IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0001 of 2018
[High Court of Lautoka Criminal Case No. HAC 118 of 2014]

BETWEEN	:	**PREETIKA ANUWESH LATA**
		Appellant
AND	:	**STATE**
		Respondent

Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. M. Fesaitu and Ms. N. Sharma for the Appellant**
	:	**Mr. A. Singh for the Respondent**
Date of Hearing	:	**23 February 2021**
Date of Ruling	:	**24 February 2021**

RULING

[1] The appellant had been charged in the High Court of Lautoka on one count of receiving contrary to section 306(1) of the Crimes Act, 2009 and one count of money laundering contrary to section 69(3) (b) of the Proceeds of Crime Act, 1997 committed between the 14 February 2013 and 14 May 2014, at Lautoka in the Western Division. The charges were as follows:

'FIRST COUNT

Statement of Offence

RECEIVING: *Contrary to Section 306 (1) of the Crimes Decree, No. 44 of 2009.*

Particulars of Offence

PREETIKA ANUWESH LATA *between the 14th day of February 2013 and 14th day of May 2014, at Lautoka in the Western Division, dishonestly received $285,680.96, knowing or believing the property to be stolen.*

SECOND COUNT

Statement of Offence

MONEY LAUNDERING: *Contrary to Section 69(3)(b) of the Proceeds of Crime Act of 1997.*

Particulars of Offence

PREETIKA ANUWESH LATA *between the 14th day of February 2013 and 14th day of May 2014, at Lautoka in the Western Division, received money to a total value of $285,680.96, and she knew or ought to have known the money being proceed of crime were derived directly or indirectly from some form of unlawful activity.*

[2] After the summing-up, on 21 November 2017 the assessors had expressed a unanimous opinion of guilty against the appellant on both counts. The learned High Court judge in the judgment delivered on 22 November 2017 had agreed with the assessors and convicted the appellant accordingly. She was sentenced on 07 December 2017 to 02 years of imprisonment on the first count and 05 years of imprisonment on the second count, both to run concurrently with a non-parole period of 02 years.

[3] The appellant's solicitors had filed a timely notice of appeal on 05 January 2018 against conviction and sentence. With the change of solicitors, the Legal Aid Commission had tendered amended grounds of appeal and written submissions on 06 October 2020. The state had tendered its written submissions on 03 December 2020.

[4] The grounds of appeal urged on behalf of the appellant are as follows:

Against conviction

1. *The Learned Trial Judge had not adequately directed the assessors on the law of money laundering*

2. *The conviction on receiving is unreasonable as the charge is a duplicate of the principle offence of money laundering.*

Against sentence

3. *The Learned Trial Judge erred in principle by double counting having accounted for some aggravating features that is already reflected in selecting the starting point. .*

[5] The learned High Court judge has summarized the facts of the case as follows in the sentencing order:

> 3. *Your husband Sudhanshu Sharma joined the Fiji Sugar Corporation (FSC) in 2011 and was in-charge of payroll of roughly around 2,000 employees and non-staff members of FSC. In 2012, new payroll processing software was implemented. Your husband was the officer responsible for processing and consolidating the payroll and generating bank files for all employees of the FSC.*
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> 4. *As the payroll officer, your husband fraudulently transferred FSC funds to his and your accounts without the knowledge of the FSC.*
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> 5. *You were never employed by FSC nor were part of non-staff payroll and therefore not entitled to receive any payment from the FSC. You knew very well that you were not entitled to receive any payment from the FSC. Still you kept on receiving proceeds of crime into your bank accounts and withdrew and used them for your family expenses.*
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> 6. *You opened a new bank account with Westpac Bank to facilitate your husband to transfer proceeds of crime to that account.*
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> 7. *At the financial year end reconciliation, it was revealed that FSC funds had been misappropriated. Before police investigation began, your husband suddenly resigned from FSC and fled the country for the USA. The internal audit revealed that FSC money to the total value of $285,680.96 had been transferred to your two bank accounts. After this revelation, you admitted that your two bank accounts had received proceeds of crime but denied any knowledge about illegal money deposited in your bank accounts.*
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> 8. *When police investigations began, you returned a sum of $ 169,640/- and agreed that the money in your two bank accounts except wages remitted from your employer belongs to the FSC.*

[6] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10

of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds. This threshold is the same with leave to appeal applications against sentence as well.

[7] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal.** The aforesaid guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

01st ground of appeal

[8] The appellant argues that the directions on money laundering at paragraphs 15 and 16 of the summing-up are inadequate. They are as follows.

> *'[15] To prove the 2nd count where the accused is charged with Money Laundering the Prosecution must prove that,*
>
> *(i) the Accused;*
>
> *(ii) received money that are proceeds of crime;*
>
> *(iii) accused knew, or ought reasonably to have known that the money was derived or realized directly or indirectly from some form of unlawful activity.*
>
> *[16] The offence of Money Laundering is not predicated on proof of the commission of a serious offence or foreign serious offence.*

[9] The appellant had been charged under section 69 (3)(b) of the Proceeds of Crimes Act. Section 69 is as follows.

Money laundering

(1) In this section:

"transaction" includes the receiving, or making, of a gift.

(2) A person who after the commencement of this Act, engages in money laundering commits an offence and is liable on conviction, to:

(a) if the offender is a natural person - a fine not exceeding $120,000 or imprisonment for a term not exceeding 20 years, or both; or

(b) if the offender is a body corporate - a fine not exceeding $600,000.

(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, disposes of or brings into Fiji any money, or other property, that is proceeds of crime, and the person knows, or ought reasonably to know, that the money or other property is derived or realised, directly or indirectly, from some form of unlawful activity.

[10] Section 3 of the Proceeds of Crimes Act interprets the following terms as follows:

"proceeds", *in relation to an offence, means any property that is derived or realised, directly or indirectly, by any person from the commission of the offence;*

"proceeds of crime" *means:*

(a) proceeds of a serious offence; or

(b) any property that is derived or realised, directly or indirectly, by any person from acts or omissions that occurred outside Fiji and would, if the acts or omissions had occurred in Fiji, have constituted a serious offence;

"property" *includes money or any other property, real or personal, things in action or other intangible or incorporeal property;*

"serious offence" *means an offence of which the maximum penalty prescribed by law is death, or imprisonment for not less than 12 months;*

"unlawful activity" *means an act or omission that constitutes an offence against a law in force in Fiji or a foreign country.*

[11] The appellant had agreed that her two bank accounts had received money stolen from Fiji Sugar Corporation (FSC). Therefore, the trial judge had informed the assessors at paragraph 106 of the summing-up that the money received by the appellant's two bank accounts can be considered as proceeds of a crime for the purpose of the 02nd count, *i.e.* money laundering.

[12] In the appellant's written submissions, it has been stated that there was no dispute by the appellant regarding the physical element of money laundering in that the money said to be unlawfully taken from FSC during the period in question was deposited into the bank accounts of the appellant.

[13] The trial judge had stated at paragraph 107 of the summing-up that the only dispute was with regard to the mental element of each offence and in respect of the 02nd count the assessors had to be satisfied that the appellant knew or ought reasonably to have known that the money was derived or realised directly or indirectly from some form of unlawful activity.

[14] The appellant in her written submissions has fully agreed with this position.

[15] Therefore, it is clear that there was no need to give further or elaborate directions on the physical element of money laundering in the summing-up.

[16] The trial judge had addressed the assessors fully and in great detail on all matters placed by the prosecution and the defence on the fault element of money laundering *i.e.* the issue of knowledge or constructive knowledge on the part of the appellant at paragraphs 108-112 of the summing-up. The judge had explained the gist of the appellant's defence namely that her husband had smartly and subtly taken control of and used her two bank accounts to carry out his criminal activity while the prosecution had alleged that the appellant had lied to court and all the deposits and withdrawals had been effected with her knowledge.

[17] The appellant relies on certain paragraphs in **Stephen v State** [2016] FJCA 70; AAU53.2012 (27 May 2016) to buttress her argument that the trail judge had not adequately directed on important key words and phrases that constitute the offence of

money laundering. On a plain reading of ***Stephen*** it is clear that those observations including paragraph 53 have been made by court on the physical element of the offence of money laundering which was not in dispute in the appellant's case.

[18] The court's further criticism of the trial judge in ***Stephen*** was aimed at the wrong direction on the fault element too because it had been based on a judicial decision under the Summary Offences Ordinance and the Drugs Trafficking (Recovery of Proceeds) Ordinance of Hong Kong not on money laundering. In the process of discussing the fault element of knowledge or constructive knowledge the court also stated:

> *[65] The most important matter in determining whether a person had the requisite knowledge is to carefully examine the relevant evidence and to draw an inference based on that exercise.*
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> *[66] The dictum of Lord Bridge in* ***Westminster City Council v. Carayal Grange Ltd****. 83 Cr. App. R. 155 at 164 it was held that;*
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> > *"... it is always open to the tribunal of fact ... to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not wish to have his suspicions confirmed."*
>
> *[67] In* ***Tracey v. DPP****, Lord Diplock had said that*
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> > *"Knowledge or belief" are words of ordinary usage and in many cases no elaboration at all was needed."*
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> *[68] The other component in the Act is that in the case of Money Laundering it is sufficient even if the prosecution can prove that the accused ought reasonably to know that the money or other property is derived or realised, directly or indirectly, from some form of unlawful actions. See section 69(3).*
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> *[69] In here, it is my opinion that the meaning of the phrase 'ought reasonably to know', as against having actual knowledge, should be understood to mean, either constructive knowledge or with having reference to all the attendant circumstances a person ought to have known the existence of the unlawfulness involved.*
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> *[70] In any case these are matters to be decided by referring to the evidence involved in the case.*

[19] It is in this context that the Court of Appeal made the remarks that the learned trial judge had not adequately and correctly explained to the assessors the ingredients of the charge of money laundering and that it is a serious non direction tantamount to an incurable misdirection and ordered a retrial.

[20] However, the trial judge in the instant case did not have to explain as said in **Tracey v. DPP** (supra) the words 'knowledge' or 'ought to have known' and he had correctly asked the assessors to form an opinion of the appellant's knowledge or constructive knowledge from inferences from all proven circumstances and the appellant's conduct. He then explained to the assessors all the relevant circumstantial evidence.

[21] The trial judge had fully ventilated the issue of knowledge or constructive knowledge in his judgment and ruled in favour of the prosecution.

[22] In the circumstances there is no reasonable prospect of success at all of this ground of appeal.

02nd ground of appeal

[23] The appellant complains of duplicity of charges in the information in that she argues that the physical element of receiving stolen or tainted money is reflected in both charges.

[24] The respondent submits that the appellant's counsel did not raise any objection to both charges being laid against the appellant in the same information at any stage of the trial proceedings.

[25] Section 59 of the Criminal Procedure Act provides for offences to be included in the same charge or information if they are founded on the same facts or form or they are part of a series of offences of the same or similar nature. However, if the trial judge is of the opinion that an accused may be prejudiced in his or her defence by reason of being charged with more than one offence in the same charge or information or for any other reason it is desirable to try the accused separately, the judge has the discretion to order separate trials in respect of such offences. The appellant has not cited any statutory provision or judicial authoritative pronouncement to the contrary.

[26] It is therefore clear that the respondent was well within the legal framework to prefer the two counts against the appellant in the same information. However, not only did the appellant not complain of any prejudice by having to face both counts at the same trial but also did the trial judge not see any need to order separate trials on the two charges.

[27] In my view, the appellant had demonstrated no difficulty in facing both counts at the same trial and taking up her common defence in respect of both charges.

[28] Therefore, there is no reasonable prospect of success of this ground of appeal.

03rd ground of appeal

[29] The appellant complains of double counting in the sentencing process.

[30] In the absence of a guideline judgment as to the sentencing tariff for money laundering, the trial judge had analysed several past sentencing decisions made under different factual circumstances and decided to take 04 years as the starting point based on the objective seriousness of the offence (though mixed with a few instances of personal circumstances) as described at paragraphs 21 and 22. His enhancement of the sentence by 03 years had been based on aggravating factors mostly relating to the appellant (offender) as set out at paragraph 24. Although there is evidence of a few common features being considered under both heads, the judge by and large had followed two-tiered sentencing approach [see **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008) and **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015)].

[31] The Supreme Court advanced the proposition in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) stating that if judges take as their starting point somewhere within the range, they will have factored into the exercise at least *some* of the aggravating features of the case. The ultimate sentence will then have reflected any *other* aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise *any* of the aggravating factors, and they will then

have to factor into the exercise *all* the aggravating features of the case as well as the mitigating features.

[32] Since the trial judge had picked the starting point at a low range of sentences for money laundering, he was entitled to consider all aggravating factors and add 03 years for all of them.

[33] In any event, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[34] The ultimate sentence of 05 years of imprisonment with a non-parole period of 02 years is not excessive or harsh at all. Given the gravity of the offences, in fact one might say that the ultimate sentence was too lenient.

[35] There is no reasonable prospect of success of this ground of appeal.

Order

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL