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

CRIMINAL APPEAL NO. AAU 0037 OF 2016
(High Court Action No: HAC 252 of 2013)

BETWEEN : **SAVENACA BATIBAWA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra, RJA**

Counsel : **Ms B Malimali for Appellant**

Ms J Prasad for Respondent

Date of Hearing : **14 June, 2019**

Date of Ruling : **2 August, 2019**

RULING

[1] The Appellant was charged with another (Josefa Saquavere) on three counts of Money Laundering contrary to section 69(2)(a) and (3)(a) of the Proceeds of Crime Act 1997.

[2] After trial where the Assessors opined unanimously that the Appellant was guilty, the learned Trial Judge concurred with the opinion of the Assessors and convicted the Appellant.

[3] The Appellant was sentenced to 13 years imprisonment with a non-parole period of 12 years.

[4] The Appellant filed a timely appeal setting out the following grounds of appeal:

Against Conviction

1. *The Learned Trial Judge failed to give a balanced summing up that resulted in the conviction to be unsafe and unsatisfactory; and*

2. *That the learned Trial Judge failed to properly direct himself and direct the assessors according to law when the Assessors gave verdict of guilty in this case largely built on circumstantial evidence of the complainant that under all the circumstances of the case the finding of guilt was unsafe and unsatisfactory; and*

3. *That the Learned Trial Judge failed to properly direct himself and assessors according to the law and facts regarding the admissibility of the internal Audit Reports prepared by the TLTB Internal Auditor and the TLTB Computer Analyst as evidence against the Appellant which only confirmed that the Appellant is a driver and delivery boy, therefore evidence are important to be considered under all the circumstances of the case, the finding of guilt is unsafe and unsatisfactory; and*

4. *That the Learned Trial Judge failed to properly direct himself and assessors according to the law and facts regarding the admissibility of the internal Audit Reports prepared by the TLTB Internal Auditor and the TLTB Computer Analyst as evidence against the Appellant which only confirmed that the Appellant is a driver and delivery boy, therefore evidence are important to be considered under all the circumstances of the case, the finding of guilt is unsafe and unsatisfactory; and*

5. *That the Learned Trial Judge failed to properly direct himself and assessors according to law and facts regarding paragraph D (iii) of the*

Summing Up that the evidence did not provide or link between the Appellant and Accused 2 and Appellant and Accused 3 directly or shown to be engaged directly to indirectly in transactions involving proceeds of crime amounting to $212,737.62, $94,387.88, $239,407.20, $84,959.46 and $5411.10 which under all the circumstances of the case, the finding of guilt is unsafe and is unsatisfactory; and

6. *That the Learned Trial Judge failed to properly direct himself and assessors according to law and facts regarding the performance of duties within the Trust Department and how Distribution clerks shared works and usage of each-other's passwords and username to enter the TLTB computers, whereby the usage of word computers are usage and is shown to be engaged directly to indirectly transactions involving proceeds of crime which under all the circumstances of the case, the finding of guilt is unsafe and is unsatisfactory; and*

7. *That the learned Trial Judge failed to direct himself and assessors that the important witness namely Tukana Levaci was absent and which prosecution failed to provide in Court during the proceedings in which all documentary evidence provided in Court pointed towards him that proved that money laundering transactions were made by him as the Distribution Clerks and other authorized persons in this particular case; but Prosecution failed to call or provide those witnesses to give evidence, and to allow the Appellant/Defence to cross examine, whereby the witness was not there to confirm the part he played in the transaction or money laundering and that such non direction placed the Appellant to disadvantage and that the verdict was therefore unsafe; and*

8. *That the Learned Trial Judge failed to direct Prosecution to ensure all its witnesses are present and be called to give evidence and be cross examined by the Appellant / Defence for the purpose of a fair trial, and that such non direction placed the Appellant to disadvantage and the verdict was therefore unsafe; and*

9. *That the learned trial judge placed undue emphasis and weight in summing up to the evidence at paragraph H – The analysis of the evidence sub paragraph 29, clearly emphasized of the lack of evidence that directly connected the Appellant to the 2nd Accused and 3rd Accused that connected them to the alleged criminal offence of money laundering and even the Police Caution Interview statement tendered as prosecution Exhibit 71(A) and 71 (B) showed no confession in the case for that matter to draw any evidential inference which would have impacted the prosecution's case; and*

10. *That the learned trial Judge failed to properly direct himself and the assessors in law and in fact although the Appellant is employed and work as Distribution Clerk and Acting Trust Accountant at the Trust*

Department with TLTB, his password and username is known and are used by other Distribution Clerk at the Trust Department that prove that he may have not done the transaction of money laundering therefore the guilty verdict is unsafe; and

11. That the learned judge failed to properly direct himself that the sentence is harsh and excessive." (sic)

[5] In addition to these grounds, the written submissions filed on behalf of the Appellant contained two additional grounds of appeal. Leave had not been sought to file additional grounds, therefore those two grounds are disallowed.

[6] Grounds 1 and 2 deal with the summing up as being unbalanced and inadequate. In this case it is necessary to consider the evidence which involved several technical details regarding tampering with computer data, emails, user ID's and the dealings of the Computer system by different Officers who were dealing with the necessary data.

[7] Although the Respondent has submitted that the learned Trial Judge had adequately dealt with the evidence led in his summing up, to consider whether it was adequate it would be necessary to consider the evidence. In these circumstances leave is granted so that the matter can be looked into by the Full Court.

[8] Ground 3 is vague and appears to be mis-conceived as it speaks of the Appellant being a driver and a delivery boy whereas he has been a responsible officer of the TLTB.

[9] Grounds 4 and 5 are similar to grounds 1 and 2 and are urged on the basis of inadequacy of the summing up in relation to the evidence led at the trial. To consider whether these grounds are arguable it would be necessary to consider the entirety of the evidence and the Full Court would be in a position to do so when the entirety of the record is made available.

[10] Grounds 6 and 7 relate to a witness, Tukana Levaci, who had been absent as he had fled Fiji. This person had been associated with Josefa Saqanavere, (the Appellant in Appeal No.AAU0035 of 2016) in tampering with the computer system. Here again it would be necessary to consider the evidence that was led regarding the charges against the Appellant to consider whether these grounds are arguable.

[11] The Full Court would be in a position to consider these two grounds when the entirety of the record is made available.

[12] Ground 8 has been withdrawn by the Appellant.

[13] Grounds 9 is similar to grounds 1, 2, 4 and 5 and would require a consideration of the entirety of the evidence led at the trial, which the Full Court would be able to consider.

[14] Ground 10 is regarding sentence, where the Appellant had been sentenced to 13 years imprisonment.

[15] The Respondent has conceded that the term of imprisonment is beyond the tariff for the offence of money laundering which has been set at 5 to 12 years.

[16] The ground against sentence is arguable.

Orders of Court:

(i) Leave to appeal against conviction is allowed on grounds 1 to 9 except grounds 3 and 8.

(ii) Leave to Appeal against sentence is allowed.

COURT OF APPEAL FIJI

Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL