

**IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY**

CRI 2008-054-1871

THE QUEEN

v

STANFORD WAYNE KIRIONA

Hearing: 10 June 2010

Counsel: E J McCaughan for Crown
R D M Lima in Person

Judgment: 15 June 2010

**JUDGMENT OF RONALD YOUNG J
(Application for relief from forfeiture order)**

Introduction

[1] On 19 February 2010 Stanford Wayne Kiriona having previously pleaded guilty to conspiring to supply methamphetamine, possession of methamphetamine for supply and possession of a methamphetamine pipe was sentenced to five years and five months' imprisonment. During the course of his sentencing remarks Clifford J made an order for the forfeiture of a Chevrolet van owned by Mr Kiriona.

[2] Ms Lima, Mr Kiriona's sister representing herself has made an application for relief against that forfeiture. The Crown oppose the application. Although it was

not clear what the statutory basis was for Ms Lima's application I assume it to be an application pursuant to s 141(1) of the Sentencing Act 2002.

[3] Prior to sentencing Clifford J had a disputed facts hearing dealing with, in part, the basis on which the Crown sought an order for confiscation of the Chevrolet van. The van is a 1979 Chevrolet, licence plate N1GR. Mr Kiriona had been the registered owner of the vehicle since July 2004. The Crown case was that the vehicle had been used in the commission of the conspiracy charge which Mr Kiriona had pleaded guilty to.

[4] Section 32(4) of the Misuse of Drugs Act 1975 provides as follows:

(4) If, on the conviction of any person for an offence against section 6 of this Act, the Court is satisfied that any motor vehicle, aircraft, or ship or boat or other vessel owned by the convicted person (whether solely or as joint tenant or tenant in common with any other person or persons) or in which he has any interest (whether pursuant to a hire purchase agreement, leasing agreement, or otherwise) at the time of his conviction was used by the convicted person in the commission of that offence (whether or not he was the driver or person in charge), the Court shall, unless in the circumstances of the case the Court considers that it would be unjust to do so, order, in addition to any other penalty imposed under this Act, that the motor vehicle, aircraft, or ship or boat or other vessel be forfeited to Her Majesty.

[5] The Crown outlined out Mr Kiriona had used the vehicle on a number of occasions to facilitate the sale and purchase of drugs.

The Application

[6] Section 141 provides a process by which any party other than the offender whose vehicle has been confiscated and who has an "encumbrance" (other than a lease) over a confiscated vehicle may apply to the Court before the vehicle is sold. As a result of the application the Court can either direct the Registrar to transfer the vehicle to that other person, or direct the other person to sell the motor vehicle and account for the proceeds in accordance with s 141B.

[7] Essentially if an applicant pursuant to s 141 can establish that they have an encumbrance over the confiscated vehicle then, subject to them paying the costs of

the impoundment and the towing and storing the vehicle they can be entitled to the sale price of the vehicle up to the value of their encumbrance.

[8] Section 127 defines encumbrance in the following way:

127 Interpretation of terms used in sections 128 to 142

(1) For the purposes of this section and sections 128 to 142, unless the context otherwise requires,—

encumbrance, in relation to a motor vehicle in respect of which a confiscation order is made, includes—

- (a) a hire purchase agreement:
- (b) a leasing agreement:
- (c) any other agreement entered into between the offender and another party under which the other party obtains or retains any interest in the motor vehicle

hire purchase agreement means a hire purchase agreement within the meaning of [section YA 1 of the Income Tax Act 2007]

[9] Ms Lima has filed two affidavits relating to the circumstances under which she says she is a party to an encumbrance with respect to the motor vehicle.

[10] Ms Lima's evidence is that in 2004 her brother, Mr Kiriona, borrowed \$7,000 from her in two instalments, one in May 2004 and the second in July 2004 to enable him to purchase the Chevrolet van. She says that their understanding was that he would at some time repay the \$7,000. Since that time Ms Lima has not received any repayment of the loan. She does not claim she has ever sought repayment from Mr Kiriona. There is no written acknowledgment of the loan.

[11] Mr Kiriona has also sworn an affidavit. He confirms that the two payments totalling \$7,000 were made to him in May and July 2004 by Ms Lima to buy the van. Further, Ms Lima attaches to her affidavit copies of her bank statement transferring the \$7,000 to a bank account number given to her by Mr Kiriona.

[12] Mr Kiriona, however, says that the purchase price of the van was only \$5,000 and that the rest of the money was to pay “expenses incurred for the registration and warrant”.

[13] Once Mr Kiriona was arrested with respect to the drug charges it seems that he told Ms Lima that he could not repay the loan and that she could take the van instead. By that stage (19 February 2008) Ms Lima had also completed a financing statement and had registered it on the Personal Property Securities Register relating to the \$7,000 loan and the Chevrolet van.

Discussion

[14] The issue for me to resolve is whether or not Ms Lima has an encumbrance as defined by s 127 of the Sentencing Act. In particular Ms Lima has to satisfy me that there is an agreement entered into between Mr Kiriona and Ms Lima under which, she obtained or retained any interest in the Chevrolet van. “Interest” is further defined as “any proprietary interest whether legal or equitable, whether vested or contingent”.

[15] Ms Lima has not satisfied me that she has any interest of any sought in the Chevrolet motor vehicle.

[16] Even on her own evidence it is quite clear that she loaned her brother \$7,000 and he purchased a car. That transaction gave her no interest in the vehicle. It is hard to know whether the claim this was a loan was genuine or not. There is no evidence that between 2004 and 2008 Ms Lima made any demand for the repayment of the money. On her own evidence Mr Kiriona made no effort to repay the loan nor did she seek repayment.

[17] Mr Kiriona’s evidence is that only \$5,000 was directly used to purchase the motor vehicle. The remaining loan may have gone on expenses related to the motor vehicle.

[18] Ms Lima's attempt to create an interest in the motor vehicle by the registration of a security interest cannot help her.

[19] The events which gave rise to the offending were in 2007. It is not possible therefore for Ms Lima to somehow create an interest in the vehicle arising from the money she loaned her brother subsequent to his offending. To allow otherwise would be to permit the avoidance of the statutory regime for confiscation by a simple method of retrospective declaration of interest.

[20] In summary, therefore, it is clear from Ms Lima's own evidence that she has no interest in the Chevrolet motor vehicle. She made a simple loan to her brother who in turn purchased a vehicle with the money lent. She had no interest in the motor vehicle. Mr Kiriona for all purposes owned the vehicle but in turn had a debt to his sister. This arrangement therefore illustrates that Ms Lima had no interest in the motor vehicle and therefore cannot succeed in her application under s 141 of the Sentencing Act.

[21] I have proceeded on the assumption in this judgment that Ms Lima did indeed loan the money to her brother although on the evidence I have seen it is far from clear that was the case.

[22] For the reasons given the application is refused.

Ronald Young J

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