IN THE SUPREME COURT OF FIJI
CRIMINAL APPELLATE JURISDICTION

CRIMINAL PETITION CAV 0033 OF 2016
(Court of Appeal No: AAU 1 of 2012)
(High Court HAC 128 of 2007S)

BETWEEN: **MONIKA ARORA**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Mr Justice Chandra, Judge of the Supreme Court**
The Hon Madam Justice Ekanayake, Judge of the Supreme Court
The Hon Mr Justice Calanchini, Judge of the Supreme Court

Counsel: **Mr P Sharma for the Petitioner**
Ms J Prasad for the Respondent

Date of Hearing: **5 July 2017**

Date of Judgment: **6 October 2017**

JUDGMENT

Chandra J

[1] I have read the draft judgment of Calanchini J and agree with his reasoning and his decision.

Ekanayake J

[2] I have read the draft judgment of Calanchini J and agree with the conclusions, reasoning and the proposed orders.

Calanchini J

[3] At a trial in the High Court before a judge sitting with three assessors Monika Arora (the petitioner) was convicted on one count of money laundering contrary to section 69(2)(a) and (3)(b) of the Proceeds of Crime Act 1997 and one count of corrupt practices contrary to section 376(b) of the Penal Code (now repealed). Although the three assessors returned unanimous opinions of not guilty on both counts, the trial judge, in a reasoned judgment, disagreed with the opinions of the assessors and convicted the petitioner on both counts. The petitioner was sentenced to terms of imprisonment of 7 years on count 1 and 6 months on count 2 to be served concurrently with a non-parole term of 6 years.

[4] The procedure followed by the trial judge is the procedure for criminal trials in Fiji under section 237 of the Criminal Procedure Act 2009. The significant distinctions between a trial by jury and a trial by judge sitting with assessors are discussed in the judgment of the Privy Council in **Prasad –v- R** [1980] FJUKPC 1; [1980] UKPC 37.

[5] The petitioner appealed to the Court of Appeal against her conviction on 11 grounds and against sentence on one ground. The judge who heard the leave application concluded that the grounds of appeal against conviction could be summarized into one issue, namely whether the trial judge had given cogent reasons for not accepting the unanimous "*not guilty*" opinions of the assessors to sustain the conviction on appeal. Leave to appeal against conviction and sentence was granted.

[6] The task of the Court of Appeal in such a case is to determine whether the trial judge has proceeded on cogent and carefully reasoned grounds based on the evidence before him and his views as to the credibility of witnesses and other relevant considerations: **Ram Bali v R** (1960) 7 Fiji LR 80. As the appeal is by way of re-hearing the Court of Appeal

is required to make an independent assessment of the evidence: **Ram -v- The State** (CAV 1 of 2011, 9 May 2012).

[7] The Court of Appeal considered the evidence before the trial judge and his judgment in relation to both counts. The Court concluded that the judge had addressed the elements of the offence of money laundering and had given cogent reasons for convicting the petitioner. The Court of Appeal took the same view in relation to the corrupt practices count. The Court acknowledged that the summing up by the trial judge had fully set out the evidence adduced at the trial and that not all of that evidence had been reproduced in his judgment. The Court of Appeal noted that it was appropriate to consider both the summing up and the judgment to determine whether the reasons in the judgment were sufficiently cogent to sustain the conviction. As for the appeal against sentence they concluded that the petitioner had not demonstrated any error in the exercise of the sentencing discretion by the trial judge. The appeals against conviction and sentence were both dismissed.

[8] In her petition to this Court the petitioner seeks leave to appeal against conviction on seven grounds and against sentence on one ground only. The petitioner challenges the conclusion of the Court of Appeal that the reasons given by the trial judge for convicting the petitioner on both counts were cogent. The petitioner submits that the Court of Appeal had failed to consider that in his judgment the trial judge had drawn an unfavourable inference from the silence of the petitioner during her caution interview and in the process had reversed the onus of proof. It was also claimed that by concluding that the petitioner knew or ought to have known that the signatures on the cheques were forged the trial judge had again reversed the onus of proof. The petitioner challenges the interpretation of the money laundering charge by the Court of Appeal and their application of the decision in **Stephen v The State**, AAU 53 of 2012; 27 May 2016. The petitioner also relies on the finding of both the High Court and the Court of Appeal that there was no evidence that the petitioner had forged the cheques or the supporting documents. Finally the petitioner claims that she was prejudiced by the absence of the trial judge's notes in the Court of Appeal. The basis of the petition for leave to appeal

against sentence is that the Court of Appeal failed to consider the possible rehabilitation of the petitioner when it dismissed the appeal against sentence with particular reference to the non-parole period.

[9] The circumstances under which this Court is permitted to grant leave to appeal to a petitioner are set out in section 7(2) of the Supreme Court Act 1998 which states:

> *"In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless*
>
> *(a) a question of general legal importance is involved;*
> *(b) a substantial question of principle affecting the administration of criminal justice is involved; or*
> *(c) substantial and grave injustice may otherwise occur."*

[10] This Court in **Katonivualiku -v- The State** (CAV 1 of 1999; 17 April 2003) observed that:

> *"It is plain from this provision that the Supreme Court is not a Court of criminal appeal or general review nor is there an appeal to this Court as a matter of right and whilst we accept that in an application for special leave some elaboration on the grounds of appeal may have to be entertained, the Court is necessarily confined within the legal parameters set out above, to an appeal against the judgment of the Court of Appeal ...."*

[11] It is apparent from these observations that the proceedings in this Court are not by way of a re-hearing of the appeal as is the case in the Court of Appeal. It also follows that only in exceptional circumstances will this Court entertain an issue that was not raised in the grounds of appeal before the Court of Appeal. In the event that leave is granted, in keeping with the practice of the Court, the appeal will be determined in this judgment.

[12] It is sufficient to set out in brief outline the case against the petitioner of which a more complete account can be found in the summing up and in the judgment of the trial judge.

[13] At the time of the offences the petitioner was the secretary to the Managing Director of Vinod Patel Ltd (the company). Before assuming that position she had been an accounts clerk and had as a result acquired a fair knowledge of the internal company accounts

procedures. In her position as secretary to the Managing Director she was responsible for the telegraphic transfers at the ANZ Bank Centrepoint branch in respect of overseas payments on behalf of the company.

[14] It was not disputed that between 6 January 2006 and 11 May 2007 the petitioner had encashed at the ANZ Bank Centrepoint (the Bank) 36 cheques belonging to the company and obtained a total amount of $472,466.47 in cash. The evidence established that the cheques were forged and that the supporting invoices and payment vouchers were fictitious. The signatures and initials on the cheques and the supporting documents had been forged.

[15] The transactions had continued for some time until discovered by the company's chief financial officer (Kumar Shankar) on 12 May 2007 when he noticed that a cheque for $15,172.38 had been encashed by the petitioner. There was evidence that when the petitioner was confronted with this transaction she admitted that she had cashed the cheque at the bank and later returned the money. There was evidence that the petitioner met with the company's accountant (Navin Sen) on 13 May 2007 and offered him $10,000.00 to stop the investigation. The original documents (i.e. cheques, invoices, payment vouchers and bank statements) were all admitted into evidence at the trial. There was also evidence before the High Court that none of the payees named on the cheques received any of the money obtained in cash by the petitioner.

[16] The petitioner acknowledged cashing the cheques and claimed that she handed all the cash to either the chief financial controller (Shankar) or Umabant Patel, the managing director of the company. The evidence given by Shankar was that the only money he received from the petitioner was $15,172.38 which had been handed to him by the petitioner upon her being interviewed on 12 May 2007. Patel did not give evidence at the trial.

[17] The Court of Appeal noted that the prosecution had not established who it was who had forged the signatures and initials on the supporting documents. It was also established

and accepted by the Court of Appeal that the only invoices and vouches that were considered to have been forged were those that related to the 36 forged cheques presented at the Bank by the petitioners for payment in cash. The evidence established that the indorsements to pay cash on the cheques made payable to named payees were also forged.

[18] The evidence established that the petitioner's husband had returned a total of $26,100.00 as part settlement of the monies received by the petitioner. The evidence was to the effect that the payment was made by the petitioner's husband using the petitioner's ATM card. The petitioner's evidence was to the effect that she had not authorized her husband to make any payment and that the company had stolen $26,100.00 from her. However the petitioner admitted that she had not reported this allegation to the police or any other authority.

[19] The Court of Appeal accepted that it was open to the trial judge, on the evidence before him, to reject the suggestion that either the chief financial controller (Shankar) or the managing director of the Company were involved in the transactions as had been alleged by the petitioner. The Court of Appeal noted that apart from the allegation made by the petitioner, there was no evidence before the trial judge to substantiate such a claim. At the trial Shankar denied any involvement and although the managing director did not give evidence the judge rejected the allegation against both officers. The Court of Appeal did not discuss the issue of disposal of the funds by the petitioner.

[20] In this Court the first two grounds relied upon by the petitioner refer to the comments by the trial Judge in his judgment concerning the petitioner's failure to explain what she had done with the money after she had cashed the cheques. The grounds allege that by doing so the trial judge had allowed himself to draw an unfavourable inference as to her credibility and had reversed the onus of proof. The respondent submitted that these issues were not expressly raised by the petitioner in the Court of Appeal. However, because it may be argued that the issues were impliedly raised in the Court of Appeal, it is appropriate to consider the issues. In doing so, it is also noted that it would appear that

the caution interview was not admitted into evidence at the trial. Whilst the objection to the comments by the trial judge in his judgment are premised on both the right to silence and the reversal of the onus of proof, the issue is usually considered by the courts on the basis of the propriety of drawing an unfavourable inference from an accused person's exercise of the right to silence. The position at common law was discussed by the Court of Appeal in **R -v- Johnson and Hind** [2005] EWCA Crim. 971; [2006] Crim. L.R. 253. The Court of Appeal applied its earlier decision in **R v. Gilbert** (1978) 66 Cr. App. Rep.237 and concluded that at common law a judge was not entitled to comment adversely on an accused's failure to respond to police questioning or to volunteer her account of events at a stage prior to trial. The common law protects an accused who does not wish to answer questions and who does not wish to reveal her case before trial. That position has not been altered by statute in Fiji nor, to the best of my research, has it been modified by any decision of this Court. The trial judge would seem to have regarded unfavourably the petitioner's silence in her caution interview on the issue of her explanation as to the disposal of the cash.

[21] The third ground relied upon by the petitioner alleges that the Court of Appeal's comments in paragraphs 69 and 71 have the effect of reversing the onus of proof. Those comments relate to what the petitioner knew or ought to have known. I do not accept that those comments reverse the burden of proof. The evidence adduced by the prosecution was to the effect that neither the chief financial officer nor the managing director signed the cheques the subject matter of the offences. The trial judge accepted that evidence and as a consequence concluded that on account of her having been employed as the secretary to the managing director he was satisfied beyond reasonable doubt that she knew or ought to have known that the cash had been obtained from the Bank as a result of some form of unlawful activity.

[22] Grounds 4, 5 and 6 may be considered together. These grounds relate to the elements of the offence of money laundering and the assertion that the evidence did not satisfy the elements. For the offence with which the petitioner was charged, the relevant parts of section 69 are:

"(1) ----

(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) ...

(3) a person shall be taken to engage in money laundering if, and only if,

(a) _

(b) the person uses, disposes of or brings into Fiji any money or other property that are proceeds of crime, or

(c) _

(d) ---

(e) --

and the person knows or ought reasonably to know that the money or other property is derived or realized, 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."

[23] The particulars of the offence were stated as being that the petitioner and others between 9 December 2005 and 11 May 2007 disposed of cash being the proceeds of crime to the sum of $472,466.27 for her benefit and the benefit of others which she ought reasonably to know that such cash was derived indirectly from the falsification of the Vinod Patel Company books of account.

[24] The prosecution was required to prove three elements. The first was that the petitioner had disposed of money in the sum of $472,466.27. Secondly, prosecution must establish that the money was the proceeds of crime. Thirdly, the prosecution must also establish that the petitioner knew or ought reasonably to have known that the money was derived or realized directly or indirectly from some form of unlawful activity. All three elements

must be proved beyond reasonable doubt. However the offence is not predicated on proof of the commission of a serious offence.

[25] This Court will not lightly interfere with findings of fact made by the trial judge. For that reason there would appear to be no basis for concluding that the findings of fact supporting the second and third elements were perverse or without foundation. It is the first element of the offence that is of concern. The prosecution was required to establish beyond reasonable doubt that the petitioner had disposed of the cash. The purpose of disposal is to integrate the proceeds of crime into "*clean money*" for the benefit of the petitioner and or others.

[26] In his summing up the trial judge discusses the evidence on this issue at paragraph 40 as follows:

> "*The prosecution points to the properties owned by the accused and her husband including their liabilities, as possible motives for her to commit the offences. On 18 January 2006 the accused and her husband borrowed $210,000 to buy their residential property at 70 Sekoula Road Laucala Beach Estate. They were required to pay $1 354 per month for the next 24 months. They had a business in Arora Holdings Limited, incorporated on 23 April 2004. They had a taxi registration number LT 507. They owned two motor vehicles, registration No. DU 884 and EM 291. In January and February 2006 they spent $6,680 on overseas travel. At a time when the accused was taking on more financial responsibilities, she encashed Vinod Patel Company cheques allegedly totaling $33,000 [see D33, D34, D35 and D36 cheques]. According to Mr Shankar $400,000 plus has not been recovered. Was Vinod Patel Company's money being used by the accused to meet her new found financial responsibilities? That is a matter for you.*"

[27] In paragraph 41 of the summing up the trial judge phrased the question for the assessors and himself as "*do you think that the accused disposed of $472,466.47 of Vinod Patel Company money at the material times, and*

[28] This approach represents a misdirection. The assessors and the trial judge were required to determine whether the prosecution had established beyond reasonable doubt that the accused disposed of the sum of $472,466.47. Although the correct test as to the onus and

standard of proof was stated both at the commencement of the summing up and at its conclusion, the phrasing of the question in paragraph 41 is unfortunate.

[29] In his judgment the trial judge does not refer to any evidence concerning the disposal of the funds. There was no reference in the judgment to any evidence that could establish that the petitioner had disposed of $472,466.47. For example there was no evidence that the petitioner had deposited large amounts of cash into any bank account in Fiji or abroad. There was no evidence that would establish that the cash was used to make the regular mortgage payments. There was no evidence that the relatively small amount of $6000.00 for the overseas travel was paid from the cash received by the petitioner from the ANZ Bank. Both the petitioner and her husband were earning incomes during this period.

[30] It is apparent that the Court of Appeal has not independently assessed the evidence and in particular the lack thereof in relation to the essential element, of the disposal of the proceeds of crime. Such an independent assessment would have resulted in the conclusion that the prosecution had failed to establish this element beyond reasonable doubt.

[31] As a result, it is appropriate to grant leave to appeal at least on the ground that a substantial and grave injustice may otherwise occur. For the reasons stated above the appeal against the conviction for money laundering under section 69 of the Proceeds of Crime Act should be allowed.

[32] Although the grounds of appeal do not appear to challenge the corrupt practice conviction, there is no basis for this Court to disturb the findings of the trial judge in relation to this offence. Furthermore it is not necessary to consider the petition for leave to appeal against sentence for the conviction on the money laundering offence. The term of 6 months imprisonment for the conviction on corrupt practices should stand.

[33] A further issue is whether this Court should consider imposing a conviction for a lesser offence under section 14 of the Supreme Court Act 1998 and section 24(2) of the Court of Appeal Act 1949. Section 14 of the Supreme Court Act gives to the Supreme Court all the power and authority of the Court of Appeal. Section 24(2) of the Court of Appeal Act states:

> *"where the appellant has been convicted of an offence and the judge could on the information have found him guilty of some other offence, and on the findings of the judge it appears to the Court of Appeal that the judge must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by such judge a verdict of guilty of that other offence"*

[34] For the purposes of the present petition, it is a necessary requirement under section 24(2) that on the information the trial judge could have found the petitioner guilty of some other offence. The offence of money laundering is not predicated on proof of a serious crime. The essential elements of the offence are (1) disposal (2) of proceeds of crime (3) which the petitioner knew or ought to have known were derived from some form of unlawful activity. It would in my judgment, not be open to the trial judge on the information to find the petitioner guilty of some other offence. The essential physical element of the offence is the disposal of proceeds of crime. The fault element is what the petitioner knew or ought to have known about the proceeds. There is no other offence available in the event that the prosecution fails to prove all the elements beyond reasonable doubt

[35] In the event that this Court or the Court of Appeal is ever minded to exercise the jurisdiction given under section 24(2) of the Court of Appeal Act, it would be appropriate to have regard to sections 160 and 162 of the Criminal Procedure Act 2009. Both sections are concerned with the power of the trial judge to convict for offences other than those charged.

[36] Although not raised by Counsel, the procedure adopted by the prosecution in the information laying the charge against the petitioner is of some concern. It was alleged by

the prosecution that there were some 36 transactions over a period from 9 December 2005 to 11 May 2007. Ordinarily where there are multiple transactions that allegedly constitute separate offences, the prosecution should proceed by laying a separate count in respect of each transaction That would appear to be the effect of section 59 of the Criminal Procedure Act 2009 which states:

> *"(1) Any offence may be charged together in the same charge or information if the offences charged are:*
> *(a) founded on the same facts or form, or*
> *(b) are part of a series of offences of the same or a similar nature.*
>
> *(2) Where more than one offence is charged in a charge or information, a description of each offence shall be set out in a separate paragraph of the charge or information and each paragraph shall be called a count."*

Section 61(7) provides that:

> *"Where a charge or information contains more than one count, the counts shall be numbered consecutively."*

[37] However, under section 70(2) of the Criminal Procedure Act 2009 the use of a *"rolled up"* charge is permitted:

> *"70(2). When a person is charged with any offence involving theft, fraud, corruption or abuse of office and the evidence points to many separate acts involving money, property or other advantage, it shall be sufficient to specify a gross amount and the dates between which the total of the gross amount was taken or accepted."*

[38] In my judgment the offence of money laundering under section 69 of the Proceeds of Crime Act 1997 does not fall within the description of an *"offence involving theft, fraud, corruption or abuse of office."* To come within section 70(2) of the Criminal Procedure Act the many separate acts of alleged offending that it is sought to have "rolled up" into one specimen or representative count must all have as their essential element either theft, fraud, corruption or abuse of office. Since the Criminal Procedure Act came into effect in 2010 it can reasonably be assumed that the offence of money laundering under section 69 of the Proceeds of Crime Act 1997 had been intentionally excluded.

[39] In the present case it is not necessary to say more than that the prosecution should not have proceeded by way of one count alleging some 36 incidents of money laundering.

[40] In conclusion the petitioner is granted leave to appeal and the appeal against the conviction on the money laundering offence is allowed. In my judgment it is not in the interests of justice to order a new trial. The prosecution should not be given a second chance to prove beyond reasonable doubt the essential element of disposal of the proceeds of crime. The petitioner has already served a substantial portion of her sentence. The appeal against the conviction for corrupt practices is dismissed as is the appeal against sentence in respect thereof.

Orders:

1. *Leave to appeal against the conviction for money laundering is granted.*
2. *Leave to appeal against the conviction and sentence for corrupt practices is refused.*
3. *Appeal against the conviction for money laundering is allowed.*
4. *The conviction for money laundering is quashed and a verdict of acquittal is entered.*

....

Hon Mr Justice Chandra
Justice of the Supreme Court

....

Hon Madam Justice Ekanayake
Justice of the Supreme Court

....

Hon Mr Justice Calanchini
Justice of the Supreme Court