## STATE v JOHNNY ALBERT STEPHEN (HAC0088 of 2010S)

HIGH COURT — CRIMINAL JURISDICTION

MADIGAN, J

3-4, 10-11, 12 April 2012

**Criminal Law — sentencing — money laundering — international — aggravating factor — amount of money — nature of crime — no discount for clear record — lack of remorse — Proceeds of Crime Act s 69(3)(b).**

The accused was convicted of two counts of money laundering contrary to s 69(3)(b) of the Proceeds of Crime Act 1997. Over a two month period, the accused received and passed on money totaling approximately $39,000, involving overseas bank accounts.

**Held** –

(1) If there is an international element to the money laundering then it becomes a stain on Fiji's banking reputation, and that must be a factor in sentencing. Within a range of five to twelve years' imprisonment, international money laundering where the accused gains substantially in an affair of high sophistication will attract penalties at the upper end of the scale.

(2) For the purpose of sentencing, the amount of money laundered is of paramount importance over and above the nature of the crime generating the funds being laundered.

*Xu Xia-Li* (CACC 395/2003), followed.

(3) The activity culminating in these two counts was unsophisticated, of short duration and dealt with a total of approximately $39000 only and therefore a sentence must start at the lower end of the five to 12 year band. The accused's clear record offers him no discount, as a clear record should not be a mitigating factor in sentencing for money laundering, and his lack of remorse cancels out any benefit he would otherwise have received for a clear record. The international component and assault on Fiji's banking integrity is an aggravating factor for which two years are added.

Accused sentenced to seven years' imprisonment with minimum term of five years.

**Cases referred to**

*HKSAR v Javid Kamran* (CACC 400/04); *Monika Arora* (HAC 125/07), considered.

*O'Keefe* (AAU 29/07), questioned.

*J. Prasad with A Singh* for the State.

*N. Nawasaitoga* for the Accused.

**Madigan J.**

**[MONEY LAUNDERING]**

**[1]** The accused has been found guilty after trial of the following counts:

*Count One*

*Statement of Offence*

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

*Particulars of Offence*

JOHHNY ALBERT STEPHEN, between the 6th day of August to the 24th day of September 2009 at Suva, in the Central Division received money amounting to $17,420.90 and disposed of the same, that is the proceeds of crime knowing or ought to have reasonably known that the said $17, 420.90 is derived or indirectly from some form of unlawful activities.

*Count Two*
*Statement of Offence*
*MONEY LAUNDERING*: Contrary to s 69(3) (b) of the Proceeds of Crime Act 1997.
*Particulars of Offence*
JOHNNY ALBERT STEPHEN, on the 25th day of September 2009 at Suva in the Central Division received money amounting to $21, 440.56 that is the proceeds of crime knowing or ought to have reasonably known that the said $21,440.56 is derived directly or indirectly from some form of unlawful activities.

**[2]** The facts adduced in evidence were that the accused was an unemployed businessman from Vanuatu and resident in Fiji. In early 2010 he came to know, in unexplained circumstances, an individual whom he knew as David Turner ('DT'). He says that DT contacted him by email and phone and suggested a 'business/investment arrangement'. The accused never met DT and thought he came from England, or perhaps Nigeria. The accused acceded to his suggestion of business and agreed to have his bank account made available to DT for these purposes. DT was to remit US$15,000,000 to the accused which the accused was to invest for DT. These funds were locked in the Bank of America in the USA and could only be unfrozen and remitted to the accused on the payment of taxes to the bank. The money to pay these taxes would be credited to the accused's account by DT and they were then to be sent on to a named lady in Washington State, U.S.A. who DT said worked for the Bank of America and she would use the money to settle the outstanding taxes.

**[3]** The accused received two amounts of $6,210 into his account in August 2009 which he sent on to the lady as instructed. In September he received F$5,000 which he sent on. Most of the remittances were made through the Western Union remittance service. In September 2009 his account was credited with $21,440 by telegraphic transfer from the Cook Islands; however, he was unable to remit these funds to Washington because he was arrested on the same day.

**[4]** Officers from the Westpac Bank gave evidence that these amounts ($6,210 x 2), $5,000 and $21,440 were fraudulently taken from the accounts of genuine Westpac clients who had been tricked into divulging their passwords and P.I.N numbers on line. Their accounts were subsequently accessed on line and the amounts transferred to the accused's bank account.

**[5]** The accused and DT had entered into a written agreement that US$15 million were to be credited into the account of the accused; the accused was to keep 20% of that for his own use and the balance was to be invested in Fiji; the avenues of investment were never discussed and DT was described in the agreement as being resident in Ghana. The accused never knew DT, nor did he know the woman in the USA to whom he was sending the money. He had no idea why he had been chosen to be the recipient of this large sum of money.

**[6]** The accused is aged 42 and is unemployed. He is a native of Vanuatu but has been resident in Fiji and married to a Fijian citizen since 2008.

**[7]** The maximum penalty for money laundering is a fine of $120,000 and/or a term of imprisonment of 20 years. There is very little guidance in Fiji from previous sentencing authorities. In the case of *Monika Arora* (HAC 125 of 2007), Temo, J. handed down a sentence of seven years for the offence, however that case was not a case of money laundering at all; it was a case of theft. The learned Judge nevertheless canvassed sentencing principles for the offence and concluded that the tariff should be a sentence of between 8 years to 12 years imprisonment.

**[8]** A great deal of assistance is provided from the jurisdiction of Hong Kong where there are similar legislative provisions against money laundering and where there have been numerous convictions in the past few years for the offence. The maximum penalty for the offence in Hong Kong is however 14 years imprisonment and sentences passed there are only of use in the principles of sentencing enunciated therein.

**[9]** The HK Court of Appeal said in *HKSAR v Javid Kamran* (CACC 400/2004)

> *'Money laundering is a very serious offence as it is an attempt to legitimise proceeds from criminal activities. Serious criminal offences are very often motivated by financial gains and those who assist criminals in laundering money indirectly encourage them in their criminal activities. Successful deterrents against money laundering could be effective measures against crime'.*
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> '*It is not feasible to lay down guidelines for sentence of money laundering offences, as there is a very wide range of culpability factors arising include the nature of the offence that generated the laundered money, the extent to which the offence assisted the crime or hindered its detection, the degree of sophistication of the offence and perhaps the accused's participation including the length of time the offence lasted and the benefit he derived from the offence.'*

**[10]** The court positively endorses the dicta in that court. It must also be a factor in sentencing for this crime that if there is an international element to the transactions, then it becomes a stain on the Fiji's banking reputation. Fiji in terms of development and geographical position is a hub of commercial activity in the Pacific, and any assault on the legitimacy or integrity of that system is very serious indeed.

**[11]** Within a 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.

**[12]** It was said by the HK Court of Appeal in *Xu Xia-Li* (CACC 395/2003):

> *'By the nature of the offence itself, in our judgment, the nature of the indictable offence from which the money was derived should be of no particular significance in sentencing, save that if the defendant knew that the money was derived from very serious crimes, it would be an aggravating feature to be taken into account in sentencing'.*

**[13]** This must be correct: the offence is money laundering and not being a party to a crime and the amount of money laundered is of paramount importance over and above the nature of the crime generating the funds laundered.

**[14]** This principle of money laundering standing apart from the crimes producing the monies unfortunately does not sit squarely with the decision of the Fiji Court of Appeal in *O'Keefe* AAU 0029 [2007] where the Court decided that sentences for money laundering if charged in conjunction with the generating offence(s) must be subordinate to those ancillary criminal offences. In light of authority from other jurisdictions that the generating crimes are irrelevant to the crime of money laundering, then it may be time now for the Court of Appeal to revisit its decision in *O'Keefe*.

**[15]** This view is reinforced by the provisions of s 69(4) of the Proceeds of Crime Act, which was enacted by an amendment to the principal Act in 2004 and which may not have been brought to the attention of the Fiji Court of Appeal in 2007. Section 69(4) reads:

*'The offence of money laundering is not predicated on proof of the commission of a serious offence or foreign serious offence.'*

**[16]** Counsel for the accused submits in written mitigation that he has six children in Vanuatu (four of whom are 'schooling') who need his support. Such a submission does not ring true when he has been living in Fiji for the past four years apart from his children.

**[17]** He instructs his Counsel that despite the convictions he is innocent, which shows a distinct lack of remorse on his part. He still has hopes for the success of an online social networking company that he has invested in, and if he is able to sell his shares he can start a business in Fiji to provide for his family.

**[18]** The accused has a clear record in Fiji.

**[19]** The activity undertaken by the accused culminating in these two counts was unsophisticated, of short duration (two months) and dealt with a total of approximately $39,000 only. As such a sentence must start at the lower end of the 5 year to 12 year band. I take a starting point for each count of five years imprisonment. His clear record offers him no discount for two reasons: a clear record should not be a mitigating factor in sentencing for money laundering because criminals will inevitably search out and use people of good character to launder their ill-gotten funds in the hope that such agents will be beyond suspicion. Secondly the accused's lack of remorse demonstrated by his demeanour during trial and his insistence that he is still innocent cancels out any benefit he would otherwise have for a clear record.

**[20]** It is an aggravating feature of this case that Fiji was used as a 'transit' point for the laundering of funds. Such an international component has been referred to above in paragraph 10. For this international component and assault on Fiji's banking integrity, I add two years to the sentence meaning that the total sentence the accused will serve for each of these two offences is seven years imprisonment. These two sentences will be served concurrently and the accused will serve a minimum term of five years imprisonment.

*Five year sentence imposed.*