

IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. 24 OF 1993

(High Court Criminal Case No. 11 of 1991)

BETWEEN:

BIJENDRA NARAYAN s/o DEO NARAYAN

APPELLANT

-and-

THE STATE

RESPONDENT

—Mr S. Chandra for the Appellant  
Mr K. Wilkinson for the Respondent

Date and Place of Hearing : 6th March 1995 Suva  
Date of Delivery of Judgment : 9th March 1995

JUDGMENT OF THE COURT

On 13 March 1993 the applicant was convicted of an offence of Larceny by Servant contrary to S.274(a)(1) of the Penal Code Cap.17 and on that date was sentenced by the Trial Judge His Lordship Mr Justice Fatiaki to 15 months imprisonment.

In sentencing the applicant the learned Judge adverted to the seriousness of the offence. He referred to the accused having been "an Accounts Clerk of Suncourt (Fiji) Limited charged among other duties with the responsibility of preparing cheques and doing bankings for the company. In the course of discharging those duties he committed the offence over a period of approximately one year. A large sum of money in excess of \$16000 has been stolen by the accused and nothing has been repaid or recovered".

No offer of restitution was made by the applicant. No appeal against the sentence was forthcoming. The applicant has served that sentence.

On 19 June 1993 the Director of Public Prosecutions filed a Notice of Motion in the High Court headed "In the Matter of an

Application under Section 161(1)(b) of the Criminal Procedure Code" supported by an affidavit from one Manoj Kumar Bhika the General Manager of the Suncourt Group of Companies and of the Suncourt Hardware Store in Nabua, Suva, seeking "an Order under S.164 of the Penal Code that the sum of \$20646.41 currently held to the credit of Birendra Narayan f/n Deo Narayan and Kusma Wati f/n Birendra Narayan should be restored to Suncourt Group of Companies."

The apparent inconsistency within the Notice of Motion was rectified later with the section in question, S.161(1)(b) being substituted for S.164.

Due in no small part to the incarceration of the applicant, the matter drifted in and out of the Court with further material being filed by both the Director of Public Prosecutions and the applicant.

Eventually after having been before the learned Trial Judge on evidentiary and procedural matters on 2 and 22 July 1993, 19 August 1993 and 8 September 1993, the hearing finally took place on 7 October 1993 and 25 November 1993, His Lordship giving his ruling on 10 December 1993 whereby he ordered:

*"Accordingly the order of the court is that the monies amounting to \$17,110.69 (Seventeen thousand and one hundred and ten dollars and sixty nine cents) standing to the credit of the respondent in N.B.F. Savings Account No : 02-802312-1001-2 be paid into court for payment out to Suncourt Wholesalers (Fiji) Ltd. within 21 days of the receipt of the same."*

From this ruling the applicant has appealed to this Court by Notice of Appeal dated 23 December 1993 wherein he claims :

(a) THAT the learned Judge erred in fact and in law when he improperly assumed that all the monies standing to the credit of the Appellant in NBF Savings Account No. 02-802312-1001-2 were fully representative of the "proceeds or fruits" of Appellants illegal activities.

(b) THAT the learned Judge erred in law and in fact holding that all monies standing to the credit of the Appellant in NBF Savings Account No. 02-802312-1001-2 belonged to his employer.

(c) THAT the learned Judge did not adequately and correctly exercise his discretion whether or not this case was an appropriate one to award compensation to the victim which is a registered limited liability company.

IN ADDITION TO AND/OR IN ALTERNATIVE

(d) THAT the Order to pay all the monies held in NBF Savings Account No. 02-802312-1001-2 to the SUNCOURT WHOLESALERS (FIJI) LTD is manifestly harsh and excessive on the Appellant considering that he had been convicted and has already suffered as a result.

(e) THAT the Appellant reserves the right to add and argue any further grounds of appeal on receipt of the Court.

(f) THAT the order and the direction dated 10th of December 1993 was made by Honourable Mr Justice Fatiaki."

Before touching on the issues that arise out of this Appeal, we feel compelled to comment favourably on the helpful and comprehensive arguments advanced to this Court by Counsel for each party, particularly on their Skeleton arguments.

A further factor that bears mention in reviewing the course of these proceedings, is the advantage that results from the continued presence of His Lordship Mr Justice Fatiaki in the hearing of every step.

His background knowledge of the whole of the facts and of the course of proceedings, has allowed him to deal succinctly and precisely with questions both of fact and of law, arising from a type of legislation and decisions thereon which can best be described as "developing" or perhaps more correctly, "still developing".

In the course of his ruling the learned Judge stated as

follows :

"However before a 'compensation order' can be made pursuant to the Section the Court must be satisfied of the following threshold matters :

- (1) That the person against whom the compensation order is sought to be made has been convicted of an offence;
- (2) That the person in whose favour the compensation order is being made has suffered a "loss" as a direct result of the commission of the offence;

and

- (3) That the monies sought to be applied in or towards the payment of the compensation order is "... money found on or in the possession of the convicted person".

Needless to say the Section does not in terms require such monies to be 'stolen' nor need they be in anyway tainted by the offence.

Furthermore even if all three factors are present in any particular case the court nevertheless retains a discretion whether or not to make a 'compensation order'.

In this latter regard without seeking to exhaustively enumerate the factors which a court might consider relevant, the following may be listed :

- (a) the liability and ability of the convicted person to compensate the victim;
- (b) any contributory factors on the victim's part in failing to prevent or detect sooner the commission of the offence;
- (c) any dispute as to the ownership or possession of the money sought to be "attached" by the order;
- (d) the amount sought to be recovered by way of compensation;
- (e) the means and ability of the victim to institute civil proceedings for the recovery of the "loss";

- (f) the existence of any other sources of compensation available to the victim such as insurance; and
- (g) the certainty, quality and nature of the evidence relied upon to prove or establish the "loss" to be compensated;"

We agree with His Lordship's approach.

In our opinion this appeal must fail; nothing that learned counsel for the appellant has submitted in the skeleton argument or in his oral submissions to this Court, has persuaded us that His Lordship has erred in any aspect of his closely considered Ruling. His interpretation of the section is in our opinion correct. Likewise his application of the relevant facts to that Section. On the question of discretion he has enumerated the more important factors while not proclaiming that the list is exhaustive. In our view he has appropriately exercised his discretion and his Ruling must stand.

It would be pedantic of this Court to say more.

The Order of this Court is that the Appeal be dismissed.

*Moti Tikaram*  
 .....  
 Sir Moti Tikaram  
President Fiji Court of Appeal

*E. Williams*  
 .....  
 Sir Edward Williams  
Judge of Appeal

*J.D. Dillon*  
 .....  
 Mr Justice J.D. Dillon  
Judge of Appeal