IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 0029 OF 2012
(High Court HAC 48 of 2009)

BETWEEN : **THE STATE**

Appellant

AND : **DEEPAK RAJNEEL KAPOOR**

Respondent

Coram : **Calanchini P**
Almeida Guneratne JA
Waidyaratne JA

Counsel : **Ms. N. Karan for the Appellant**
Ms. J. Prasad for the Respondent

Date of Hearing : **12 September, 2016**

Date of Judgment : **30 September, 2016**

JUDGMENT

Calanchini P

[1] I have had the opportunity to read in draft the judgment of Waidyaratne JA and agree that in this case it is not in the interests of justice to enhance the sentence. The appeal should be dismissed.

Almeida Guneratne JA

[2] I agree with His Lordship, Justice Waidyaratne's judgment and reasoning that, although the sentence handed down by the learned High Court Judge is erroneous and is based on a misdirection of law as to why the sentence ought not to be varied and enhanced.

[3] The sentence passed no doubt was "unduly lenient" yet, this Court will not replace it with what it considers to be the sentence that ought to have been passed. This is because this Court takes into account the fact that the offender ought not to be put through the sentencing process a second time by uprooting him from the life he is leading after being released. Such an offender is entitled to a "double jeopardy discount".

[4] My only reservation in that regard is whether that approach ought to be regarded as a general one or whether some qualitative distinction ought to be drawn having regard to the nature and gravity of the offence and the disparity between the sentence that ought to have been passed and the sentence which in fact was imposed on the offender.

Waidyaratne JA

[5] This is an appeal by the State against the sentence imposed on the Respondent by the learned High Court Judge by his order dated 10 April 2012. On the 2 June 2014 a Single Judge of the Court of Appeal granted leave to appeal in terms of Section 21(2) (c) of the Court of Appeal Act.

[6] The Appellant has filed the notice of appeal within time on 08 May 2012 in the Court of Appeal setting out the grounds of appeal against the sentence dated 10 April 2012. The delay is not attributed to either party and appears to have taken place in the normal course of the appellate proceedings.

Therefore the prejudice owing to the delay has not been determined as relevant in an application that is made pursuant to section 21 (2) (c) of the Court of Appeal Act.

[7] The Respondent was charged with five counts of larceny by servant contrary to Section 274(a) of the Penal Code, Cap. 17 and on a count of money laundering contrary to Section 69(2) and3(a) (b) of the Proceeds of Crime Act 1997.

[8] On the 2 March 2012, the Respondent was convicted on his plea of guilty consequent to admitting the summary of facts.

[9] On the 10 April 2012, the High Court Judge has sentenced the Respondent to 17 months imprisonment with a minimum term of 2 years imprisonment.

[10] Being aggrieved by the said order the State has appealed against the sentence and has moved this Court to set aside the same and to impose an appropriate sentence according to law on the following grounds:

1. That the learned trial Judge has erred in law and in fact in referring to the tariff and case law for simple larceny when the respondent was convicted for the offence of larceny by servant.

2. That the learned trial Judge erred in law in sentencing on the count of money laundering based on an ancillary offence whereas Section 69(4) of the Proceeds of Crime Act 1997 specifies that money laundering is not predicated on proof of a serious offence.

[11] No appeal has been filed against the conviction. The conviction on the plea of guilt was not contested in this case.

[12] The Respondent, both in his submission dated 5 September 2016 and at the hearing conceded that he was charged with five counts of larceny committed by a servant, to which he pleaded guilty. Further, the Respondent conceded that the learned trial Judge in his determination has erred in principle when he applied a wrong tariff. In pronouncing the sentence, the learned trial Judge has imposed a sentence that is relevant to an offence of simple larceny.

The Facts

[13] At the time of the incident the respondent worked as a clerk at the Fiji Public Trustee Corporation Limited. His duties were to maintain the trust files and attend to the payments of the beneficiaries whose monies were held in trust. It is alleged that he fraudulently prepared documents claiming rightful disbursement of trust funds entitled to Satish Chand Lal, Arishma Sharma and Sumeet Prasad. On these fraudulent documents, the Office of the Public Trustee has issued cheques in the names of the beneficiaries to the value of $9,063.02, $28,720.21 and $14,824.04 respectively. It transpired that the Respondent has accepted the cheques by forging the signatures of the above beneficiaries. The total amount defrauded is $52, 607.27.

[14] In another instance the Respondent has obtained two cheques for $3,338.63 and $32, 061.04 as payments due to Ashmeeta Sharma. In this instance he has forged the signature of Ashmeeta Sharma to depict that said Ashmeeta Sharma authorized said payments to the Respondent. Further, the Respondent by deception has obtained the services of another person to have the cheques deposited into accounts to which he had accesses. It also transpired that he has later withdrawn the monies from the said accounts. By the said modus operandi, the respondent has obtained a total sum of $88,006.94 which he has later deposited into his personal accounts.

Ground 1

[15] It is borne out in the evidence that the respondent was charged and convicted on five counts of larceny committed by a servant and not on offences of simple larceny. Therefore, the learned High Court Judge has erred in principle, in considering the tariff and the case laws relevant to simple larceny and thereby imposing an incorrect sentence.

[16] The sentence of larceny by servant is a serious offence and the accepted tariff for larceny by servant is between 2 to 3 years imprisonment.

[17] In the case of **Panniker v. State** Crim. App. No. 28 of 2000; 15 May 2000 the tariff for an offence of larceny by servant was held to be between 2 to 3 years imprisonment. Hence, it is evident that the learned High Court Judge has erred in principle in applying the wrong tariff in the instant case.

Ground 2

[18] The learned High Court Judge has taken the aggravating factors that were admitted by the Respondent into consideration, when determining the sentence although he erred in applying the wrong tariff for the offence of larceny by servant.

[19] The Respondent served as a clerk at the time relevant to this appeal. He has prepared fraudulent cheques by using false information or particulars. The monies that he defrauded were public property which was legitimately due to beneficiaries. The Respondent by deception has obtained the services of another person to deposit the fraudulent cheques into some fictitious accounts to which he had access. The total amount of monies fraudulently obtained by the Respondent was $88,006.94.

[20] The tariff for an offence of larceny by servant is between 2 to 3 years. In the circumstances the minimum tariff the Respondent have attracted would be 2 years imprisonment.

[21] However the learned High Court Judge has misdirected himself and imposed only 12 months imprisonment for the offence of larceny by servant.

[22] The learned High Court Judge has taken the aggravating and mitigating circumstances into consideration. Those are set out in paragraphs 14 and 18 of the judgment. I do not wish to repeat those as the Appellant has not made any complaint regarding the same. In the circumstances, I agree with the reasons that have been taken into consideration by the learned High Court Judge in his judgment dated 10 April 2012.

[23] The learned High Court Judge has given a term of twelve months for aggravating circumstance and deducted eight months on the plea of guilt and other extenuating

circumstances. Therefore the total term of imprisonment for each offence of larceny by servant is sixteen months.

[24] Furthermore, at this stage I am reluctant to vary the order of the learned High Court Judge where he has ordered the sentences to run concurrently. Hence, the order made to have the sentences for larceny by servant to run concurrently, will remain.

Ground 3

[25] The Respondent has also pleaded guilty to the charge of money laundering which was count no. 6. He has admitted the statement and particulars of the offence which set out that he engaged directly in a transaction involving $88,806.94 that were proceeds of crime knowing or ought to have reasonably known that the monies were derived directly or indirectly from unlawful activities.

[26] Consequent to the plea of guilty to the offence of money laundering, the learned High Court Judge in his determination at paragraph 15 has made the following observation;

> *"That the money laundering offence (count 6) to which the respondent pleaded guilty is not strictly money laundering at all, but that the respondent had admitted facts that aver that he attempted to conceal the proceeds of crime."*

Having stated that, the learned High Court Judge has proceeded to sentence the respondent. A comment such as that is both confusing and unwarranted; especially after finding the respondent guilty on his own plea. In view of the facts discussed above, the observation made by the learned High Court Judge is contradictory to the facts of the case. As stated above the Respondent was found guilty on his own plea. In that backdrop it appears that the learned High Judge has made an incorrect observation, to say the least.

[27] Further, citing the case of **O'Keefe** (2007) AAU 0023/07, the learned High Court Judge at paragraph 15 of his sentencing judgment made the following observations:

"That money laundering is a very serious offence which in itself attracts stiff sentences of eight to twelve years but when charged with other offences; the sentence for money laundering must be based on the seriousness of the ancillary offences."

[28] The appellant in his submissions contended that the approach of the learned High Court Judge is erroneous in law, especially his reference made to the necessity of having to prove a predicate offence in order to prove an offence of money laundering.

[29] The appellant further submitted that the offence of money laundering is not a predicate offence that is hinged on the proof of a serious offence; therefore it is an error in law to state that the offence of money laundering should be based on ancillary offences or seriousness of such offences.

[30] The learned High Court Judge at paragraph 19 when determining the sentence for the offence of money laundering has stated that, he is constrained by the decision of the Court of Appeal in **O'Keefe** case and has imposed a sentence of 16 months imprisonment.

The Proceeds of Crime Act 1997 as Amended by the Act No. 7 of 2005

[31] Section 69 of The Proceeds of Crime Act 1997 as amended by the Act No. 7 of 2005, in Part V defines the offence of Money Laundering.

[32] Section 69 ...

"Section 69 ...
69(3) ... A person shall be taken to engage in money laundering if, and only if;

(a) The person engages, directly or indirectly in a transaction that involves money, or other property, that is proceeds of crime, or ...

(b) The person receives, possesses, conceals, uses, disposes of or brings into Fiji any money or other property that are proceeds of crime ...

(c) The person converts or transfers money or other property derived directly or indirectly from a serious offence or a foreign serious offence with the aim of concealing or disguising the elicit origin of that money or other property, of aiding any person involved in the commission of the offence or evade the legal consequences thereof, or ...

(d) The person conceives or disguises the true nature, origin, location, dispossession, movement or ownership of the money or other property derived directly or indirectly from a serious offence or a foreign serious offence or

(e) The person renders assistance to a person falling within paragraph (a), (b), (c) or (d) ...

(4) The offence of money laundering is not predicated on proof of the commission of a serious offence or foreign serious offence."

[33] According to Section 69(4) of the Proceeds of Crime Act the legislature in its wisdom has created the offence of money laundering as a separate offence with its distinct elements. It is not an offence that is dependent on the proof of another offence. Thus it is considered as a standalone offence.

[34] In the above circumstances, the offence of money laundering is not only a serious offence where the legislature by statute has fixed a maximum sentence of 20 years imprisonment but has also identified it to be a separate offence that consist of distinct physical and fault elements.

[35] If I may put it succinctly money laundering is all about converting ill gotten money or property into legitimacy through laundering. That is the physical element in the offence. In order to substantiate the offence of money laundering the prosecution is required to prove that the perpetrator 'knew' or ought reasonable 'to have known' that the money or other property involved in the crime have been derived or realized directly or indirectly by some unlawful activity. The word 'knowledge' connotes the requisite mental element of the crime. In the circumstances it should be noted that both the physical element and the fault element are pre requisites for an offence of

money laundering to be complete. Thus an offence of money laundering stands out as a complete and a separate offence that was created under the Proceeds of Crime Act 1997. The facts available in the instant case qualify the ingredients of the offence of money laundering; Section 69(3) of the Act and **Stephen v. State** FJCA 70; AAU53.2012 (27 May 2016)

[36] Considering the above facts, I am of the view that the learned High Court Judge has erred in law by making the above observation and failing to consider the offence of money laundering as a separate offence and handing down a sentence of sixteen months imprisonment.

[37] For the aforesaid reasons I am of the view that the learned Trial Judge has erred in principle in applying the wrong tariff in determining the sentence for an offence of larceny by servant.

The observations made by the learned Trial Judge to the effect that count no. 6 is not strictly an offence of money laundering is also erroneous.
Furthermore, he has misdirected himself in law in determining the sentence for an offence of money laundering on the basis that money laundering is dependent upon the seriousness of an ancillary offence and by failing to hold that money laundering is a separate offence.

[38] By failing to consider the offence of money laundering as a separate offence, the learned Trial Judge has erred in determining the sentence for the offence of money laundering against the respondent and handing down a sentence of 16 months.

[39] However at this juncture I do not consider it to be in the interest of justice to interfere with the sentence pronounced by the learned High Court Judge although it is apparent that it is not in accordance with law and a lower tariff has been applied.

[40] The learned High Court Judge in paragraph 18 has imposed a sentence of sixteen months imprisonment on each count of larceny by Servant and has ordered that the sentences should run concurrently.

[41] Twelve (12) months out of the sixteen months imprisonment for the money laundry were ordered to run concurrently with the sentence of larceny by servant and four months consecutively to the aforesaid sentence. The net result was that the respondent was imposed a total of 20 months imprisonment.

Thereafter the learned High Court Judge deducted three months for the clear record of the respondent as a mitigating factor. In the circumstance the total sentence the respondent has to serve is seventeen months imprisonment.

[42] The learned High Court Judge appears to have erred in paragraph 21 wherein he stated that the respondent should serve a total term of seventeen months imprisonment and should serve a minimum term of two years. On the face of the record the said pronouncement is erroneous as the total term of imprisonment is seventeen months.

[43] Subject to the aforesaid errors and misdirections, the learned High Court Judge has sentenced the respondent to a term of seventeen months and has given reasons for not suspending the same.

[44] The counsel for the respondent at the hearing and in his submissions dated 5 September 2016 stated the following and pleaded not to enhance or vary the sentence.

1. That the respondent was in prison serving the sentence from 10 April 2012 up to October 2012

2. Thereafter the respondent was granted extra mural release from October 2012 until his release on 26 march 2013

3. Therefore the respondent has served his sentence and since 26 March 2013 to date has integrated into civil society

4. Presently the respondent is employed as a clerk and earns an income of $ 135 per week

5. The respondent is married and is the father of a ten year old daughter and a three year old son

[45] In the case of **Naiveli v. State** [1994] FJCA 29; AAU004u.92s (12 August 1994), Naiveli was found guilty of breach of Section 111 of the Penal Code Cap.17. He was sentenced to nine months imprisonment and was suspended for 1 year and was imposed a fine of $ 1000. In an appeal by the State against the sentence, the Court of Appeal declined to lift the suspension requiring the appellant to serve an immediate term of imprisonment as it would be an extra penalty when the period of suspension has since passed. Therefore the appeal was dismissed.

[46] In the case of the **State v. Joseva Vaileba** [2015]; AAU0075 of 2011 (27 February 2015) Joseva Vaileba was found guilty of committing rape. After trial and conviction he was sentenced to four years imprisonment without a term of parole. The State appealed against the sentence on the grounds that the learned trial Judge has erred in law as he failed to consider aggravating factors submitted by the prosecution and also that the sentence imposed was inadequate and lenient.

The Court of Appeal in that case decided that the learned trial Judge has erred not considering facts as aggravating factors. However, Joseva Vaileba has served two years and eight months of his term of imprisonment and was released by the correction services and a period of eleven months has passed since his release. Considering the above circumstances the court dismissed the appeal as the court was of the view that justice would not be served by enhancing the sentence.

[47] In this case the respondent has already served a term of imprisonment from 10 April 2012 to 26 March 2013 and has been released almost three years and six months earlier. The question remains whether this court should enhance the sentence at this juncture or not. As far as the Respondent is concerned, he has already served the full term that was handed down by the court. Then the question that remains to be answered is whether it is fair to send him back to serve an additional term of imprisonment, in the event this court enhances the sentence to commensurate with the prescribed law.

[48] It was brought to the notice of this court that the respondent is married with two young children aged ten and three and he is presently employed and has integrated into the society. In principle I agree that the sentence handed down by the learned High Court Judge is erroneous based on a misdirection of law. However late as this stage, I am reluctant to vary the sentence and order an enhancement in the interest of justice. Therefore for reasons stated above the appeal is dismissed.

Order of the Court

Appeal against sentence dismissed.

Hon. Mr. Justice W. D. Calanchini
PRESIDENT COURT OF APPEAL

Hon. Mr. Justice Almeida Guneratne
JUSTICE OF APPEAL

Hon. Mr. Justice K. Waidyaratne
JUSTICE OF APPEAL