

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 067 OF 2009

STATE

-v-

FAIYAZ KHAN

Counsels : Mr. F. Lacanivalu for the State
Mr. I Khan for the accused

Date of Trial : 28 October -1 November 2013

Date of Sentence hearing : 12 November 2013

Date of Sentence : 15 November 2013

SENTENCE

1. The accused is before the Court for sentence, after being convicted of the following counts.

COUNT 1

Statement of Offence

UTTERING FORGED DOCUMENT: Contrary to Section 343 (1) of the Penal Code, Cap 17.

Particulars of Offence

FAIYAZ KHAN s/o Mubarak Khan, on the 27th day of August 2008 at Sigatoka in the Western Division, knowingly and fraudulently uttered a Fiji Islands Revenue & Customs Authority cheque number 230415 in the sum of \$186,561.65 knowing the same to be forged.

COUNT 2
Statement of Offence

OBTAINING MONEY ON FORGED DOCUMENT: Contrary to Section 345 (a) of the Penal Code, Cap 17.

Particulars of Offence

FAIYAZ KHAN s/o Mubarak Khan, on the 27th day of August 2008 at Sigatoka in the Western Division, obtained the sum of \$186,561.65 by virtue of a forged instrument namely Fiji Islands Revenue & Customs Authority cheque number 230415 knowing the same to be forged.

COUNT 3
Statement of Offence

MONEY LAUNDERING: Contrary to Section 69 (3) (a) of the Proceeds of Crime Act, Cap 27.

Particulars of Offence

FAIYAZ KHAN s/o Mubarak Khan, on the 28th day of August 2008 at Ba in the Western Division, engaged directly in a transaction in particular the purchasing of hardware Materials from Bombay Trading (Investments) Limited with \$1,850.40 that was proceeds of crime, knowing that the aforesaid money was derived indirectly from an unlawful activity namely the forgery of Fiji Islands Revenue & Customs Authority cheque number 230415.

COUNT 4
Statement of Offence

MONEY LAUNDERING: Contrary to Section 69 (3) (a) of the Proceeds of Crime Act, Cap 27.

Particulars of Offence

FAIYAZ KHAN s/o Mubarak Khan, on the 29th day of August 2008 at Lautoka in the Western Division, engaged directly in a transaction in particular the purchasing of hardware materials from Tubemakers & Roofmart (SP) Limited with \$5,860.63 that was proceeds of crime, knowing that the aforesaid money was derived indirectly from an unlawful activity namely the forgery of Fiji Islands Revenue & Customs Authority cheque number 230415.

COUNT 5
Statement of Offence

MONEY LAUNDERING: Contrary to Section 69 (3) (a) of the Proceeds of Crime Act, Cap 27.

Particulars of Offence

FAIYAZ KHAN s/o Mubarak Khan, on the 05th day of September 2008 at Sigatoka in the Western Division, engaged directly in a transaction in particular the purchasing of hardware materials from Multiline Distributors Limited with \$965.71, that was proceeds of crime, knowing that the aforesaid money was derived indirectly from an unlawful activity namely the forgery of Fiji Islands Revenue & Customs Authority cheque number 230415.

2. You pleaded not guilty to above charges. Following trial lasting five days in this Court, you were found guilty on above counts against you.
3. After considering the unanimous verdict of Guilty of the assessors and having reviewed the evidence and summing up in this trial, the Court decided to concur with the verdict of the assessors and found you guilty of the above charges.
4. The brief facts of the case as revealed by the evidence is that the you presented to ANZ bank a Fiji Islands Revenue & Customs Authority cheque number 230415 for the value of \$ 186,561.65, knowing the same to be forged to be deposited to your company account. The forged cheque in question was given to you by Salendra Sen Sinha, who had pleaded guilty for the forgery earlier and was sentenced. You had obtained a special answer from the bank that is to cash the cheque same day. Further you had withdrawn \$60,000 same day. You had withdrawn further \$ 70,000 two days later and \$40,000 more few days later. There was evidence that you should have known that the cheque was a forged cheque.
5. The maximum penalty for uttering forged document is 14 years. The tariff for fraud cases ranged from 18 months to 4 years with 4 years imprisonment reserved for the worst type of offending, as observed by Her Ladyship Ms. Nizhat Shammen in ***Hu Jun Jun v The State*** [2005] FJHC 93; HAA 0024J.2005S (26 April 2005). In ***State v Kesi*** [2009] FJHC 145; HAC 024.2009 (22 July 2009) His Lordship Mr. Daniel Gounder identified the tariff for fraud offences as 18 months to 3 years imprisonment.
6. However, in ***State v Prasad*** [2011] FJHC 218; CRC 024.2010 (19th April 2011) His Lordship Mr. Justice Paul K. Madigan stated as follows:

“Forgery of cheques and of an authority to transfer is punishable by a maximum penalty of fourteen years. The tariff for forgery has always been seen as between eighteen

months to three years imprisonment depending on the circumstances of the case. It is the Court's view that this tariff having been in place for many years seriously needs to be revisited. In these lean economic times forgery, especially by those in positions of trust, is becoming far too prevalent and the forgery is usually the conduit to obtaining money or property by means of the uttering of the forged document."

"There is no reason now why the range for forgery should not be between 3 years and 6 years, with factors to be considered to be-

High gain-actual or intended

Whether the accused a professional or non professional

Sophisticated offending with high degree of planning

Target individuals rather than institutions

Vulnerable victim."

7. Considering the above, I commence your sentence at 4 years imprisonment for uttering a forged document.
8. Aggravating factors;
 - (a) The high gain you obtained,
 - (b) The target in this offence is Fiji Islands Revenue and Customs Authority,
 - (c) The high degree of planning and sophistication of the offence,
 - (d) The lack of remorse shown by you.

Considering all, I increase your sentence by 2 years, now the sentence is 6 years imprisonment.

9. Mitigating circumstances

- (a) You are first offender at the age of 37,
- (b) Family dependent on you - father of two children and sole bread winner,
- (c) You claim that you are an active social worker.

Considering all, I reduce 1 year from your sentence, now your sentence is 5 years imprisonment.

10. You were never in remand till you were convicted by this Court.
11. The maximum penalty for obtaining money on forged document is 14 years according to Section 345 (a) of the Penal Code, Cap.17. The tariff, aggravating and mitigating circumstances are same as the first count. Therefore sentence of 5 years is ordered for the 2nd count as well.

12. The maximum penalty for the offence of money laundering is a fine not exceeding \$120,000 or imprisonment for a term not exceeding 20 years, or both according to Section 69 (2) (a) of the Proceeds of Crime Act, 1997.

13. In **O'Keefe v State** [2007] FJCA 34; AAU 0029.2007 (25 June 2007) it was held by the Court of Appeal that:

"When sentencing in individual cases, the court must strike a balance between the seriousness of the offence as reflected in the maximum sentence available under the law and the seriousness of the actual acts of the person who is to be sentenced. Money laundering is clearly potentially a very serious offence. It can be, and is, used to disguise the true nature of money derived from criminal activity and so make it available for legitimate use. It is essential for large criminal organizations if they are to be able to maximize the proceeds of their unlawful activities. Of necessity, it is an international problem and undoubtedly smaller jurisdictions may be seen as useful and unsuspecting conduits. That is why parliament imposed the heavy penalties under the Proceeds of Crime Act."

"However, where is here, the court is sentencing for the associated criminal offences which produced the money to be laundered, it must base its sentence on the relative seriousness of the individual offences."

14. The principle of **O'Keefe** was cited with approval in the case of **State v Sinha** [2010] FJHC 480; HAC 046.2008 (29 October 2010) by His Lordship Mr. Daniel Gounder when he sentenced Salendra Sen Sinha for similar offences, a starting point of 4 years was selected. The amount of money withdrawn by the accused using FIRCA cheques in that case was \$ 187,333.57.

15. In **State v Prasad** [2011] FJHC 218; CRC 024.2010 (19th April 2011) His Lordship Mr. Justice Paul K. Madigan followed **O'Keefe** in ordering 6 years imprisonment for money laundering offences. His Lordship observed that:

*"There is no real precedent in Fiji for the offence of money laundering which carries a maximum penalty of 20 years. Were the offences to be charged alone, that is without being charged in conjunction with other offences that generate the money sought to be laundered, it is probable that the offence could attract sentences in the range of eight to twelve years, however this Court is bound by the decision of the Fiji Court of Appeal in **O'Keefe v State** AAU 0029.2007. In that case the appellant was appealing a sentence*

passed on him in the magistracy after the High Court had dismissed his appeal. Mr. O'Keefe had entered plea of guilty in the Magistrates Court to several counts of forgery and false pretenses for which he was sentenced to concurrent terms of 2 years and then also one offence of money laundering for which he was sentenced to five years imprisonment."

"Having passed strong sentences on the first accused for his fraud offences, I will not additionally punish him for the money laundering offences, despite the fact they are very serious offences indeed. I sentence the first accused to a term of six years for each money laundering offence he has been convicted of. Each of these terms is to be served concurrently with each other and concurrently to the conspiracy sentence."

16. In **State v Arora** [2012] FJHC 1004; HAC 125.2007 (17 February 2012) His Lordship Mr Salesi Temo observed that:

*"Money laundering is a serious offence, and it carries a maximum penalty of 20 years imprisonment, or fine not exceeding \$120,000, or both. (Section 69 (2) (a) of the Proceeds of Crime Act 1997) His Lordship Mr. Justice Paul K. Madigan, in the case of **The State v Anand Kumar Prasad & others**, Criminal case No. HAC 024 of 2010, High Court, Lautoka noted in April 2011 that, "there was no real precedent in Fiji for the offence of money laundering", despite it carrying a maximum penalty of 20 years imprisonment." His Lordship suggested a tariff between 8 to 12 years imprisonment."*

"Given the seriousness in which Parliament regards "money laundering" offences in the Proceeds of Crime Act 1997, by giving it a maximum penalty of "20 years imprisonment, money laundering in Fiji should be a sentence between 8 to 12 years imprisonment. This tariff gives effect Parliament's intention of treating 'money laundering" as a serious offence. A lighter tariff would be counter-productive to Parliament's intention as enshrined on the Proceeds of Crime Act 1997. Of course, the final sentence will depend on the aggravating and mitigating factors."

In that case a starting point of 8 years was taken for the count of money laundering of \$472,466.47 and on second count of corrupt practices a sentence of 6 months imprisonment ordered.

17. In **State v Stephen-Sentence** [2012] FJHC 1010; HAC088.2010 (12 April 2012) His Lordship Mr. Justice Paul K. Madigan stated that:

“Within range of five to twelve years imprisonment for this offence, domestic money laundering on a small scale of little sophistication and with little benefit to the accused would attract sentences at the lower end of the scale. The laundering of funds internationally and where the accused gains substantially in an affair of high sophistication will attract penalties at the upper end of the scale.”

18. Following the principle in **O’Keefe v State** [2007] FJCA 34; AAU 0029.2007 (25 June 2007) which was followed by His Lordship Mr. Daniel Gounder in **State v Sinha** [2010] FJHC 480; HAC 046.2008 (29 October 2010) in similar circumstances I order sentence of 5 years for each charge of money laundering.

19. Your sentences are as follows:

- | | | | |
|-------|---|---|---------|
| (i) | 1 st count of uttering forged document | - | 5 years |
| (ii) | 2 nd count of obtaining money on forged document | - | 5 years |
| (iii) | 3 rd count of Money Laundering | - | 5 years |
| (iv) | 4 th count of Money Laundering | - | 5 years |
| (v) | 5 th count of Money Laundering | - | 5 years |

20. The Fiji Court of Appeal in **Vukitoga v State** [2013] FJCA 19; AAU 0049.2008 (13 March 2013) cited with approval the following citation of D.A. Thomas, Principles of Sentencing (2nd edition, 1979) p. 56-57 which was cited in High Court of Australia judgment **Mill v The Queen** [1988] HCA 70:

“The effect of the totality principle is to require a sentence who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is ‘just and appropriate’. The principle has been stated many times in various forms: ‘when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong’; “when... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behavior and ask itself what is the appropriate sentence for all the offences.”

21. Considering the totality principle, I order all the sentences to run concurrently.

22. You have filed submissions to consider a non custodial sentence and cited several authorities. However considering the serious nature of the offences even part non custodial sentence is not justified.

23. Acting under Section 18 (1) of the Sentencing and Penalties Decree, I impose 4 years as non parole period.

Summary

24. You are sentenced to 5 years imprisonment, each charge to run concurrently with each other. You will not be eligible for parole until you complete serving 4 years of imprisonment.

25. 30 days to appeal to Court of Appeal.

Sudharshana De Silva
JUDGE

**At Lautoka
15 November 2013**

**Solicitors for the State :
Solicitors for the Accused:**

**Office of the Director of Public Prosecution, Lautoka
Mr Iqbal Khan**