

SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC

CM 25/2020 (arising from CO
25/2016)

In the matter between:

HATTAM MONTHUSIMIRA

1st Applicant

IMAM TARANI

(rep. by Clifford Andre)

2nd Applicant

and

THE REPUBLIC

(rep. by David Esparon and Steven Poweles)

Respondent

Arising from

THE REPUBLIC

(rep. by David Esparon)

and

IMAM TARANI

1st Accused

HATTAM MONTHUSIMIRA

2nd Accused

HOSSEIN BAZDAR

(rep. by Clifford Andre)

3rd Accused

Neutral Citation: *Republic v Tarani & Ors* CM 25/2020 (arising from CO 25/2016) [2020]
SCSC (17 June 2020)

Before: Burhan J

Summary: **Application for the release of vessel to the Counsel of claimant; need for
an inquiry to establish the claim and identity of claimant;**

Heard: 11th May 2020

Delivered: 17th June 2020

RULING

BURHAN J

- [1] The background facts to this ruling are that by Judgment dated 14 December 2018, the Seychelles Court of Appeal acquitted the two accused Hattam Monthusimira and Imam Tarani of all charges. Both accused were initially convicted by the Supreme Court for the offences of importation into Seychelles and trafficking in a quantity of 97945.1 grams of Heroin and 784.6 grams of Opium (both controlled drugs). It is undisputed in this application that the vessel arrested during the investigation on which the aforementioned controlled drug was found was named Payam Al Mansur.
- [2] On the 21st of December 2018, learned Counsel for both the acquitted accused, Mr. Andre, filed an application on behalf of both the acquitted accused (hereinafter referred to as the applicants) moving that the vessel Payam Al Mansur be released immediately and the vessel be restored into the state it was at the time of arrest to allow the crew to sail to Iran and deliver the vessel to the rightful owner. An additional request was made that *“adequate provisions be ordered against the Republic which would allow the said vessel to undertake the journey from Seychelles to Iran in the shortest time frame.”*
- [3] According to the proceedings of 21st January 2019, it appears, due to the non-appearance of Counsel for the applicants, Mr. Andre, the said application was dismissed. An application for reinstatement was made by Mr. Andre and with the consent of Court as borne out by the proceedings of 4th February 2019, the application containing the same requests as referred to above was reinstated. On the 7th of February 2019, this Court made an order that the vessel could not be forfeited in terms of section 153 B (1) of the Criminal Procedure Code (CPC) on the basis there was no conviction, as the conviction had been set aside by the Seychelles Court of Appeal. It further ordered that the vessel be kept in custody until a final decision is arrived at by the Court hearing the application made under the Proceeds of Crime (Civil Confiscation) Act (POCA), as while the aforementioned application was being heard, it was also brought to the attention of this

Court that the Government of Seychelles represented by the Attorney General had filed a separate application on the 26th of December 2018, under the provisions of section 4 and 8 of the Proceeds of Crime (Civil Confiscation) Act (POCA) before Vidot J. In that application, the Attorney General was seeking a prohibition order under section 4 of POCA prohibiting the respondent (Imam Bakhsh Tarani) from disposing of the vessel Payam Al Mansur. The application further sought that a receiver be appointed and notice be given to the respondent of such an order.

[4] However the application under POCA was dismissed by Vidot J by Judgment dated 4th March 2019.

[5] Learned Counsel Mr Andre after the orders of this Court dated 7th February 2019 and the order of Vidot J dated 4th March 2019, on the 5th of March 2019, filed a further application renewing his application that the vessel Payam Al Mansur be released in the state it was at the time of arrest and that *“adequate provisions be ordered against the Republic which would allow the said vessel to undertake the journey from Seychelles to Iran in the shortest time frame.”*

[6] This application was dismissed on the 8th of April 2019 on the basis that such order was not within the purview or ambit of this Court.

[7] Thereafter, almost a year later, the current application dated 6th April 2020 has been filed by Hattam Monthusimira and Imam Tarani alleging that the Republic be held guilty for contempt of court as though several release orders had been made by Court, the vessel had not been released up to date. In the annexed affidavit, learned Counsel Mr. Andre further moves that the vessel be released to him based on a Power of Attorney signed by one Malekmohammad who states that he is the owner of the vessel Payam Al Mansur in the said Power of Attorney.

[8] During the hearing of this application, learned Counsel for the applicant Mr. Andre on the 25th of May 2020 withdrew his application in respect of contempt of court against the Republic but continued with his application to have the vessel released to its owner. Therefore this Court will not proceed to consider the submissions made by both parties in

respect of the issue of contempt of court. However learned Counsel further maintains his application that the vessel Payam Al Mansur be released to him as agent of the owner Malekmohammad.

[9] Prior to analysing the facts before Court, it would be pertinent to mention that the 1st applicant in this application Hattam Monthusimira was the 2nd accused in the main case. The evidence indicated that he was the son of the owner of the vessel who was also referred to as Hadimalik during the trial. The 2nd applicant in this application Imam Tarani was the 1st accused in the main case and according to the evidence led at the trial was the Captain of the vessel Payam Al Mansur at the time it was arrested.

[10] Before proceeding further in analysing the facts before Court, it would be best to set out the law pertaining to the numerous applications made before Court where detention or forfeiture of property taken into custody during investigations arises. On consideration of these provisions, it appears the underlying principle is that forfeiture occurs, only after a conviction of an offence unless forfeiture is specially provided for by law.

[11] Section 153 of the CPC reads as follows:

“In addition to any forfeiture specially provided for by this Code or any other law, the corpus delicti when it is the property of the offender and all the things produced by the offence or which may have been used or were intended to be used for committing the offence shall on the conviction of the offender become forfeited to the State.”

[12] Section 153B (1) of the CPC read as follows

“Without prejudice to section 151 but subject to this section, where a person is convicted of an offence and the court is satisfied that the offender has benefited from the offence or from the offence taken together with any other offence of which the offender is convicted in the same proceeding or which the court takes into consideration in determining the sentence of the offender, the court may, on the application of the Attorney-General or a person authorised by the Attorney-General made not more than 90 days after the conviction of the person, make an order of forfeiture in respect of the proceeds of that offence.”

[13] Section 30 (1) of the Misuse of Drugs Act (Cap 133) applicable to the facts of this case, reads as follows:

(1) Subject to this Act, where a person is convicted of an offence under this Act, the court may, in addition to any other penalty, order to be forfeited to the Republic any vessel, vehicle or other thing whatsoever which –

- a. is owned by the offender which the court is satisfied has been used in any manner in connection with the commission of the offence; or*
- b. is owned by any other person and which the court is satisfied has been used by the offender with the consent or knowledge of the other person in connection with the commission of the offence*

[14] It follows therefore, when one considers the facts in this case as no conviction exists, no order of forfeiture can be made either under section 153 and 153(B)(1) of the Criminal Procedure Code or even section 30 of the Misuse of Drugs Act. Therefore for all purposes the vessel Payam Al Mansur has to be released as already done so by this Court.

[15] It appears the next issue that arises is to whom the vessel should be released to. Learned Counsel for the Republic has brought to the attention of Court that although the Court ordered the release of the vessel, no order was made as to who it should be released to.

[16] The relevant provisions of the Criminal Procedure Code dealing with to whom the property taken into custody is to be released are set out in the following sections.

[17] Section 98 of the CPC reads as follows:

“(1) When any such thing is seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.

(2) If any appeal is made, or if any person is committed for trial, the court may order it to be further detained for the purpose of the appeal or the trial.

(3) If no appeal is made, or if no person is committed for trial, the court shall direct such thing to be restored to the person from whom it was taken, unless the court sees fit and is authorised or required by law to dispose of it otherwise.”

[18] Section 153 (B) (6) of the CPC reads as follows:

“(6) Where

(a) the court has made an order of forfeiture under this section; and

(b) the conviction of the person in relation to which the order was made is quashed,

the order of forfeiture shall cease to have effect and a person who claims to have an interest in any property in respect of which the order was made may apply to the court for an order declaring the nature, extent and value of the applicant’s interest and –

(a) directing the Republic to transfer the property to the applicant; or

(b) declaring that there is payable to the applicant by the Republic an amount equal in value to the value of the applicant’s interest declared under this section.”

[19] Section 155 of the CPC reads as follows:

“Where, upon the apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order-

(a) that the property or a part thereof be restored to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored either to him or to such other person as he may direct; or

(b)”

[20] Therefore, when one considers the sections set out above, it is clear that property taken into custody at the time of investigation could under section 98 (3) of the CPC if not forfeited be released or restored to the person from whom it has been taken from or seized. In terms of section 153 (B) (6) and 155 (a) of the CPC, the property is to be restored to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored either to him or to such other person as he may direct. The underlying principle governing the release of property taken into custody is for Courts to determine who is entitled to the property and such entitlement could be based on ownership or even possession.

- [21] Several cases from India have dealt with similar provisions and concluded that such property must be returned to the person from whom it was seized, unless other circumstances exist to depart from this position. While these cases dealt with cases of theft, they may provide some direction particularly in cases where a serious dispute of ownership exists regarding the property in question.
- [22] These cases while dealing with acquittal in theft cases are nonetheless instructive. Thus in ***Keshar Singh vs The State of Bihar Through Patnar High Court 25391 of 2013***, it was held that “...when a person accused of theft is acquitted from the charge, the property should be returned to that person from whom the property was seized where there is dispute of ownership the criminal court should not decide the issue of ownership but the dispute of ownership will be decided by the Civil Court.” The disputes of ownership in this case involved a private party who was claiming the same property. In addition, the Indian case of ***M. Savudi Karuppanan Ambalam v Guruswami Pillai And Anr Madras High Court (1933) 64 MLJ 431*** “where a person accused of theft is acquitted and claims as his own the property seized from him by the Police and alleged to have been stolen, it should be restored to him in the absence of special reasons to the contrary.” Which principle was established in ***Vaiyapuri Chetty v Sinniah Chetty (1930) 59 MLJ 901***
- [23] In the present matter, the issue of identity and ownership is being raised by the Attorney General on behalf of the Republic, which is a different matter. Therefore, when one considers the sections set out above and the case law referred to herein, it is clear that property taken into custody at the time of investigation could under the prevailing laws if not forfeited, be released to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored either to him or to such other person as he may direct. A person who was in possession of the property at the time of arrest also clearly falls under the provision of entitlement.
- [24] Based on the above findings therefore the vessel in this instant case could be released to the person who *appears entitled* to it which would include the owner. It is also the view of this Court that once the claimant has established his claim that he is entitled to the vessel the said claimant could direct that the vessel be released to who he directs. Further

the vessel Payam Al Mansur could also be released to Captain of the vessel Imam Baksh Tarani who was in charge of the vessel at the time of it being arrested.

[25] Having thus considered this issue, it should be borne in mind that the duty is cast on the claimant to prove to Court that the claimant falls under any of these categories mentioned in the preceding paragraph. The main issue at present is to determine the authenticity of the current claim made by Malekmohammad the owner of the vessel who has so far provided several documents to prove his ownership of the vessel. Learned Counsel for the Republic Mr. Poweles drew the attention of Court to several discrepancies in these documents, the fact that the documents are not original but copies with certifications hard to decipher. Learned Counsel for the Republic also refers to the history of the activities of the vessel and to evidence extracts led at the trial that the drugs were put on the vessel by the owner and the fact that the documents have not been produced in accordance with the provisions of the Evidence Act as being foreign documents they are not apostilled and challenges the claim made, on these grounds.

[26] Learned Counsel for the Republic also raises the issue that the vessel has not been produced as an exhibit in Court and indirectly challenges the jurisdiction of this Court to make a finding on the issue of ownership of the vessel Payam Al Mansur. Section 155 of CPC is not confined to exhibits produced in Court but refers to “*any property is taken from him the court before which he is charged may order-*” Therefore this contention has no merit.

[27] Having thus considered all the issues in this case, considering the objections of learned Counsel for the Republic which challenges the very authenticity of the documents produced, I am of the view that an opportunity should be given to the claimant to lead oral evidence to substantiate the authenticity of the documents he relies on, to establish his claim. Learned Counsel for the Republic would be free to cross examine all witnesses called in order to clarify any doubts and after the inquiry Court would make a final ruling as to whether the claimant has established his claim for the vessel Payam Al Mansur.

[28] In regard to Mr. Andre acting as the agent based on the Power of Attorney, Learned Counsel Mr. Andre should decide whether he is acting as agent or counsel. During the

course of the inquiry Mr. Andre who is swearing affidavits on behalf of his client and who submits that he is acting as agent for the claimant, may have to give evidence. Therefore, it would not be possible for him to act as Counsel and agent as well. As witness, he would be mindful he would be subject to cross examination on issues which would clash with the privilege communication between Mr. Andre and his client.

[29] In addition, the learned Counsel for the Republic further placed before the court that the owner of the vessel might be involved in international crimes, including terrorism and that as such, the Republic is under obligations to be cautious in handing over the vessel. All these issues have no bearing on the current proceedings since there is no case before the court in relation to the issues raised. This court has already adjudicated and decided on the release of the vessel.

[30] On the part of the applicants, they raised the issue of COVID-19 as the reason for non-compliance with the standard required for documents. Since the applicants waited for over a year to bring the application, they cannot rely on the current COVID-19 to be exempted from the required standard.

[31] Having thus come to the aforementioned findings on the issues raised thus far, this Court fixes the application for an inquiry where an opportunity is provided and the burden is on the claimant to establish his entitlement to the vessel.

Signed, dated and delivered at Ile du Port on this 17th day of June 2020.

Burhan J