

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. : HAM 196 OF 2017

BETWEEN : THE STATE

Applicant

- 1. SAIRUSI QIOKATA**
- 2. NIMILOTE WAQAVOU**
- 3. RUSIATE NAMILAMILA**
- 4. TAITO KOROI**
- 5. MOSESE TUISORISORI**

Respondents

Counsel

Mr. A. Datt for Applicant

Ms. K. Vulimainadave for Respondents

Date of Ruling: 14th August, 2018

Date of Ruling: 12th October, 2018

RULING

Introduction

- 1. This application has been made by the State seeking an order in terms of Section 155 (1) (c) of the Criminal procedure Act 2009 for disposal of seized property kept in police custody.**
- 2. The Respondent's were jointly charged with one count of 'Aggravated Robbery' in Criminal Case No. HAC 83/2013.**

3. It was alleged that the Respondents had robbed the shop/dwelling house of one Parwati (the 1st complainant) and her husband Kumar Sami (the 2nd complainant) at Toko, Tavua.

4. During police investigations, the following items were recovered and exhibited at the Vatukoula Police Station:
 - (a) 1 pioneer DVD brand Silver in colour;
 - (b) Samsung brand digital camera;
 - (c) 2 piece yellow ring;
 - (d) 1 digital camera audio sonic colour black;
 - (e) 1 black bag containing 1 packet BH 20's sealed with 1 packet Rothman 10's sealed;
 - (f) 5 packet BH 10's sealed with 1 packet 20's sealed;
 - (g) 9 packet juicy fruit chewing gum with 2 packet PK chewing gum;
 - (h) 2 packet BH 10's, 1 packet BH 20's sealed;
 - (i) 2 large sony battery;
 - (j) 1 packet Rothman 10's sealed;
 - (k) 33 'AA' national blue battery;
 - (l) 32 packet matches;
 - (m) 6 x \$6.00 vodafone recharge;
 - (n) 4 x \$3.00 Digicel recharge;
 - (o) 10 x \$6.00 Ink recharge;
 - (p) 1 Nokia Pink Mobile Phone;
 - (q) 1 Next GT Maroon Mobile Phone;
 - (r) 1 Alcatel Red Mobile Phone;
 - (s) 1 Red Meenoos Bag;
 - (t) 1 Philips CD Cynchrostart recording radio with 2 pin;
 - (u) 1 sports black and blue travelling bag where all the items are packed in;
 - (v) 1 bottle of 40 oz Bounty Rum with ¾ filled with Rum; and
 - (w) Total cash of \$2,570.00.

5. In November 2014, whilst the substantive matter was still pending, the 1st complainant formally applied for the release of the exhibited items in case No. HAM 260/14.

6. The then presiding judge, ordered the release of all the exhibited items to the 1st complainant except the following items for which four Respondents made a counter claim contesting the ownership:
 - (i) Total cash of \$2,570.00;
 - (ii) 1 black bag containing 1 packet BH 20's sealed with 1 packet Rothman 10's sealed; and
 - (iii) 1 Nokia Pink Mobile Phone.
7. The State relied on the confessions allegedly made by each Respondent in their respective caution interviews. The Respondents challenged the admissibility of confessions and a *voir dire* inquiry was held to decide admissibility. After the inquiry, the Court held caution interviews to be inadmissible.
8. The State thereafter filed a *nolle prosequi* and the substantive matter was discontinued. The State then filed this application, under Section 155 (1) (c) of the Criminal Procedure Act 2009 for the disposal of the remaining exhibited items to the party deserving.
9. The Notice of Motion and affidavits were served on the 1st, 2nd, 3rd and 5th respondent but the 4th respondent could not be located. The 1st and 3rd respondents chose not to attend the proceedings. The 4th respondent had no major claims *vis-à-vis* the remaining exhibited items hence the Court decided to hold an inquiry into the claims made by the 1st complainant and 2nd and 5th Respondents.
10. The State relies on the affidavits of the 1st complainant (Ms Parwati); Investigating Officer PC Loame Turagaluvu; and Senior Legal Officer Ms Luisa Latu of the Office of the Director of Public Prosecutions. On the directions of the Court, the State filed an affidavit of Inspector Meli Balekinakorovatu, the police officer who had conducted the search and seized the monies from the houses of Nihilote Waqavou ("the 2nd Respondent") and Mosese Tuisorisori ("the 5th Respondent").
11. 2nd and 5th Respondents also filed affidavits and submissions and they rely on the same.

The Law

12. Section 155 (1) of the Criminal Procedure Act 2009 (“CPA”) states that it shall be lawful for any court in any criminal proceedings to make orders for –
 - (a) the preservation ...[sic] ...in the proceedings;
 - (b) the sale, destruction or other disposal ...[sic] ... which may be dangerous;
 - (c) *the restoration or awarding of possession of any such property or thing to the person appearing to the court to be entitled to possession of it, without prejudice to any civil proceedings which may be taken in relation to it;*

13. Section 101 of the CPA states as follows:
 - (1) When anything is seized and brought before a court, it may be detained until the conclusion of the case or the investigation, and reasonable care shall be taken for its preservation”.
 - (2) If any appeal is instituted, or if any person is committed for trial, the court may order property which has been detained to be further detained for the purpose of the appeal or the trial.
 - (3) *If no appeal is instituted, or if no person is committed for trial, the court shall direct the property to be restored to the person from whom it was taken, unless the court sees fit or is authorized or required by law to otherwise dispose of it.*

[emphasis added]

Analysis

14. The only property in issue for disposal now is the cash of \$2,570.00. The 2nd Respondent (Nimilote Waqavou) and the 5th Respondent (Mosese Tuisorisori) are claiming \$980.00 and \$1,290.00 respectively on the basis that the said money was taken from them and the money belongs to them.
15. This application has been made under Section 155 (1) (c) of the Criminal procedure Act 2009. Since the substantive matter was not set for trial proper after the Ruling on *voir dire*, it can be argued that property disposal has to be dealt with under 101 of the CPA. The section says that *the court shall direct the property to be restored to the person from whom it was taken, unless the court sees fit or is authorized or required by law to otherwise dispose of it*. The claim by the 2nd and 5th Respondents appears to have been made on the basis of Section 101 (3) of the CPA.
16. It can also be argued that the said money was claimed by the 1st complainant whilst the substantive matter was still pending, and therefore the court should have made a proper order under Section 155 (1) (c) of the CPA which states *'the restoration or awarding of possession of any such property or thing to the person appearing to the court to be entitled to possession of it, without prejudice to any civil proceedings which may be taken in relation to it'*.
17. Since the Court had not given an order whilst the case was still pending as required by law, it is just and reasonable to make an order under Section 155 (1) (c) awarding the possession of money to the person appearing to the court to be entitled to possession of it, without prejudice to any civil proceedings which may be taken in relation to it.
18. Even in a scenario where a court is called upon to give an order under Section 101(3) of the CPA, it has discretion to direct the property not to be restored to the person from whom it was taken. Section 101 (3) says that the recovered items goes back to the person from whom it was taken "*... unless the court sees fit ...*" Section allows a Court to look at the facts and circumstances in greater detail, and award

possession of recovered items to the party most deserving, upon being satisfied that the claimant has a just and legitimate right to possession.

19. Relying on the affidavit of IP Meli Balekinakorovatu, the Applicant concedes, that the respective sums of money were seized from the house or the compound of the two Respondents. Therefore, there is no dispute that the property was taken from the custody of the 2nd and 5th Respondents.
20. However, in the circumstances of this case I do not see it fit to restore the money to the 2nd and 5th Respondents for the reason given in this Ruling.
21. According to the affidavit of IP Meli Balekinakorovatu, the monies had been hidden in a suspicious manner. The sum of \$ 980.00 had been taken from the 2nd Respondent's possession when it was hidden stuck to the upper part of a bed side drawer. The sum of \$1,290.00 had been taken after being pointed out by the 5th Respondent when it was packed in a container and buried in the ground.
22. It appears that no claim has been made by 2nd and 5th Respondents to the money either when it was recovered or when the 1st complainant made the clam in court in the first instance. When the matter was called before Justice De Silva, 1st complainant had made an oral application claiming the ownership of the property seized by police. Then the Judge had directed the State to file a formal application. When the same was filed, 2nd and 5th Respondents had not claimed the money.
23. This what can be gathered from the affidavit filed by Ms. Luisa Latu, the State Counsel who had handled the file at that time. There is no reason to doubt the recollection of State Counsel Ms Latu regarding the events took place in court on 22/10/14 since she had recorded the minute on a software database called 'CASES' straight after the matter was called.

24. It was only after the Applicant (the State) had filed a formal application for the release of the remaining exhibited items that the two Respondents had raised their claims to the recovered cash.
25. When a *nolle prosequi* was filled, the Respondents were discharged. However they did not file an application in court claiming the cash until the State filed the present application and served notices on them. The delayed response by the Respondents in raising their claims raises a valid suspicion that the monies are not theirs.
26. The complainants had positively identified the recovered items except the cash. The complainants could not state with certainty that the currency notes taken from the possession of two Respondents are the very same ones that were robbed from their shop/dwelling house. It would not have been possible for them to identify the cash because there were no identification marks on currency notes.
27. The fact that the two Respondents did not claim some of the items that were taken from their possession in the same search operation, when a claim was made by the 1st complainant for all the properties, further confirms that the belated claim made to by the two Respondents for money is not legitimate.

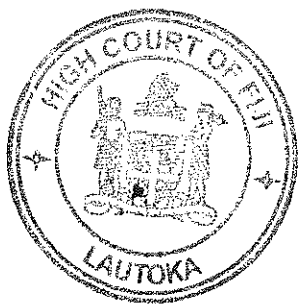
Conclusion

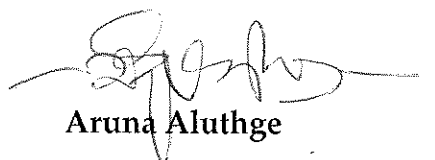
28. Section 155 (c) of the CPA reserves the right for the party, which does not get possession of the recovered items in a criminal matter, to institute a civil proceeding in relation to the said items irrespective of the fact that a criminal court has ordered the release of such items to another party. Therefore, there is an alternative remedy for the party, which does not get possession of the recovered items in the criminal jurisdiction.
29. There is a sufficient evidentiary basis to find on balance of probabilities that the recovered cash was stolen property hence its possession can safely be awarded to

the complainants, with the respondents reserving the right to institute civil proceedings in relation to the same.

Order

30. For reasons given I allow the application of the State and order the release of money to the 1st complainant (Ms Parwati) without prejudice to 2nd and 5th Respondent's right to file a civil claim.




Aruna Aluthge
Judge

AT LAUTOKA

12th October, 2018

Solicitors: Office of the Director of Public Prosecution for State
Legal Aid Commission for Respondents