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

CRIMINAL APPEAL NO. AAU 93 of 2018
AAU 99 of 2018
[In the High Court at Suva Case No. HAC 059 of 2013]

BETWEEN	:	**1. RAHUL RAJAN NAIDU** **2. RIMAKSHNI RANIGAL** ***Appellants***
AND	:	**THE STATE** ***Respondent***
Coram	:	**Mataitoga, JA** **Qetaki, JA** **Kulatunga, JA**
Counsel	:	**Mr. N. Sharma & Mr. M. Anthony for the 1st Appellant** **Mr. S. Singh for the 2nd Appellant** **Ms. S. Shameem & Mr. R. Kumar for the Respondent**
Date of Hearing	:	**10 May, 2023**
Date of Judgment	:	**14 June, 2023**

JUDGMENT

Mataitoga, JA

[1] I have read the final draft Judgment of Kulatunga, JA. I agree with his reasons and conclusions.

Qetaki, JA

[2] Have considered judgement in draft, and I agree with it.

Kulatunga, JA

Introduction

[3] When **Rimakshni Ranigal v State** AAU093 of 2018 and **Rahul Rajan Naidu v State** AAU 099 of 2016 were taken up for argument on the 10th May, 2023 the Counsel for the respective Appellants and the State Counsel agreed to consolidate and have a single judgment for both appeals.

[4] The two Appellants along with another were charged with 6 Counts of Money Laundering of which counts 1-4 were against Rahul Naidu (Appellant in AAU099 of 2016 who for convenience and clarity will be referred to as ***1st Accused-Appellant***), the 5th count was against Avenai Danford and the 6th count was against Rimakshni Ranigal (Appellant in AAU093 of 2016 who for convenience and clarity will be referred to as ***3rd Accused-Appellant***).

[5] The charges against them were as follows:

> ***COUNT 1***
> ***Statement of Offence***
>
> ***MONEY LAUNDERING****: Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act, 1997 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.*
>
> ***Particulars of Offence***
>
> ***RAHUL RAJAN NAIDU****, between the 14th day of July, 2011 and the 21st day of July, 2011 at Lautoka in the Western Division, engaged directly or indirectly in transactions involving $12,000.00 FJD that were the proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of criminal activity.*
>
> ***COUNT 2***
> ***Statement of Offence***
>
> ***MONEY LAUNDERING****: Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act, 1997 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.*

Particulars of Offence

RAHUL RAJAN NAIDU*, on the 1st day of August, 2011 at Lautoka in the Western Division, engaged directly or indirectly in transactions involving $890.00 FJD that were the proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of criminal activity.*

COUNT 3
Statement of Offence

MONEY LAUNDERING*: Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act, 1997 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.*

Particulars of Offence

RAHUL RAJAN NAIDU*, on the 1st day of August, 2011 at Lautoka in the Western Division, engaged directly or indirectly in transactions involving $500.00 FJD that were the proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of criminal activity.*

COUNT 4
Statement of Offence

MONEY LAUNDERING*: Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act, 1997 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.*

Particulars of Offence

RAHUL RAJAN NAIDU*, on the 1st day of August, 2011 at Lautoka in the Western Division, engaged directly or indirectly in transactions involving $145.00 FJD that were the proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of criminal activity.*

COUNT 5
Statement of Offence

MONEY LAUNDERING*: Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act, 1997 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.*

Particulars of Offence

AVENAI RANAMALO DANFORD*, between the 14th day of July, 2011 and the 21st day of August, 2011 at Lautoka in the Western Division, engaged directly or indirectly in transactions involving $12,000.00 FJD that were the*

proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of criminal activity.

COUNT 6
Statement of Offence

MONEY LAUNDERING*: Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act, 1997 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.*

Particulars of Offence

RIMAKSHNI RANIGAL*, between the 14th day of July, 2011 and the 1st day of August, 2011 at Lautoka in the Western Division, engaged directly or indirectly in transactions involving $6,500.00 FJD that were the proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of criminal activity.*

[6] This was a trial before Assessors who unanimously opined that the 1st Accused-Appellant was guilty of the first four counts of Money Laundering as charged and the majority opined that the 3rd Accused-Appellant was guilty of the sixth count. The trial judge found that all the accused were engaged directly or indirectly in transactions involving stolen money, knowing or ought reasonably to have known, that the said money had been derived or realized, directly or indirectly, from some form of unlawful activity and found them guilty of Money Laundering as charged, convicted and sentenced them.

[7] Following the convictions on counts 1-4 prescribed in the indictment, the 1st Accused-Appellant Rahul Rajan Naidu was sentenced for a period of 6 years and 9 months' imprisonment for each count to be served concurrently with a non-parole period of 5 years. A sum of $ 12,000/- to be restituted to the Westpac Bank within one year of the date of sentence, and in default of which 6 months' imprisonment in addition to the term of imprisonment was ordered.

[8] The 3rd Accused-Appellant Ranigal was convicted of count 6 and was sentenced for a period of 5 years' imprisonment with a non- parole period of 3 years.

Facts

[9] As found by the trial Judge three persons were involved in a sophisticated online scam having international consequences. Ms. Laurel Vaurasi the principal of Shekinah Law and two others namely Sailasa and Alvish, are the victims of the predicate offence in this case, who maintained their bank accounts with Westpac Bank with online banking facilities. Upon hacking into their electronic banking facility, unauthorized transfers were made online to two other accounts in the Westpac Bank. The money has been so illegally transferred into the account of the, Avenai Danford (The 2nd Accused) and that of another person by the name of Avitesh Chand. The amounts so deposited into those two accounts were withdrawn on the instructions of the 1st Accused-Appellant Rahul Naidu. Then Avenai Danford, had withdrawn the said stolen money from his account and given it to the 1st Accused-Appellant, who then with the assistance of the 3rd Accused-Appellant Rimakshni, the teller at the Western Union, transferred the same out of the country through Western Union, breaching protocols and procedures of Western Union. As found by the trial judge the 1st Accused-Appellant coordinated all these illegal transactions whom the trial judge found to be *the main culprit or money mule*.

Appeals

[10] Challenging his conviction and the sentence, the 1st Accused-Appellant moved this Court on 10 grounds of appeal against the convictions; and 5 grounds of appeal against the sentence. Single Judge heard the application and ruled that all grounds of appeal against conviction are without a proper basis and thus no leave was granted. However as for the ground of appeal against the sentence leave was granted.

[11] Challenging his conviction and the sentence the 3rd Accused-Appellant moved this Court on 12 grounds of appeal against the conviction and 5 grounds of appeal against the sentence. Single Judge heard the application and ruled that the grounds of appeal against both the conviction and sentence are not arguable and thus leave was not granted.

[12] Both the Appellants in their renewed appeals, are once again seeking to challenge their convictions and sentences on their original grounds of appeal. Both Appellants filed written submissions upon filling their respective notices of renewal and the Respondent too has tendered written submissions separately in respect of each Appeal

[13] During the hearing counsel for the 1st Accused-Appellant Rahul Rajan Naidu informed court that he does not wish to pursue with the appeal against the conviction. Acting in accordance with the guidelines set out in **Masirewa v. State** Cri. Appeal No. CAV0014 of 2008S:17 August 2010 [2010] FJSC 5; this Court made inquiries from the appellant regarding the application to abandon the appeal against conviction. He confirmed and tendered Form 3 under Rule 39 of the Court of Appeal Rules, stating that he does not wish to prosecute the appeal against the conviction and that he applied to abandon the same. He also confirmed that his application to abandon the appeal against sentence was voluntary, he received legal advice and wished to abandon it and that he understood that he would not be able to prosecute his appeal against the conviction again once it is dismissed by this court upon his application to abandon the same. Accordingly, the court allowed the application to abandon the appeal against the conviction and 1st Accused-Appellant's appeal against the conviction therefore stands dismissed.

[14] Accordingly, the 1st Accused-Appellant pursued only with his appeal against his sentence. The 3rd Accused-Appellant pursued with the appeal against the conviction as well as the sentence. At the outset I will consider the appeal preferred by the 3rd Accused-Appellant Rimakshni Ranigal against the conviction and the appeals against the sentences of both the 3rd Accused-Appellant and the 1st Accused-Appellant Rahul Naidu.

Appeal of 3rd Accused-Appellant Rimakshni Ranigal

Appeal against the conviction

[15] The grounds of appeal urged against the conviction are;

1. *That the learned Trial Judge erred in law and in fact in relying on and/or considering and / or taking into consideration inadmissible and / or prejudicial evidence in finding the Appellant guilty.*
2. *That the learned Trial Judge erred in law and in fact in not adequately / sufficiently / referring/ directing himself and the assessors on the circumstantial evidence that was relied by the State.*

3. *That the learned Trial Judge's failure to adequately evaluate the evidence prior to returning a verdict of guilty as charged, and the failure of the Learned Trial Judge to independently assess the evidence before conforming the said verdict, have given rise to a grave and substantial miscarriage of justice.*

4. *That the learned Trial Judge erred in law and in fact is not directing himself and or the Assessors to refer to any Summing Up the possible defence on evidence and as such by his failure there was substantial miscarriage of justice.*

5. *That the learned Trial Judge erred in law and in fact in not taking into consideration adequately that the action of the Appellant was not contrary to law and further whether she has knowledge that the monies she sent overseas were tainted monies. Such failure to do so caused substantial miscarriage of justice.*

6. *That the learned Trial Judge erred in law and in fact in taking too long to outline all the evidence in his summing up which was unfair, imbalanced, confusing and one side and hence a substantial miscarriage of justice had occurred.*

7. *That the learned Trial Judge erred in law and in fact in not adequately / sufficiently / referring / directing himself or the Assessors the Prosecution evidence against the Appellant was highly circumstantial which was not adequately supported by Prosecution evidence.*

8. *That the learned Trial Judge erred in law and in fact in misdirecting and / inadequately directing the Assessor on the law as to circumstantial evidence and failure to do so caused substantial miscarriage of justice.*

9. *That the learned Trial Judge erred in law and in fact when he did not reconsider before sentence that the Prosecution witness whose evidence that Learned Judge relied on again the Appellant lied on oath and that the evidence that was provided by the Appellant's counsel was not contradicted by the State and such there was miscarriage of justice.*

10. *That the learned Trial Judge erred in law and in fact when it was brought to his attention new evidence that the prosecution witness*

Ravinesh Mani, had lied during the trial, rejected the Appellants application for stay of the proceedings and/or not to proceed with sentence and/or if the Learned Trial Judge persists to sentence then the execution of sentence by stayed pending further investigation of the misleading/false evidence given by Prosecution witness, Ravinesh Mani and as such a failure caused a substantial miscarriage of justice.

11. That there has been a substantial miscarriage of justice in that assessors were tainted during the trial by the conduct of one or more assessors.

12. That there has been a substantial miscarriage of justice in that the Appellant has been denied a fair trial.

Consideration of the Grounds of Appeal

[16] The grounds of appeal 1, 2, 3, 4, 5, 6, 7, 8, 11 and 12 are formulated in such general terms this court was unable to comprehend what the appellant's real complaints are. They do not specify with certainty and clarity the details of the alleged errors, mis-directions or non-directions. The said grounds of appeal are prolix, numerous and lacking in particulars. The single judge refusing leave too had observed so, however the 3rd Accused-Appellant thought it fit to renew the same grounds verbatim before the full court. The Respondent raised this objection and submitted that the grounds do not comply with Rule 35(4) of the Court of Appeal Rules (the Rules) which requires the notice of appeal to "*precisely specify*" the grounds upon which the appeal is brought.

[17] This court has repeatedly emphasized that when formulating grounds of appeal, it is necessary to formulate precise and specific grounds of appeal giving particulars. If misdirection is complained of, it must be stated whether the alleged misdirection is one of law or fact and its nature be stated. If an omission is complained of, as to what is alleged to have been so omitted it must be stated.

[18] In **Mohammed and Others v FICAC** [2017] FJCA Crim. App. No. AAU 70 (2015, 5 May 2017), confronted with a similar situation the Court stated the following:

"[13] Grounds 1 – 3 seek to challenge the adequacy of the summing up taking into account the length of the trial. These three grounds are expressed in general terms. Reference has not been made in either the grounds themselves or in the written submissions to any specific omission in respect of either the

evidence or the closing addresses. The grounds do not comply with Rule 35(4) of the Court of Appeal Rules (the Rules) which requires the notice of appeal to "precisely specify" the grounds upon which the appeal is brought. The reason for this requirement was long ago stated by the Court of Appeal in ***Fielding v R*** *(1938) 26 Cr. App. R 211:*
"It has been said many times in this Court that particulars must be given in the grounds of appeal. If misdirection is complained of, it must be stated whether the alleged misdirection is one of law or fact and its nature must also be stated. If omission is complained of, it must be stated what is alleged to have been omitted. It is not only placing an unnecessary burden on the Court to ask it to search through the summing-up and the transcript of the evidence to find out what there may be to be complained of, but it is also unfair to the prosecution, who are entitled to know what case they have to meet."
[14] Furthermore the grounds of appeal may also be described as prolix when they are numerous and equally lacking particulars. As a result leave to appeal on grounds 1 – 3 is refused."

[19] Then the Court of Appeal in **Gonevou v State** [2020] FJCA 21; AAU068.2015 (27 February 2020) emphasized the necessity of formulating precise and specific grounds of appeal and said;

"[10] Before proceeding further, it would be pertinent to briefly make some comments on the aspect of drafting grounds of appeal, for attempting to argue all miscellaneous matters under such omnibus grounds of appeal is an unhealthy practice which is more often than not results in a waste of valuable judicial time and should be discouraged."

[20] The grounds of appeal **1, 2, 3, 4, 5, 6, 7, 8, 11 and 12** are vague and lack details of the alleged errors. The rules require the grounds of appeal to be drafted with reasonable particulars so that the opposing party can effectively respond to them. Even upon reading several times I myself was at a loss to comprehend and decipher as to what the Appellant's complaints or grievances are.

[21] However, in fairness to the Appellant, I have read and re-read the appellant's written submissions to identify the matters urged by the said grounds of appeal. I observe that in the submission apart from liberally citing case law chapter and verse, there is no specific issue relevant to each distinct ground of appeal separately. The submissions made under grounds 1-8, 11 and 12 appear to be the same issue repetitively made in different forms.

[22] Upon considering the oral as well as the written submissions with the grounds of appeal it appears that the pith and substance of the 3rd Accused-Appellant's complaint is that, circumstantial evidence upon which the inference of knowledge that money was tainted was inferred has not been sufficiently dealt with in the summing up and the judgment. The said items of evidence as identified from the submission are; *the evidence of PW 9, documents PEX12 and PEX13 the effect and inferences to be drawn from the absence of the signatures on them, the failure of the Western union admin team to pick these; good character evidence of the Accused; the third party transfer of money.* The sum total of the submission is that the trial judge erred in concluding that these items of circumstantial evidence inferentially proved the element of knowledge that she knew or ought to have reasonably known that the money derived from some form of criminal activity. Thus, I will proceed to consider ***grounds of appeal 1, 2, 3, 4, 5, 6, 7, 8, 11 and 12*** together.

1st to 8th, 11th and 12th Grounds of Appeal

[23] On the perusal of the judgment and the summing-up it is evident that the Trial Judge has sufficiently considered the aspect of circumstantial evidence as well as the requisite knowledge and the issue of third-party transfers in the following manner.

a. In the Judgment at para 10 these issues were adverted to as follows;

10. There is no direct evidence to conclude that the accused had the necessary guilty knowledge that the money was derived or realized directly or indirectly from some form of unlawful activity. In the absence of direct evidence, Prosecution relies on circumstantial evidence and invited the assessors to draw reasonable inferences, on the basis of the facts proved in evidence, that each accused knew or ought to have reasonably known that the money was tainted with illegality.
11. In my summing up I directed the assessors to look at the evidence objectively and test whether each accused as a reasonable person ought to have known that the money was tainted with illegality when they were engaged in those transactions.

b. The learned Trial Judge has analysed circumstantial evidence of ***knowledge*** against the Applicant before convicting her. This is at paragraphs 35 to 38 of his judgment where the learned Judge has analysed the evidence as follows;

35. Prosecution says that the third accused Ranigal facilitated all illegal transactions going out of the way and therefore she as a reasonable teller of Western Union ought to have known that she was sending money derived from an illegal source.
36. There is evidence that the 3rd accused carried out third party transfers on the request of the 1st accused. According to Ravinesh Mani, she had violated policy guidelines and instructions given by Western Union. She knew that one person can send only $500.00 per year. Despite that knowledge she facilitated transactions of 1st accused by using ID's of other people who were not physically present at the branch. She had faced blank forms (PEX 13) to Shoeb and sent money overseas without verifying the identity and the signature of the sender. She had put only one test question for all transactions although they involved several Nigerian recipients.
37. Although the 3rd Accused was not supposed to ask about the origin of money from the customers, there is clear evidence for the assessors to conclude that she had knowledge that the transactions she carried out on the instructions of the 1st accused were not legitimate. Although the stated purpose of sending money was to buy computers from Nigeria, the transactions involved several Nigerian recipients and therefore, as a reasonable teller she ought to have known that the money she was sending abroad was not realized from a legitimate source.
38. The only inference that the assessors could have drawn from the facts provided in this case is that each accused either knew or ought to have known that the money they were dealing with were tainted with illegality.

c. Then in summing-up the direction on ***evaluating circumstantial evidence*** was as follows;

> *"[11] The Prosecution relies on circumstantial evidence to prove that accused persons had the guilty knowledge and that there is no other reasonable explanation than that they had that knowledge. The law on circumstantial evidence is that if, on considering a series of pieces of evidence, you are satisfied beyond reasonable doubt that the only reasonable inference to be drawn is the guilt of the accused, and there is no other reasonable explanation for the circumstances which is the accused's innocence, then you may convict the accused of the offence charged."*

Then clearly and precisely directed further as follows;

> *"[153] In the absence of direct evidence, we don't know what was there in each accused's mind. Under these circumstances, the Prosecution relies on circumstantial evidence and invites you to draw certain inferences from proved facts and their conduct as to the knowledge of each accused. Please remember the inferences you draw must be reasonable in the circumstances and based on proved facts. You have to put each piece of evidence together to form the opinion whether each*

accused knew that money they were dealing with was tainted with illegality."

d. Then the contentious ***issue of knowledge*** was identified and in the summing-up the Assessors were clearly directed as follows;

"[149] The only dispute in this case is with regard to the last element that the accused knew or ought reasonably to have known that the money was derived or realized directly or indirectly from some form of unlawful activity. This is the mental element of the offence of the offence."

e. Then clearly and precisely directed on the ***fault element*** of the offence, in the summed up as follows;

"[162]Prosecution says that the third accused Rimakshni Ranigal facilitated an illegal transactions going out of the way and therefore she as a reasonable teller ought to have known that she was sending money derived from an illegal source.

[163] The Prosecution says that the 3rd accused carried out third party payments on the request of 1st accused violating policy guidelines and instructions received from Western Union as stated by Ravinesh Mani. They say that 3rd Accused knew that one person can send $500.00 in one year and despite that knowledge she facilitated the transaction of Rahul by using ID's of other people who were not physically present. They say that 3rd accused went out of her way to fax blank form (PWEX 13) to Shoeb and sent money overseas without verifying the IDs or making sure that the person who is sending money is physically present and he or she has signed the forms. They say that Bhawikha Naidu and Rangini Naidu had never filled the two send money forms (PEX 13). They say that only one test question was given in every form. Prosecution is inviting you to draw inferences from her conduct as to her knowledge.

[164] The Counsel for 3rd accused argues that third party transactions are permitted and she was in compliance with the instructions she received from her superiors. He says that 1st accused was not supposed to ask about the origin of money from the customers and she just believed what Rahul had said and carried out legitimate transactions although she may have been negligent. It is for you to form your own opinion as to her knowledge."

[24] The above extracts are self-evident and self-explanatory that the Learned Trial Judge has covered, considered and correctly stated and analysed the issue of knowledge and circumstantial evidence thereof and the manner of evaluating the same. There is no error, or misdirection or a non-direction in this regard. That being so I will now

consider if the inferences drawn and the findings arrived at by the trial judge are reasonable and lawful. In applying that test, I will evaluate whether the evidence was rationally and reasonably capable of supporting the said inferences and if the conclusion and the finding of guilt is reasonable on the criminal standard.

Inference of Knowledge

[25] It was submitted on behalf of the 3rd Accused's that she did not know that third party payments were not allowed. 3rd Accused remained silent but her statement under caution was led in evidence by the prosecution. In her caution interview she admits that a person is entitled only to send a maximum of $500 per year through Western Union transfers and should obtain RBF approval for anything more. She says that Rahul informed her that the money was remitted for the purchase of computers. She states that such higher amounts may be remitted with approval of the RBF. That being so there is a strong inference that all these transfers were in fact for and on behalf of Rahul and not for or on behalf of third parties so to speak. This is a clear violation of the $500 limit per person and an evasion of the RBF approval requirement. 3rd Accused certainly knew that and she actively and knowingly assisted Rahul to this end.

[26] Then she says that Rahul wanted to remit money through this means as it was necessary to pay for the computer suppliers without delay. If that be so how come these remittances were made spreading over a period of ½ a month? It would be apparent even to the most mundane and naive mind that it cannot be true. Thus the 3rd Accused Appellant most certainly should have known and did know that Rahul was making sure that this money and transfers were kept secret especially from the RBF and financial regulatory authorities. The 3rd Accused in these circumstances most certainly would have known or ought to have known that this money was derived from some illegal and criminal activity. This being so the inferences drawn and the conclusions arrived at by the trial Judge on the element of the requisite knowledge are correct and lawful.

Third Party Payments

[27] Now what are third party payments? It is when the sender is not present in person before the teller but there is another who comes to effect the transfer naming the said third party as the sender. Then the sender becomes the third party. This is what may be understood from the 3rd Accused's caution interview (Q29 and Q71) and the totality of the evidence.

[28] According to the evidence of PW 9 Ravinesh Mani, in 2011, a third party could not and was not permitted to send money using somebody else's ID. Sender needs to be physically present to send money. He or she is required to produce a valid ID card. He said that all tellers including Ranigal were well aware that there is no third party sending of money in Western Union. But the 3rd Accused in her caution interview, says that she believed that it was not prohibited.

[29] According to Ravinesh Mani once the transaction is processed, Money Transfer form and a receipt to confirm the transaction are generated by the system of Western Union that is PEX 12. The transaction commences with the submission of a send money request form being submitted by the customer. That is PEX 13. Then the transfer is processed and the computer-generated send money receipt PEX 12 is issued to confirm the transaction.

[30] If that be so, the teller should receive a completed Send Money Form (PEX 13) with the identity card of such third party. It is then that the teller is able to effect the transfer and then the teller is required to obtain the signature of the customer on the computer printed Send Money Form (PEX 12).

[31] There are 12 (PEX 13) Send Money Forms on all of which the 3rd Accused admits transferring money. PW 4 Shoeb Nur Ali testified that the said PEX 13 forms were faxed to his company from Western Union on Rahul's instructions and upon inserting a name of persons working under him these were faxed to Western Union by PW11 Naomi Seru, to the female recipient at Western Union. The details of the recipients and the sender's phone numbers are not inserted and are blank in these. However, in

the corresponding computer printed Send Money Forms (PEX 12), the details of the recipients and the phone number of the sender are inserted. How did the accused obtain this additional information? According to PW 8 Ravinesh, if PEX 12 is not signed by the customer it means he/she was not present. This leads to the necessary and only inference that the 3rd Accused has herself obtained this information and perfected and processed these transactions.

[32] This witness has also testified that Rimakshni Ranigal had not followed the proper procedure when she failed to verify the identities of most of the senders by not stating their ID numbers and the sender not having signed the form and the sender not being physically present at the branch. The 3rd Accused in her caution interview says that she cannot remember that if anyone was present. The duty to verify customer identity and the third party are requirements mandated by virtue of section 4 of the Financial Transactions Reporting Act and the 3rd Accused has acted in violation of the same.

[33] These proved circumstances clearly lead to the irresistible inference that 3rd Accused obtained details of the recipients and other information and was personally and actively participating in sending this money acting beyond her scope of employment. The evidence of the 1st Accused is that he requested the 3rd Accused to make these transfers. The 3rd Accused admits that fact. As such the necessary inference a reasonable court or jury can draw is that these twelve remittances under the names of third parties were in fact remittances made on behalf of the 1st Accused and the so called third parties was only a front to this end to protect the 1st Accused and conceal his involvement.

[34] It was submitted that the 3rd Accused-Appellant was not well trained and that 3rd party transactions were common practice. PW9 Ravinesh Mani testified otherwise, that the Appellant was trained and emails were sent to staff on third party transactions and that no third-party transactions were permitted by Western Union. (Vol. 3 page 703 - 704 and 675-678). Thus, the inferences drawn that the 3rd Accused knew or ought to have known that that these are proceeds of a crime and of some form of criminal activity are correct and reasonable.

Sum-up on Circumstantial Evidence

[35] The trial Judge certainly has conveyed clearly and coherently to the assessors the essence as opined in **Naicker v The State** [2018] FJSC Special Petition No. CAV 19 of 2018, 1 November 2018, the Supreme Court as follows;

> *"33. There is no prescribed form of direction when the prosecution's case against the defendant is based on circumstantial evidence alone. So long as the judge gets the essence of it, that is sufficient. The essence of it is that the prosecution is relying on different pieces of evidence, none of which on their point directly to the defendant's guilt, but when taken together leave no doubt about the defendant's guilt because there is no reasonable explanation for them other than the defendant's guilt."*

[36] The Learned Judge in the summing up and judgment has separately and distinctly adverted to and considered that, the Appellant was denying *knowledge* that the monies derived from unlawful activity. Then at paragraph 164 of the summing-up adverted and considered that the Appellant's defence was that third party transactions were permitted and carried out legitimate transactions although she may have been negligent. It is for you to form your own opinion as to her knowledge. These directions in the summing-up in relation to the manner of evaluating circumstantial evidence as well as what could constitute circumstantial evidence are correct.

[37] For the said reasons I find that grounds of appeal 1-8, 11 and 12 have no merit.

9th and 10th Grounds of appeal

[38] The complaint in Grounds 9 and 10 is that the learned Trial Judge erred in law and fact when he did not allow an application to call fresh evidence after the judgment was pronounced and before the sentence. The basis of this application was that when PW9 was under cross examination he denied having previously been charged with any Money Laundering offence arising from a similar situation, which the Appellant submits to be a false denial by PW 9 (vide- vol 3 page 706 of the brief).

[39] During cross-examination no specific allegation was put to the witness that he had been so charged with an offence of money laundering. It was more of general inquiry made from the witness. However, as evident from the subsequent application to call fresh evidence the allegation was against City Forex and not against the witness. The witness has not lied to that extent. In the most this is a matter if at all, only relevant to the credit of the witness and is not on any contentious fact in issue, relevant fact or on an element of the offence. This application does not meet the requirements to justify and allow an application to lead fresh evidence before the full court as decided and discussed in **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017). Thus, there is no merit in these grounds.

Appeal against the sentences

Appeal of 1st Accused-Appellant Rahul Naidu against the sentence

[40] The 1st Accused Appellant relies on two grounds of appeal against the sentence. They are g*rounds of appeal 11 and 15;*

11. THAT the Appellant's appeal against sentence being manifestly harsh and excessive and wrong in principle in all the circumstances of the case.

15. THAT the Learned Trial Judge erred in law and in fact in ordering the Appellant to pay restitution as well as imposing custodial sentence.

11th Ground of appeal

[41] It is submitted that the sentence is manifestly harsh and excessive and wrong in principle in the circumstances of the case. It was submitted that:

a. The Learned Trial Judge erred in determining the range of 5 to 12 years and picking the starting point of 6 years; and

b. The Trial judge considered the same grounds to determine the higher starting point as well as to add 3 years for aggravating circumstances resulting in double counting;

[42] As for the sentencing tariff in respect of the offence of money laundering there appears to have been no authoritative guideline judgment determining the applicable tariff at the point of sentencing in this case. The learned trial judge observing that tariff for the

offence of money laundering is not well settled endeavoured to identify the appropriate sentencing range.

[43] Thus, the learned trial judge having stated that it is not feasible to lay down guidelines for sentence in money laundering offences, has in fact identified a sentencing tariff in the end. He had considered the following previous comparable decisions; **HKSAR v Javid Kamran** (CACC 400/2004), **State v Stephen** HAC 088 0f 2010 (12 April 2012), **O'Keefe v State** [2007] FJCA 34; AAU0029.2007 [25 June 2007], **State v Sinha** [2010] FJHC 480 (29 October 2010), **State v Stephen** HAC 088 0f 2010 (12 April 2012), **State v Shyam** [2013] FJHC 529; HAC146.2010 (14 October 2013), **State v Lata** [2017] FJHC 927; HAC118.2014 (7 December 2017), **Monika Aurora HAC 125 of 2007** and **Johnny Albert Stephen HAC 88 of 2010** and identified tariff to be 05 to 12 years imprisonment as the appropriate sentencing range then picked 6 years as the starting point.

[44] Almost 4 years since that His Lordship Justice Gates in **Shyam v The State** CAV0024 of 2019 (26 August 2022) remarked that;

> *"[38] The maximum penalty for money laundering was a fine not exceeding $120,000 or imprisonment for a term not exceeding 20 years or both. The tariff identified from a few cases that had come before the Fiji courts was imprisonment in the range 5 to 12 years."*

[45] This I will consider as an authoritative observation by the Supreme Court that the appropriate tariff for money laundering is 5 to 12 years. **Shyam** has certainly confirmed the tariff as considered by the Learned Trial Judge to be correct. The starting point of 6 years is within the said tariff and is at the lower end of the spectrum which is a reasonable point to start. I see no error or unreasonableness in this regard.

[46] It was also submitted that the aggravating circumstances overlapped with the grounds considered for objective seriousness. In the written submission or the oral submission there is no specific reference to any such ground that was so double counted except for the general allegation. As the starting point is at the lower end of the tariff even if

there be double counting the prejudice if any is negligible or marginal. Thus I see no basis for this submission and it is misconceived.

[47] As held in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) the sentencing process is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and recognising that the so-called starting point is itself no more than an inexact guide. …… 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.

[48] In the aforesaid circumstances the final sentence arrived at is well within the tariff set for this offence of 5-12 years. It is commensurate with the facts and circumstances of this case. I see no sentencing error in this regard. This ground of appeal thus fails.

15th Ground of Appeal

[49] It was submitted that the order of restitution is not lawful and increasing the sentence by 6 months for the failure to restitute is not permitted in law. This argument is two pronged. Firstly, such an order cannot be made and secondly, no default term is permitted. Restitution is provided for by section 153(1)(c) of the Criminal procedure Act as well as section 49 of the Sentencing and penalties Act. As for section 153(1)(c) of the Criminal procedure Act, restitution may be ordered to be paid from a fine or money found in the possession of a convict. The imposition of a fine or recovery of money is a pre-requisite. This is not the case in the present matter. As for restitution under section 49 (1)(a) of the Sentencing and penalties Act, when property is stolen and a person is convicted of an offence an order may be made against a person who has possession or is in control of such property to restore. Section 49 (1)(a) empowers the court in the present case to make an order for restitution upon the finding of guilt or conviction if the relevant facts appear from the evidence or admissions. The Trial Judge was certainly empowered to make the order for restitution of $12,000 in addition to any other sentence that may be imposed.

[50] However, the learned Trial Judge has also ordered that restitution to be made within 12 months and failing which a further period of 6 months be added to the sentence. It is in effect a default sentence that was so ordered. It was submitted that the law does not empower or enable a court to make such an order.

[51] I have perused the Sentencing and Penalties Act and found no provision that enables the ordering a sentence in default of restitution and neither did the counsel for the Respondent bring to our notice of any such enabling provision.

[52] Section 37 of the Sentencing and Penalties Act does provide for the imprisonment in default of payment of fines, but as defined in the said Act "fine" does not include any money payable as restitution or compensation.

[53] Then section 29 of the Sentencing and Penalties Act does provide that, *nothing in this act affects the power of court to enforce any sentence, penalty on an offender or to make any other order as a consequence of the finding of guilt against, or conviction of the offender*. This is a general provision saving the powers of a court to make consequential orders in respect of enforcing sentences and penalties. However, to my mind this provision cannot be extended or interpreted to include a default term to enforce an order of restitution as restitution is not within the meaning of the word fine.

[54] The enforcement mechanism for an order of restitution made under section 49 is provided for in Section 50 of the Sentencing and Penalties Act. Section 50 reads as follows:

> *Section 50*
>
> 1. *An order made under section 49 (1) (c) may be enforced as a judgment debt due by the offender to the person in whose favour the order is made.*
> 2. *An order made under section 49(1)(a) or (b) may be enforced by a court by any means available to that court in a civil proceeding.*

[55] Thus, in the absence of a specific enabling and empowering provision to that effect, I am inclined to accept the argument of the Appellant that ordering a default term of

imprisonment of 6 months for the failure to restitute and then adding the same to the sentence of imprisonment is not lawful and is illegal.

[56] Accordingly, 6 months' imprisonment ordered in default of restitution is set aside and so much of the sentence imposing the default term is hereby set aside. The said order of restitution may be enforced under Section 50 of the Sentencing and Penalties Act. Subject to this variation, the sentence and the order of restitution made against the 1st Accused Appellant are affirmed. The appeal against the sentence of the 1st Accused-Appellant is allowed to that extent.

Sentence of the 3rd Accused

[57] The Appeal against sentence was on the following grounds of appeal that;

> *14. That the Appellant' appeal against sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case.*
> *15. That the learned Trial Judge erred in law and in fact in passing sentence of imprisonment was disproportionately severe punishment contrary to section 25 of the Constitution of Fiji (1998) section 11 (1) of the 2013 Constitution of Fiji).*
> *16. That the learned Trial Judge erred in law and in fact in not taking into consideration adequately the provisions of the Sentencing and Penalties.*

[58] Of the said grounds of appeal 14th ground was considered in relation to the 1st Accused and held to be without merit. Thus, I will now consider grounds 15 and 16. It is submitted that the sentence is harsh, excessive and wrong in principle.

15th and 16th Grounds of appeal (against the sentence)

[59] The final sentence imposed is 5 years imprisonment. As for the 3rd Accused, the sentence of 5 years imprisonment is within the tariff of 5-12 years and is at the lowest end. It is certainly not harsh considering the nature of the offence.

[60] In an offence of money laundering a primary consideration may be the money laundered. The knowledge that the money must have been received from a crime is by itself is an aggravating feature. The appellant claims to have not received any

benefit. As submitted on behalf of the Respondent receiving a benefit and the quantum may aggravate however, not receiving any benefit cannot per se be a mitigating factor as it is implicit in the offence that the accused was aware that the monies were tainted. Further receiving any benefit is not an element of the offence of Money Laundering.

[61] A fit sentence anticipates punishment to be commensurate with the seriousness of the offence. Therefore picking the starting point of 5 years is not unreasonable and finally ending at 5 years imprisonment has come to the lowest end of the tariff 5-12 years. In these circumstances there is no reason in law or otherwise to interfere with the sentence.

Fresh ground of appeal urged

[62] During the course of the argument Mr. Shelvin Singh appearing for the 3rd Accused-Respondent mentioned in-the-passing so to say, that in view of the a recent decision of the Court of Appeal he wishes to raise a new ground of appeal on the propriety and the legality of the charge against Rimakshni Ranigal. It was submitted that it is defective as sufficient information has not been stated therein. It was his submission that the lack of sufficient information is contrary to section 14 (2) of the Constitution and that he is entitled to raise this ground without notice to any other in the course of the argument and in this manner. Mr. Singh did not specifically raise a ground nor elaborate further. He merely mentioned in the passing of such a recent decision on this issue. He did not submit any copy either. From what he submitted the said decision is **Saqanavere v State** [2022] FJCA 98; AAU035.2016 (29 September 2022) and in which His Lordship Bandara JA., held thus;

> *"[101] In the instant case the mere mentioning in the charge the terms, "**transactions involving proceeds of crime**" and "**from some form of unlawful activity**", do not meet the requirement of the constitutional provision "**to be informed....of the nature of and reasons for the charge**". Furthermore, it does not meet the requirement set out under section 119 of the Criminal Procedure Code; "....**charge or information shall contain...a statement of the specific offence.....together with such particulars as maybe necessary for giving reasonable information as to the nature of the offence charged.**"*

> *[102] It is emphasized that the instant charges do not provide the Appellants with the, "**reasonable information as to the nature of the offence charged.**" The said failure does not only amount to a violation of section 119 of the Criminal Procedure Code, but also a breach of a "**Rights of accused persons**" as set out in terms of Article 14 (2) (b) of the Constitution."*

[63] According to which the particulars of the charge should include a description as to what the illegal activity or the predicate offence is. The conviction in that was set aside and a re-trial was ordered. Similarly in the present charge, it is correct that the said particulars are not stated and do not specify or describe as to what the *illegal activity* is.

[64] In **Saqanavere v State** the court held that in a charge under section 69(2)(a) read with (3)(a);

a) Proceeds of a crime should be realised or derived from the commission of a *"serious offence"* or from a disposal of proceeds of a serious offence or acquiring proceed of a serious offence.

b) The Appellants should have been informed in the charge as to what *"serious offence"* constituted the unlawful activity, with which they were charged, in an informative form as is reasonably practicable

c) The commission of a substantive *"serious offence"* becomes a constituent element for the constitution of the money laundering offence. [paras. 99-100]

[65] **Saqanavere v State** based its finding on the premise that, proceeds of a crime should be realised or derived from the commission of a "serious offence" or from a disposal of proceeds of a serious offence or acquiring proceed of a serious offence. Then it was decided that the Appellants should have been informed in the charge as to what "serious offence" constituted the unlawful activity and the conviction was set-aside. To this end their lordships considered the definition of proceeds of crime in section 4(1A) as being applicable to section 69(3)(a).

[66] Section 69 defines the offence of money laundering as follows;

> *69. 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, uses, disposes of or brings into Fiji any money or other property that are ***proceeds of crime****, or,*

(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 illicit origin of that money or other property, or of aiding any person involved in the commission of the offence to evade the legal consequences thereof; or*

(d) the person conceals or disguises the true nature, origin, location, disposition, 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),

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.***

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

[67] Section 69 (3)(a)-(d) provides four situations in which a person is said to have engaged in money laundering, of which reference to a *serious offence or a foreign serious offence* is made only in section 69 (3) (c) and (d) but ***not*** in (a) or (b).

[68] Sections 69(3)(a) and (b) of the Act refers to *"****proceeds of crime***" but I see no reference to a *"****serious offence or a foreign offence"****.* In the contrary sections 69(3)(c) and (d) refers to *"****serious offence or a foreign offence"*** but there is no direct reference or the use of the term *"****proceeds of crime***".

[69] According to section 3 *"proceeds of crime" falls to be constructed in accordance with section 4(1A);*

Section *4 (1A) is as follows;*

> *"In this Act,* ***in relation to a serious offence or a foreign offence****, "proceeds of crime" means property or benefit that is –*
> *(a) wholly or partly derived or realised directly or indirectly by any person from the commission of a serious offence or a foreign serious offence;*
> *(b) wholly or partly derived or realised from a disposal or other dealing with proceeds of a serious offence or a foreign serious offence; or*
> *(c) wholly or partly acquired proceeds of a serious offence or a foreign serious offence.*
> *and includes, on a proportional basis, property into which any property derived or realised directly from the serious offence or foreign serious offence is later converted, transformed or intermingled, and any income, capital or other economic gains derived or realised from the property at any time after the offence."* [emphasis added]

[70] The definition*, of "proceeds of crime"* in section 4 (1A) is a qualified definition, in relation to *a* ***serious offence or a foreign offence*** and will apply only in relation to and if a reference is so made to a ***serious offence or a foreign offence*** in any provision of the Act.

[71] Thus, in the absence of any reference to a *serious offence or a foreign serious offence* in sections 69(3)(a) and (b) the definition of *"proceeds of crime"* in section 4 (1A) cannot have any application to Money Laundering offences under sections 69(3)(a) and (b) of the Act. As far as offences under sections 69 (3) (a) or (b) are concerned the requirement is that the property involved be proceeds of crime simpliciter and certainly not that of a *serious offence.*

[72] In **Saganavere v State** whilst appreciating that the Appellants were charged under section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act 1997 it was held that;

> *"……proceeds of a crime should be realised or derived from the commission of a "serious offence" or from a disposal of proceeds of a serious offence or acquiring proceed of a serious offence. The Appellants should have been informed in the charge as to what "serious offence" constituted the unlawful activity, with which they were charged……."(*vide-para 99)
> and that;
> *"…If proceeds of crime, should be derived from the proceeds of a serious offence, or any property derived directly or indirectly from acts that have constituted a serious offence, "the charge" should inform the Appellants, as to what serious offence they have committed. …."(*vide-para 100)

[73] This interpretation appeared to have over looked the fact that, offences under sections 69 (2) (a) and (3) (a) are concerned the requirement is that the property involved should be or derived from *proceeds of crime* simpliciter.

[74] What amounts to proceeds of crime? If the definition in section 3 read with section 4(1A) is not applicable to section 69(3)(a) lets consider what amounts to *proceeds of crime* for the purposes of section 69(3)(a). Section 3 defines that,

> *"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;*

[75] The fault element required is that the Accused knows, or ought reasonably to know, that the money or the other property is derived or realized, directly or indirectly, from ***some form of unlawful activity***. Section 3 defines that,

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

[76] Thus proceeds from "***some form of unlawful activity***" means that the person knew the property involved in the transaction represented proceeds from ***some form***, though not necessarily which form, of activity that constitutes an offence in Fiji, regardless of whether or not such activity is specified. The words ***some form of*** will necessarily means an offence in the generic sense and certainly not a specific offence. Accordingly, this cannot mean or be a specific requirement to prove or state a specific serious offence.

[77] As stated above, whenever the words "*proceeds of crime*" is used in relation to serious offence the definition at section 4(1A) will apply. Section 69(3)(a) does not refer to serious offence. Therefore, the definition of proceed of crime as defined in section 4(1A) has no application to section 69(3)(a). That being so, the predicate offence for the purposes of section 69(3)(a) will be any crime or offence punishable by law in Fiji.

[78] To appreciate the relevance in context, it is necessary to comprehend the broader aspects of the offence of money laundering. There are two main types of money laundering prosecutions.

a. "*Mixed*" cases in which money laundering charge is included on an indictment/information in which the underlying predicate offence is also included.
b. Cases where money laundering is the sole charge.

[79] The person Accused or the money launderer may either be the author of the predicate crime laundering his 'own proceeds' who is '*self-laundering'*; or a person other than the author of the predicate offence. The 3rd Accused will fall in to this latter category.

[80] Where money laundering offences are included on the same information as the underlying crime (the predicate offence), necessarily the underlying criminal conduct will be proved as part of the prosecution case as well as the evidence required to prove the money laundering offence on the requisite criminal standard.

[81] Where the money laundering proceedings are standalone, there are two ways of proving that it is criminal property or that it is tainted property:

a. by proving the type of offending that gave rise to the criminal property, or
b. by relying on evidence that the circumstances in which the property was handled were such as to give rise to an '…irresistible inference that it could only have been derived from *some form* of crime or criminal activity.

[82] This was so held in ***R v Anwoir*** [2008] EWCA Crim 1354; [2008] Cr App Rep 36, states that;

> *"…….We consider that in the present case the Crown are correct in their submission that there are two ways in which the Crown can prove the property derives from crime,* ***a)*** *by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or* ***b)*** *by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime."*

[83] ***R v Anwoir*** also opined that prosecutors are not required to prove that the property in question is the benefit of a ***particular or a specific*** act of criminal conduct because such an interpretation would restrict the operation of the legislation. The prosecution need, as a minimum, to produce sufficient circumstantial evidence or other evidence from which an "*irresistible inference*" can be drawn, to the required criminal standard, that the property in question has a criminal origin. In other words, there could be no

reason for the circumstances other than a criminal one. For the purposes of the offence of Money Laundering under sections 69(3)(a) and (b) the predicate offence is any offence.

[84] Thus it is apparent that proof of a specific offence is not required in order to establish guilt under section 69(3) (a) or (b) of Proceeds of Crime Act. It is sufficient for the purposes of these subsections it be shown that the property possessed, concealed, disguised, or transferred etc., represented the proceeds *of some form of* Crime or unlawful activity. In other words, any criminal activity; and that it is not required of the prosecution to establish that it was the result of a specific or particular crime.

[85] In the light of this conclusion, it follows that in a charge under sections 69(3)(a) and (b) the failure to particularise, identify and prove a specific offence as the means by which the unlawful proceeds were produced is not a breach of section Article 14 (2)(b) of the Constitution and section 119 of the Criminal Procedure Act. What these sections require is that the nature and the reason of the offence of which the accused person be informed is that with which he is charged, in this case the offence of money laundering. As stated above proof of a particular predicate crime in the form of a serious offence is not an essential "*element*" of the offence of money laundering under section 69(3) (a) or (b) of Proceeds of Crime Act.

[86] However, where it is possible to give the accused notice of the type of criminal activity that produced the illegal proceeds, fairness demands that this information should be supplied if it was able to do so.

[87] His Lordship Justice Gates in **Shyam v The State** [2022] FJSC 40; CAV0024.2019 (26 August 2022) considered the effect and import when an issue of a defective charge is raised for the first time in appeal. His Lordship whilst holding that the rolled-up change of Money Laundering was defective and also adverting to a charge in which there was a failure to specify details of the unlawful activity, granted special leave on the ground of defective charge, however proceeded to dismiss the appeal and affirm the conviction and sentence and said that;

> *"[27] But had this caused embarrassment to the Petitioner in the way he had conducted his defence at trial? Was he prejudiced? He himself gave no evidence nor called any. There seemed no obvious difficulty in any of the cross examinations by his counsel. The difficulty for the defence was in being able to point to evidence that could be accepted as contradicting the evidence of the transactions and of the explanations given by the witnesses as to why the deposits had been made into their accounts of refunds to which they knew they were not entitled. Their evidence pointed to knowledge on the part of the Petitioner that the monies were from some form of unlawful activity. Apart from admitting there were IRD documents at his residence, which he knew was wrong, in his caution interview the Petitioner had denied all of the allegations of involvement with false refunds and with deposits into the witnesses accounts, or of receiving monies back from them. There was no sworn evidence to set against what the prosecution witnesses had said. At the end of the day, the assessors had to decide whether the prosecution case alone, as the trial Judge had pointed out, was sufficient to prove the case against the Petitioner beyond reasonable doubt."*

[88] Assuming that there was a failure to so particularise I would now in similar vein consider if the failure to specify and give details of the unlawful activity has caused any prejudice or a miscarriage of justice or embarrassed the Appellants. The 3rd Accused-Appellant had been served with disclosures and one of which is the caution interview. This was led in evidence and considering the nature and the contents and other disclosures it would certainly provide the information as to the nature of the transaction and the fact that this is monies illegally withdrawn from Sheiknah Law Account. Evidence of the predicate offence was led. Further, the 3rd Accused-Appellant did not give evidence but the cross-examination and suggestions clearly bear out that the 3rd Appellant certainly knew exactly what the nature of the predicate offence was and where the tainted money emanated from. Therefore, no miscarriage of justice had resulted by this defect in the charge. Considering the defence taken and the nature of cross examination in conjunction with the disclosures made the Appellant was certainly not embarrassed in the conduct of her defence.

The Proviso to Section 23 of the Court of Appeal Act

[89] Even if there was such an error and irregularity in the charge in not providing sufficient details in the particulars of offence, I consider that no substantial miscarriage of justice actually occurred and that the Court should therefore apply the

proviso to section 23 of the Court of Appeal Act. For convenience, the terms of the proviso may be repeated:

> "*Provided that the court may, notwithstanding that they are of the opinion that the point raised in the appeal against conviction or against acquittal might be decided in favour of the appellant, dismiss the appeal if it considers that no* ***substantial*** *miscarriage of justice has occurred.*" (Emphasis added.)

[90] In my view, it would accord with Legislature's intent in enacting the proviso to apply it in this case. That intent is indicated by use of the word "considers" rather than a more demanding word such as "s*atisfied*"; it also used the word "substantial" to describe the miscarriage of justice, notwithstanding that a miscarriage had been stipulated in the substantive provision as a ground of appeal it appears that the Legislature did not want convicted persons to go free or obtain the benefit of a new trial on the basis of an error of law or irregularity unless the error or irregularity would have made a difference to the outcome.

[91] The necessary consequence of the proviso is that, it is not every error of law or breach of the rules of evidence or procedure which have evolved to ensure a fair trial for an accused which is necessarily fatal. Any such error or irregularity needs to be material to the outcome of the trial. Unless it is so, no injustice has been done. The import of the proviso is that errors or irregularities, even though they may be perceived as a miscarriage they are not necessarily fatal unless this Court considers the miscarriage of justice to be "***substantial***". Another way of putting the point would be to say that, although a ground of appeal may disclose a miscarriage of justice, it does not represent an injustice in the particular case unless it would have made a difference to the result.

[92] In the present matter the Accused has otherwise certainly been provided with the information as to the nature of the transaction and the fact that this is monies illegally withdrawn from Sheiknah Law and other Accounts though not stated in the charge. Thus I am satisfied that the said defect in the charge has not caused any prejudice or a miscarriage of justice and also had not caused prejudice to the petitioner in conducting the defense.

[93] This objection ought to have been taken up at the outset before pleading. This was not raised as a ground of appeal at the leave stage nor in the renewed application. It was not raised even as a supplementary ground any time before this was taken up for argument. The legal position is now settled. The Court of Appeal in **Nasila v State** AAU0004 of 2011: 6 June 2019 [2019] FJCA 84 considered the situation where fresh grounds of appeal are being urged for the first time at the hearing before the full court and adopted the test for enlargement of time to appeal in respect of fresh grounds of appeal taken up for the first time before the full court at the hearing of the appeal. Those factors are:

i. The reason for the failure to file within time.
ii. The length of the delay.
iii. Whether there is a ground of merit justifying the appellate court's consideration.
iv. Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
v. If time is enlarged, will the Respondent be unfairly prejudiced?

[94] In the first place no notice was given to the respondents as well as to Court. **Saqanavere v State** (supra) on which the ground of appeal was raised, was pronounced on 29 September 2022. The Appellant had almost 8 months' notice of the same. No steps of whatever nature were taken to duly raise this fresh ground of appeal and neither is there an explanation for the said lapse. The Respondent did not and could not respond to the said ground and this court did not have the benefit of full submissions and arguments on this issue. Further there to I have already concluded that no prejudice was caused to the Appellant in defending the said charge in the form it was in and there is no substantial miscarriage of justice occurred. Accordingly, the Appellant is not granted leave in respect of this fresh ground of appeal.

[95] Accordingly, the 3rd Accused-Appellant is not entitled to have this ground considered in this appeal. I have not heard the Respondent on the same. I have herein above, to a limited extent considered the merits of this fresh ground of appeal and found that there is no prejudice or substantial miscarriage of justice.

Conclusion

[96] In **Ram v. State** Criminal Appeal No. CAV0001 of 2011: 09 May 2012 [2012 FJSC 12**]** the Supreme Court held *inter alia* that *'an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case'*. To my mind the verdict of guilt against the 3rd Accused-Appellant is neither unsafe, unreasonable nor dangerous. I have no doubt that on the available evidence count No. 6 against the Appellant has been proved beyond reasonable doubt and on the whole of the facts notwithstanding the failure to specifically state the unlawful activity in the charge no miscarriage of justice has occurred. Having regard to the evidence led the Appellant could have been convicted of count No. 6 levelled against her and therefore the verdict of guilt and the convictions in respect of the said counts against the 3rd Accused-Appellant are well founded, lawful, reasonable and supported by evidence.

[97] Therefore, I conclude that the appeal of the **3rd Accused-Appellant** (AAU 93 of 2018) should stand dismissed and the conviction and sentence be affirmed.

[98] In the aforesaid circumstances as there is no reasonable prospect of success with regard to the **3rd Accused-Appellant's** appeal against the conviction and the sentence leave to appeal should be refused. As this court has now fully considered the 3rd Accused-Appellant's appeal against the conviction and sentence, both the appeal against the conviction and sentence should be dismissed in terms of section 23(1) (a) of the Court of appeal Act.

[99] The appeal against the sentence of the **1st Accused-Appellant** is partially allowed. The 6 months' imprisonment ordered in default of restitution is set aside and subject to this variation, the sentence and the order of restitution made against the 1st Accused Appellant are affirmed.

[100] ***Orders of Court are:***

1. *1st Accused-Appellant's application to abandon the appeal against the conviction is allowed.*

2. *1st Accused-Appellant's appeal against sentence is partially allowed.*

3. *3rd Accused-Appellant's application for leave against the conviction is refused.*

4. *3rd Accused-Appellant's appeal against conviction is dismissed.*

5. *3rd Accused-Appellant's application for leave against the sentence is refused.*

6. *3rd Accused-Appellant's appeal against sentence is dismissed.*

7. *Conviction and sentence of the 3rd Accused-Appellant are affirmed.*

Hon. Mr. Justice I. Mataitoga
JUSTICE OF APPEAL

Hon. Mr. Justice A. Qetaki
JUSTICE OF APPEAL

Hon. Mr. Justice G. Kulatunga
JUSTICE OF APPEAL

COURT OF APPEAL
FIJI