

THE STATE

v.

BIRENDRA NARAYAN

[HIGH COURT, 1993 (Fatiaki J) 10 December]

Criminal Jurisdiction

Crime-procedure-compensation order- principles governing- Criminal Procedure Code (Cap 21) Section 161 (1) (b).

The Director of Public Prosecutions sought a compensation order against a convicted person on behalf of his former employer. The High Court reviewed the relevant provisions in the Criminal Procedure Code, enumerated other factors taken into account by the Court and made a partial order in favour of the applicant.

Case cited:

John Ferguson (1970) 54 Cr. App. R. 410

Application for criminal compensation order.

I. Wickramanayake for the Applicant
T. Fa for the Respondent

Fatiaki J:

On the 18th of March, 1993 after a contested trial the above-named respondent was convicted by this court of an offence of Larceny by Servant and sentenced to 15 months imprisonment. The particulars of the offence charged were as follows:

“Birendra Narayan f/n Deo Narayan between the 20th of April 1989 and 1st May 1990 at Suva in the Central Division, being employed as a servant of Suncourt (Fiji) Ltd., stole \$40,054.34 the property of the said Suncourt (Fiji) Ltd.”

The present application filed by the Director of Public Prosecutions on the 17th of June 1993 seeks:

“... an order under Section 164 of the Penal Code that the sum of \$20,646.41 currently held to the credit of Birendra Narayan f/n Deo Narayan and Kusma Wati w/o Birendra Narayan should be restored to Suncourt Group of Companies.”

At an early stage the Section under which the application was brought was amended to Section 161(1)(b) of the Criminal Procedure Code (Cap. 21) (C.P.C.).

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A It is necessary to consider the relevant background to the present application which is set out in the affidavit of the General Manager of the Suncourt Group of Companies. In brief the General Manager deposed that the respondent whilst employed as an Accounts Clerk in the Suncourt Hardware store at Nabua, stole a substantial sum of money belonging to the company which he deposited (part of) in his and his wife's personal savings accounts maintained at the National bank of Fiji (N.B.F.).

B More particularly and as proof of the illicit nature and source of the funds in the respective N.B.F. savings accounts the acting D.P.P. seeks to rely upon an admission in the respondent's police interview in which he is recorded to have said inter alia in answer to the question:

“Q: Now tell what happened to all the money which you stole from the Company?”

C A: \$17, 110.00 is in my N.B.F. account No.: 02-802312-1001-2. \$3,535.72 in wife's account at N.B.F. account No. D 93623 ...”

D The respondent for his part in opposing the application has filed 2 affidavits. In brief, the respondent admits his conviction and sentence but denies that he made the above-quoted admission in his police interview. He also seeks to re-open the voluntariness and admissibility of his police interview record and has annexed a medical report.

E I say “re-open” because in the course of the trial of the respondent this Court heard evidence in a trial within a trial and ruled that the respondent's interview record was voluntary and admissible and the same was read and exhibited in the trial.

F Furthermore the respondent during the course of his evidence in the trial proper testified that he had been threatened and assaulted and forced to answer and sign various police fabrications in his interview record. So much then for the background to this application.

I turn next to the provisions of Section 161 (1) (b) of the C.P.C. which reads: (so far as relevant)

G “161 - (1) Any court may, in its discretion, order the whole or any part of any ... money found on or in the possession of a convicted person to be applied in or towards -

(b) the payment to any person of compensation for any loss ... caused by the offence.”

The Section in its present form was first introduced into our C.P.C. in 1969 and provides a quick and ready means of avoiding the expense and delay of

resorting to civil litigation where a convicted person clearly has the resources which would enable compensation to be paid.

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 presented 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

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- (g) the certainty, quality and nature of the evidence relied upon to prove or establish the loss to be compensated;

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How then ought these principles and factors to be applied in the present case? Learned counsel for the D.P.P. submits that this is a straightforward application under Section 161 of the C.P.C. based upon a conviction of the respondent for an offence of Larceny by servant of money belonging to his employer and which the respondent admitted depositing into 2 identified bank accounts.

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Furthermore the prosecution case in the trial of the respondent was primarily based on the several admissions made by him in his police interview and the respondent's conviction raises an estoppel in so far as the admissibility and truth of his admissions are concerned.

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The monies in the account are "in the possession of (the respondent)" insofar as he admitted depositing the stolen monies into both accounts but more so in relation to the account held in his personal name i.e. N.B.F. Account No: 01-802312-1001-2.

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As for the account in the wife's name i.e. N.B.F. Account No: D93623, counsel for the D.P.P. concedes that such monies may not strictly be "in the possession of" the respondent, nevertheless, on the respondent's own admission he was the depositor of the monies which represent part of the proceeds or fruits of his illegal activities and the court ought to exercise its discretion so as to prevent the respondent indirectly enjoying such illegal ill-gotten gains.

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I accept as a general proposition that a court ought wherever possible to exercise its powers to the fullest to ensure that persons convicted of criminal offences are deprived of the unlawful proceeds or fruits of their criminal activity and that the victims of such crimes are properly and adequately compensated for any loss they may suffer therefrom, but in the exercise of its statutory powers this court's primary duty must be to ensure that the circumstances fall fairly and squarely within the four corners of the statutory prescription.

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In this application the respondent's wife has not been separately named nor does it appear in the court file that she has been served with the relevant application. No affidavit has been filed on her behalf contesting the application.

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In these circumstances in view of fact that the wife's passbook is written in her personal name alone (as opposed to say a joint account) and in the absence of any more independent and positive proof that the respondent was the source of the funds in the account such as bank deposit slips which would be available, I am not persuaded that the money in N.B.F. Savings Bank Account No.: D93623 is, to adopt the wording of Section 161 (1) of the C.P.C. "... in the possession of a convicted person ..." (i.e. the respondent).

In John Ferguson (1970) 54 Cr. App. R 410 Salmon L.J. in refusing to make a compensation order in that case in which there was a doubt as to the ownership of the money recovered from a safe-deposit box held in the appellant's name, said at p. 413:

“If there is any doubt at all whether the money ... in question belong to a third party, a criminal court is not the correct forum in which that issue should be decided. It is only in the plainest cases, when there can be no doubt that the money belonged to the convicted man, that the court would be justified in exercising its discretion... To do so in any case of doubt might cause the gravest injustice to a third party because the third party to whom the money may belong has no locus standi to appear before a criminal court. Nor is there any appropriate machinery available in the criminal courts for deciding the issue as to who is the true owner. Discovery is sometimes a very important part of the machinery for resolving issues of that sort and discovery for this purpose can be obtained only in the civil courts. A civil court is the correct forum for deciding matters of this kind ...”

The State's application in regard to N.B.F. Passbook No: D93623 in the name of Kussma Wati is accordingly refused and dismissed and the passbook is ordered to be returned to her forthwith.

The state's application in relation to the respondent's passbook N.B.F. Savings Account No.: 02-802312-1001-2 however is on much firmer ground and I have no hesitation in holding that the evidence satisfies me of the existence of the 3 threshold matters which must be established before this court can exercise its discretion under Section 161 of the C.P.C.

That is to say this court is satisfied that the respondent against whom the compensation order is sought is a “convicted person”; further that as a result of the offence Suncourt Wholesalers (Fiji) Ltd. was defrauded and sustained a “loss” of an amount in excess of the monies sought to be recovered from the respondent and thirdly, that the monies standing to the credit of the respondent in N.B.F. Savings Account No.: 02-802312-1001-2 represents “money ... in the possession of the (respondent)” which may be applied in or towards the payment of compensation.

Learned counsel for the respondent in his submissions complained that he was not familiar with the trial of the respondent or the evidence adduced therein and sought to object to the application on the basis of the inadequacy of the affidavits provided in support of it.

With respect however whilst I can sympathise with counsel's predicament, the record of the proceedings in the criminal trial of the respondent is a matter of public record and would have been readily available and accessible to counsel

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had he desired to inform himself about it assuming that the respondent's instructions were incomplete on that account.

A In my view the present application is necessarily part of criminal proceedings and does not bar civil proceedings being instituted at some later stage for the recovery of any loss caused by the commission of a criminal offence save that the civil court shall take into account any sum already paid out or recovered as compensation ordered in the criminal proceeding.

B I am satisfied that the state's application is properly brought and that this is an appropriate case for the payment of compensation to Suncourt Wholesalers (Fiji) Ltd.

Accordingly the order of the court is that the monies amounting to \$17,110.69 (Seventeen thousand 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.

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(Application partly allowed)

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