IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No: CAV 0024 of 2019
[On Appeal from the Court of Appeal Criminal Appeal No: AAU 0103/17; HAC 146 of 2010]

BETWEEN: **ROBIN SURYA SUBHA SHYAM**

Petitioner

AND: **THE STATE**

Respondent

Coram: The Hon. Mr. Justice Kamal Kumar, President of the Supreme Court
The Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court
The Hon. Mr. Justice Madan B.Lokur, Judge of the Supreme Court

Counsel: Mr P Sharma for the Petitioner
Mr. A Jack for the Respondent

Date of Hearing: 9th August, 2022

Date of Judgment: 26th August 2022

JUDGMENT

Kumar P

[1] I agree with the reasoning and judgment of His Lordship Justice Gates.

Gates J

Introduction

[2] The Petitioner raises issues on the single "*rolled up*" charge brought against him which he says did not qualify for use under section 70(2) of the Criminal Procedure Act 2009. He says it was duplicitous. The charge included alternatives within it, and its uncertainty was unfair to the Petitioner in conducting his response. The Petitioner claimed uncertainty also in the lack of accurate definition in the Judge's charge to the assessors in key words in the money laundering legislation relevant to the allegation. The Petitioner argues the Court of Appeal should have allowed an extension of time to bring his new grounds of appeal. On sentence, the Petitioner said the Judge had double counted certain aggravating factors thus arriving at an excessive sentence.

[3] On the 11th of October 2013 the Petitioner was convicted before the High Court at Suva of a single count of money laundering contrary to Section 69(2)(a) and (3)(a) of the Proceeds of Crimes Act 1997. On the 14th of October 2013 he was sentenced to 12 years imprisonment with a non-parole period of 10 years. On different grounds from those now brought to this Court, the single Judge of the Court of Appeal on the 15th of January 2015 refused leave to appeal against both conviction and sentence.

[4] The Petitioner exercised his right to have the appeal put before the Full Court of the Court of Appeal. This he did on the 27th of January 2015 and accordingly an appeal transcript of proceedings was prepared. The transcript was eventually uplifted from the registry on the 14th of April 2015. On the 9th of February 2016, the Petitioner or his then solicitor having failed to file the court record, the Registrar of the Court of Appeal pursuant to Rule 44 of the Court of Appeal Rules 1949 noted that the appeal was deemed to have been abandoned.

[5] With a new solicitor, and one year 7 months later, on the 12th of July 2017 the Petitioner filed an application for extension of time [Rule 40 Court of Appeal Rules].

[6] The case came up for mention on the 20th of June 2018. The Hon President directed the Petitioner to file amended grounds of appeal within 14 days and written submissions in support of his application for an extension of time. Amended grounds accordingly were filed on the 3rd of July 2018. These grounds were similar to those now before us in the Supreme Court.

[7] The appeal was heard by the Court of Appeal which delivered its judgment on the 3rd of October 2019 refusing an extension of time, dismissing the appeal against sentence, and affirming the conviction and sentence.

Facts and evidence

[8] The charge alleges that the Petitioner had engaged directly or indirectly in transactions to a total sum of $349,870.63 held in bank accounts as specified in a schedule [attached to the charge] that were proceeds of crime, which the Petitioner ought reasonably to have known had been derived or realised, directly or indirectly, from some form of unlawful activity. These transactions were alleged to have taken place between the 1st of March 2008 and 30th of September 2010.

[9] The evidence adduced at trial was not particularly easy to follow in its links between witnesses and documents. The first part of the prosecution case was the testimony of witnesses for the Inland Revenue Department [IRD] where the Petitioner held a position as a Tax Assessor. He sometimes acted as Senior Tax Assessor. These witnesses testified to the system of processing of tax returns filed by tax payers at the IRD. They dealt with procedures, records, restrictions of movement of files, approvals, supervision, and computerized handling of applications.

[10] One witness, the then National Manager Internal Assurance had said:

> *"When the Police came to him in July 2010 with their search warrant, neither he nor any other IRD staff had any knowledge of irregularities within the Department."*

[11] He assisted the police to search for the IRD records. Many of the records on the search list could not be found, records that should have been in the records office. Some records were found at the residence of the Petitioner. No such records could be removed from the office of IRD without authority. Contractors certificates were also found at the Petitioner's home, some of which were found to be bogus. It was said to be pointless for IRD officers to work from home because there was no access there to the IRD's F.I.T.S system.

[12] Another group of witnesses (3) came from outside the IRD, from different companies. They testified that the contractors certificates found were forgeries, and that the persons to whom the certificates were said to relate, were not employed by those companies.

[13] A third group were Bank Officers who validated the copies of the relevant bank statements from their banks. They pointed to the dates and the amounts that had been deposited from IRD into the accounts of the persons who had permitted the Petitioner to arrange the deposits. Nine of those persons gave evidence about their accounts, and as to how the monies came to be deposited temporarily into their accounts. All of these witnesses had been granted immunity from prosecution for their part in the scheme. The Judge gave a series of directions to the assessors on how to consider this evidence.

[14] They said various reasons had been given by either the Petitioner or a witness nicknamed Jimmy to explain why these deposits were needed to be made. The Petitioner had said he was having problems with his wife and he did not want her to know about the money.

[15] The witnesses also testified how they withdrew the money and handed the sums over to the Petitioner directly or through Jimmy. Jimmy himself also testified about his part in the scheme. He said when the police got to know, the Petitioner had told him and a couple of others to take the blame and he would look after their families. In his summing up the Judge went through the evidence of each of the accomplices summarizing what part each had played.

[16] In his caution interview the Petitioner had told the Investigating Officer that he admitted having IRD forms at home which he said he knew was not allowed. He denied fabricating documents such as the contractor's certificates, or forging other documents. He denied receiving cash from the people to whom refunds had been made. He denied any involvement in the fraudulent activities, and he said he did not receive any money at all.

[17] In presenting his case to the assessors, the Petitioner remained silent and did not call any supporting witnesses. The Judge reminded the assessors the Petitioner did not have to prove anything. He said:

> *"You must not assume that he is guilty because he has not given evidence. On the other hand it means that there is no evidence from the accused to undermine, contradict or explain the evidence put before you by the prosecution apart from what is in Robin's cautioned interview. However, you still have to decide whether, on the prosecution evidence you are sure of the accused's guilt."*

Ground 1 – Rolled up charge procedurally flawed

[18] The Petitioner faced a single count of money laundering contrary to section 69(2)(c) and (3)(a) of the Proceeds of Crime Act 1997. The Prosecutor had framed the charge as one count. The transactions had involved several deposits in 19 bank accounts in all over a period from the 1st of March 2008 to the 30th of September 2010. Normally pursuant to sections 59 and 61 (7) of the Criminal Procedure Act 2009 (CPA), each offence alleged should be set out in the information as a separate count.

[19] However in certain circumstances a single count or a rolled up count is permitted. That is provided for in section 70(2) CPA which states:

> *"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."

[20] The same criticism of the framing of the charge came up in **Monika Arora v The State** CAV0033 of 2016, 6th October 2017. At paras 38 – 39 Calanchini J said:

> *"[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."*

[21] The Court of Appeal in the instant case distinguished **Shyam** from **Arora**. In **Arora** there had been no schedule attached to the information. The prosecution in **Shyam** provided the following- *Schedule A*:

"SCHEDULE A"

Account Name	Financial Institution	Account Number	Account
Abdul Jamal Aziz	Australia & New Zealand Banking Group Limited [ANZ]	7023124	$ 6,580.68
Abdul Aziz	Colonial National Bank [CNB]	7216253	$22,394.48
Abdul Jamal Aziz	Westpac Banking Corporation [WBC]	9802246133	$16,994.54
Prakash Shiu Narayan Sharma	Australia & New Zealand Banking Group Limited [ANZ]	10507994	$16,001.57
Prakash Shiu Narayan Sharma	Colonial National Bank [CNB]	7290282	$23,280.14
Prakash Shiu Narayan Sharma	Westpac Banking Corporation [WBC]	9801873945	$21,212.77

Muhammed Nawaz Shah	Australia & New Zealand Banking Group Limited [ANZ]	10344213	$27,413.04
Muhammed Nawaz Shah	Colonial National Bank [CNB]	7565816	$17,572.88
Muhammed Nawaz Shah	Westpac Banking Corporation [WBC]	9802251653	$12,994.23
Razia Nasreen	Colonial National Bank [CNB]	7314545	$22,571.86
Razia Nasreen Khan	Westpac Banking Corporation [WBC]	9800636442	$12,901.59
Naizal Rahman Khan	Australia & New Zealand Banking Group Limited [ANZ]	10340955	$16,589.34
Naizal Rahman Khan	Colonial National Bank [CNB]	7549420	$22,696.55
Naizal Rahman Khan	Westpac Banking Corporation [WBC]	9802657594	$21,360.88
Farzana Nisha Shah	Australia & New Zealand Banking Group Limited [ANZ]	10610356	$16,875.99
Farzana Nisha	Westpac Banking Corporation [WBC]	9802272303	$21,154.97
Ajit Singh	Westpac Banking Corporation [WBC]	9730560	$18,721.36
Ajit Narayan Sharma	Colonial National Bank [CNB]	1730876	$13,994.38
Nitesh Nand Lal	Colonial National Bank [CNB]	7578291	$18,559.38
		Grand Total	**$349,870.63**

[22] Schedule A accompanying the charge provided therefore information of the transactions in giving, the name of the account, the bank (or financial institution), the account number, and the amount deposited in total into that account. In the trial 9 of these account holders had given evidence concerning those transactions.

[23] The court said that in **Arora** that the Petitioner had been charged with others whereas in **Shyam**, the Petitioner had stood accused alone.

[24] The Court of Appeal indicated that any objection to the information should have been taken after the information had been read out in accordance with section 214 of the CPA. That section reads:

> *"**214**.-(1) Every objection to any information for any formal defect on the face of it shall be taken immediately after the information has been read over to the accused person, and not at a later time.*
>
> *(2) Where, before a trial upon information (or at any stage of such trial), it appears to the court that the information is defective, the court shall make such order for the amendment of the information as the court thinks necessary to meet the circumstances of the case, unless the required amendments cannot be made without injustice, having regard to the merits of the case.*
>
> *(3) All amendments made under this section shall be made upon such terms as the court determines."*

[25] The Court concluded that even if there were a defect in the charge it had not caused any prejudice to the Petitioner. The Petitioner had been represented by a senior and experienced member of the Bar well versed in criminal matters. He had not asked the prosecution for more details of each deposit, nor moved the court to quash the information.

[26] Undoubtedly there was a defect in the charge. The section 70(2) procedure was not available here for the prosecution of money laundering.

[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.

[28] In **Arora**, Calanchini J had already decided that one of the elements of proof of money laundering had not been established. There was no evidence of "*disposal of the proceeds of the crime*." Therefore the conviction on the money laundering charge could not be sustained in the Supreme Court. His Lordship did not go on to say that the charge was to fail for the additional reason of the charge being defective, the wrongful use of the *"rolled up"* charge.

[29] Mr Sharma also urged that the use of singular "*transaction*" both in section 69(1) and section 69(3)(a) of CPA tends to indicate the contemplation of separate charging. We accept separate charging should have occurred here but little may turn on the use of singular or plural.

Ground 2 – Alternatives included in charge wrongfully

[30] There are occasions when an alternative charge is better charged separately. This is also a fair procedure to alert the accused and his counsel to the possibility of a conviction being sought on the lesser offence, and so be ready to meet that in the way the accused is defended during the trial. In **Arora** at para.34 it was said:

> *"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 elements 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."

[31] The particulars of offence in the charge against the Petitioner were:

> *"**ROBIN SURYA SUBHA SHYAM** between the 01st day of March 2008 and the 30th day of September 2010 at SUVA in the CENTRAL DIVISION engaged directly or indirectly in transactions involving the sum of $349,870.63 held in bank accounts specified in **Schedule A**, that is the proceeds of crime, knowing or ought reasonably to have known, that the said sum of money had been derived or realized, directly or indirectly, from some form of unlawful activity."*

[32] The Petitioner complains of the use of alternatives within the charge – *"directly or indirectly, knowing or ought reasonably to have known, derived or realized, or directly or indirectly."* The charge is in a catch-all form taken from the relevant sections of the legislation. In the circumstances of this case I would not consider the way the charge was framed would lead to any confusion in the person charged or to his counsel. Separately charged alternatives are not necessary here. This ground lacks merit.

Ground 3 – Misdirections on definitions

[33] The Judge in directing the assessors on money laundering and its meaning, and on the elements required to be proved said:

> *"[7] Money laundering in our law is engaging, directly or indirectly in a transaction, or transactions that involve money that is the proceeds of crime and that the person who engages in this activity knows or ought reasonably to know that the money is derived, directly or indirectly from some form of unlawful activity.*
>
> *[8] That is the proper legal definition but I will try to break that down for you in the context of this case and direct you on the elements of the offence that you must find proved beyond reasonable doubt.*
>
> *[9] The charge, or information, that you have before you states that between 1st March 2008 and 30th September 2010, Robin engaged directly or*

indirectly in transactions involving nearly $350,000 in various itemized bank accounts, knowing or ought reasonably to be knowing that the monies had been derived from some form of illegal activity.

[10] First you must find that Robin is involved somehow in transactions involving money. That involvement could include depositing money, transferring money between accounts or receiving money. Secondly you must find proved that the money he is dealing with represents the proceeds of crime. And thirdly you must find that Robin knew that the money was generated by crime, by some kind of unlawful activity. Even if you can't be sure that Robin criminally created the illegal funds himself, it is enough for you to find that he, or any right thinking person, would have known that the funds were the product of illegal activity.

[35] So Ladies and gentleman, that is all I wish to say about the evidence and I am coming to the end of this Summing Up. Before finishing, and to help you decide the issues on this charge I wish to clarify my earlier directions on the Law.

[36] Remember this is not a case of theft; it is a case of money laundering. It is not a case about Jimmy – it is a case about Robin. You need to have found proved by the State that Robin knew that these monies were illegally obtained, or he should have reasonably known that they were illegally obtained and with that knowledge he played a part in depositing, withdrawing or receiving that money."

[34] The Petitioner complains that the trial Judge in his summing up failed to explain in detail the meaning of the phrases *"proceeds of crime," "serious offence,"* and "*unlawful activity"*. Counsel referred us to a Court of Appeal decision in **Johnny Albert Stephen v The State** Criminal Appeal, AAU 53/12 in which certain observations were made by Gamalath JA on the inadequacy of such omission. Dr. Jack for the State, whilst conceding that these observations gave guidance to Judges on what they should cover in money laundering directions, submitted the issue had not been central to that case, were obiter dicta, and had been arrived at without the benefit of counsel's submissions.

[35] The Judge in the instant case directed on knowledge but did not deal more fully with the second limb "*ought reasonably to have known*". In that sense the directions had been more favourable to the Petitioner. Taken overall the issue canvassed for the assessors to decide was whether the Petitioner knew the monies came from some form of unlawful

activity. In plain language this was addressed substantially in para.10 of his Lordship's summing up. I agree with the court below that there was no miscarriage of justice here, and I consider our intervention in this court is not required.

Ground 6 – Sentence – double counting of aggravating factors

[36] Before considering grounds 4 and 5 on the refusal to grant an extension of time I will consider first the ground against sentence. The complaint is that the Judge counted 2 aggravating factors twice in arriving at the total sentence. They were that the fraud had been sophisticated and second, that it had been operated on the government revenue.

[37] The Petitioner identified the offending paragraphs in the Judge's sentencing remarks at para. 14:-

> *"A starting point at the top of the range of the tariff for money-laundering would be for an offence with international connotations, and which would impact on the probity of the nation's banking reputation. Whilst this offence does not have international implications, it is nevertheless very serious domestic offending with its long sophisticated planning and a fraud operated by the launderer himself on the Government Revenue. As such it is best sentenced by a starting point at the mid point of the tariff and then weighted for the serious aggravating features."*

[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.

[39] It is important that sentencing courts do not double count circumstances of aggravation. This is done when a point on the tariff is found in the initial calculation of sentence, having regard to aggravating circumstances. Then the sentence is further advanced having regard to the same aggravating circumstances which have already been considered in fixing the starting point on the tariff. Several cases have indicated the pitfall here, **Vishwa Nadan v The State** CAV 0007/19; 31st October 2019. This case was decided

after the present sentence had been delivered. **Nadan's** case had illustrated what was an obvious error.

[40] In Fiji terms this case was a substantial offending not *"an unsophisticated domestic money laundering on a small scale with little benefit to the accused"*

[41] The Judge had started on the tariff at 8 years and added 5 years *"for the serious aggravating features"* in para.13. One year was then deducted for the Petitioner's *"family circumstances and his clear record"*, the Judge arriving at 12 years imprisonment with the non- parole period of 10 years.

[42] The Judge identified the following aggravating factors (para.13):

> *"• The proceeds of crime being laundered are funds that are the rightful property of FRCA; therefore it is a fraud on the Government Revenue.*
> • *The fraud generating these illegal funds was planned over a lengthy period from March 2008 to September 2010.*
> • *The method used was highly sophisticated and designed not to be detected (in fact it wasn't detected by the FRCA authorities)*
> • *At least seven of the account holders used were naïve and unsophisticated innocent "dupes".*
> • *The accused has displayed a total lack of remorse throughout these proceedings, and is still in a state of denial.*
> • *In the face of overwhelming evidence against him he has attempted to lay the blame on others who were once his "friends".*
> • *There is no trace of any of the $350,000 generated by this "scheme" which could be returned to the Government Revenue."*

[43] Of these the most offensive and scandalous were the fraud on the revenue and the non-recovery of the funds lost, the $350,000.00 or so. The fraud on the revenue affects everyone. This money laundering assisted in the removal and disposal of the State's money. The money has gone without trace. There has been no remorse demonstrated by the Petitioner.

[44] But it was incorrect to double count the aggravating factors. The Judge also incorrectly found the family circumstances mitigatory. Only the Petitioner's clear record could cause some reduction of time to be served. 12 years was at the top end of the tariff range. Yet by different calculations the final sentence was not wrong in principle. Appellate courts do not make slight adjustments or tinker with sentences. This was a very serious case of money laundering and the sentence in my view should stand.

Grounds 4 and 5 – Refusal to grant enlargement of time within which to appeal Length of Delay and reasons for

[45] The principles to be considered in such applications can be taken shortly. The Court of Appeal had not been impressed by the Petitioner's blaming of his original counsel for not telling him what had happened to his application for leave to appeal. There was some vagueness and ambiguity, and in setting out what had happened. However there had been an error by the Registry in considering the appeal abandoned. Communication between an inmate of a prison and his lawyer is not as easy as being in touch with one's lawyer when one is out on bail. In the history of the case, undoubtedly there was some delay.

Ground of merit and ground that probably will succeed

[46] Of the grounds, one could consider the defective charge ground to have merit; not so the others.

Prejudice to Respondent, if time enlarged

[47] Delay in finalizing the case and thus completing a significant case is a prejudice to the Respondent, and the Court of Appeal also referred to the possible non-availability of witnesses and documents.

[48] I would grant an enlargement so as to have the ground on defective charge considered. On all other grounds I would refuse enlargement.

Result

[49] I would grant special leave on the grounds of defective charge and double counting in sentence, but would dismiss the petition entirely.

Lokur J

[50] I respectfully agree.

In the result:

1) *Enlargement of time granted for defective charge only.*
2) *Special leave for grounds of defective charge and double counting in sentence.*
3) *Petition dismissed.*
4) *Conviction and sentence affirmed.*

Hon. Mr Justice Kamal Kumar
President of the Supreme Court

SUPREME COURT FIJI

Hon. Mr Justice Anthony Gates
Judge of the Supreme Court

Hon. Mr Justice Madan B. Lokur
Judge of the Supreme Court