in a case such as this is real. The second respondent can point to a risk of prejudice; the Commissioner cannot.

48. So far as concerns the first respondent, the Court of Appeal was correct to identify as relevant that to permit the forfeiture proceedings to proceed against her would produce two sets of proceedings, rather than one. The principle of the common law that seeks to prevent a multiplicity of actions has a long history and cannot be ignored . The principle is stated in the County Court Civil Procedure Rules 2008 (Vic) .

Conclusion and orders

49. It may be accepted that criminal proceedings are not an impediment to civil proceedings under the POC Act, but it does not follow that it is intended that forfeiture proceedings brought under the POC Act will continue where to do so would put a respondent at risk of prejudice in his or her criminal trial.

50. The interests of justice are not served by requiring the second respondent to defend the forfeiture proceedings or pursue the exclusion proceedings before his criminal proceedings are finalized, especially since the Commissioner will suffer no relevant prejudice from a delay in the continuation of the forfeiture proceedings.

51. The appeal should be dismissed with costs.

