IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO: CAV 0013 of 2021
Court of Appeal No. AAU 0088 of 2019

BETWEEN **HANNAN WANG**

Petitioner

THE STATE

Respondent

Coram **The Hon. Mr. Justice Anthony Gates**
Judge of the Supreme Court

The Hon. Mr. Justice William Young
Judge of the Supreme Court

The Hon. Mr. Justice Alipate Qetaki
Judge of the Supreme Court

Counsel **Mr. D. Sharma and Ms. G. Fatima for the Petitioner**
Dr. A. R. Jack for the Respondent

Date of Hearing **11 October 2023**
Date of Judgment **26 October 2023**

JUDGMENT

Gates J

1. I have had the advantage of reading in draft the judgment of Young. I agree with the reasoning and orders proposed.

Young J

2. Following a lengthy trial in the Magistrates Court at Suva, Hannan Wang (Mr Wang) was found not guilty on two counts alleging money laundering. The prosecution appealed against the acquittals. In a judgment delivered on 19 February 2021, Ranasinghe J allowed the appeal in relation to one of the counts, convicted Mr Wang on that count and directed that he be sentenced in the Magistrates Court. On 9 April 2021, the Magistrate sentenced Mr Wang to five years 10 months imprisonment with a non-parole period of four years.

3. Mr Wang appealed to the Court of Appeal against conviction and also sought to challenge the sentence imposed on him. For present purposes, it is only the conviction appeal that is of moment. In a ruling delivered on 17 September 2022, Prematilaka ARJA dismissed this appeal under s 35 of the Court of Appeal Act 1949.

4. Mr Wang now seeks leave to appeal against the judgment of Prematilaka ARJA,

The facts

Overview

5. The case arises out fraudulent activities carried out in June 2015 in the names of Chunxiao Tour Company (CTC) and Jintong Trading Company (JTC). Laying the groundwork for these activities commenced in May that year. This involved obtaining regulatory approvals for CTC and JTC to operate, opening bank accounts in their names with ANZ Bank, renting offices that could be passed off as their business premises and finally, and most importantly, obtaining EFTPOS machines linked to the ANZ accounts. Between 9 and 23 June 2015, counterfeit credit cards with the skimmed details of genuine card holders were run through these machines resulting in a net total of $687,109.14 being credited to the ANZ bank accounts.

6. A scam of this sort has a short shelf-life. Cardholders whose cards have been skimmed complain as soon as they notice fake debits on their credit card statements. Such complaints came to the notice of the ANZ Bank on 23 June 2015 and the account was frozen on 24 June 2015

7. The people of primary moment for the purposes of what follows are:

   a. Mr Wang. He was a shareholder and director of Yiwu International Trading (Fiji) Ltd (YI).

   b. Guangwu Wang and Xuhuan Yang. They were also shareholders and directors of YI and were tried with Mr Wang on money-laundering charges.

   c. Lijun Liu. She too is a shareholder and director of YI and is the partner of Mr Wang. She was not charged with money-laundering but was a defence witness at trial.

   d. Annie Gu. She is a business consultant who was actively involved in obtaining the regulatory approvals, bank account and business premises and assisted in relation to the setting up of the EFTPOS machine allocated to CTC.

   e. Hai Ming Xu. He was actively involved in the scam. He arrived in Fiji on 26 April 2015 and left on 26 June the same year. He appears to be the same person as a "Mr Ling" who featured in the evidence of Ms Gu. I will generally refer to him as "Mr Ling" when referring to Ms Gu's evidence (and also that of Lijun Liu) and as "Hai Ming Zu" in other contexts.

   Ms Gu and Mr Wang were acquaintances. They had had some prior business engagement and Ms Gu was a surety for Mr Wang when he was on bail pending his trial.

The set-up of the scam 4 May – 3 June 2015

8. For the scam to operate, it was necessary to obtain regulatory approvals to allow CTC and JTC to operate as businesses, bank accounts and business premises, and, of course, EFTPOS machines. Ms Gu played a prominent role in all of this. In her evidence, she said that she had understood that she was representing Mamuti Aishan (the apparent owner of CTC) and Cheng Guo (the apparent owner of JTC) but took her instructions from a man she called Mr Ling, who she understood to be the representative of Mamuti Aishan and Cheng Guo. Mamuti Aishan and Cheng Guo did not exist. What purported to be their passport details

were plainly fake and people with those names were not in Fiji at the time. I say this notwithstanding some vague evidence from a Commissioner for Oaths who claimed to have verified their passport details.

9. Amongst the details Ms Gu recorded in relation to Mr Ling were two telephone numbers, one of which was 8021999. This was the number of Mr Wang's telephone. Ms Gu said that she had, on occasion, spoken to Mr Ling on that number. No innocent explanations were offered at trial as to how Mr Ling, at that time, would have known of this number or why he would offer it as a means for Ms Gu to contact him

10. The applications for regulatory approvals in early May 2015 identified "Shop 1, Sabrina Building, Victoria Parade, Suva" as the addresses of both CTC and JTC. Until April 2015, this had been the business address of YI. Ms Gu's explanation for this was that Mr Ling had told her that the shop belonged to a friend. Mr Wang, in his evidence, at least as I read it, claimed not to have met Hai Ming Xu until later. No explanation was offered at trial as to how Hai Ming Xu, posing as Mr Ling, would have known of this address at the time he proffered it to Ms Gu.

11. As part of the processes for the opening of the ANZ accounts, deposits were required. Deposits of $2,000 (for the CTC account) and $5,000 (for the JTC account) were provided by Ms Gu, in cash.

12. Because EFTPOS machines will not be issued to people who do not have business addresses, implementation of the scam required JTC and CTC to have what appeared to be business premises. For this reason, agreements were entered into in the names of CTC and JTC in relation to small offices at 160 Waimanu Road, a building owned by GP Hari & Co Ltd.

13. These offices appear to have become vacant in April 2015. Hari & Co's marketing of them was confined to putting up a notice on A4 paper at the front of its office in the building. The building is only a few metres from the YI premises at 134 Waimanu Road into which YI moved in April 2015.

14. The renting of the premises was initiated by Ms Gu. She dealt with Ms Aradhana Singh, an employee of Hari & Co. Ms Singh showed Ms Gu the two offices on 25 May 2015. Ms Gu returned to see Ms Singh the next day, 26 May 2015, with copies of the fake passport details

of Mamuti Aishan and Cheng Guo, proof of the regulatory approvals she had obtained for CTC and JTC and tenancy agreements that had, ostensibly, been signed by Mamuti Aishan and Cheng Guo. According to Ms Singh, Ms Gu was accompanied on this occasion by two Chinese men. One of them was introduced to Ms Singh as "Su" or "Xu" and was said to be the manager of the businesses. She said that the other man was Mr Wang, who was introduced to her as "Ken". Her interactions with "Ken" on 26 May 2015 and subsequently are an important aspect of the case and the associated evidence warrants some analysis.

15. Ms Singh said she dealt with "Ken" on three occasions:

    a. On 26 May 2015 with Ms Gu and "Su" or "Xu". Ms Singh said that on this occasion "Ken" paid the deposits. She noted the names of "Su" and "Ken" on the tenancy agreement for CTC. On the JTC agreement she also wrote "Ken" and then added "Xu". A telephone number, apparently that of "Su" or "Xu", was also recorded.

    b. A week later. On this occasion, "Ken" came with Ms Gu to pick up the keys to the two offices.

    c. On 23 June 2015. On this occasion "Ken" came alone and he paid overdue rent on the offices.

16. As to Ms Singh's identification of Mr Wang as being the person she knew as "Ken":

    a. Having been shown a number of photos by the Police, she had picked out as "Ken" a photo of Mr Wang.

    b. She had seen "Ken" on a number of other occasions at the YI premises at 134 Waimanu Road.

    c. Mr Wang accepted in his evidence that he was the man who paid the rent on 23 June 2015.

17. Ms Singh's evidence was challenged in cross-examination and also by the Ms Gu who denied that Mr Wang had ever accompanied her to see Ms Singh. She said that that on 26 May 2015 she had been accompanied by Mr Ling and another Chinese man she did not know. In his evidence, Mr Wang appeared to acknowledge being present on 26 May 2015, but I am inclined to think that this is not what he meant – that what he intended to say was that he had met Ms Singh on 23 June 2015 when he paid the rent but not on 26 May 2015.

18. As to the installation of the EFTPOS machines:

a. On 5 June 2015, Mr Eremasi Tikoduadua went to the CTC office at 160 Waimanu Road. There he met two Chinese men. In his evidence, he said that one of them was Guangwu Wang whom he said he knew and that Guangwu Wang claimed to be, or was introduced as, the owner of CTC. He trained both men in the use of the EFTPOS machine. While this was going on, Ms Gu (who Mr Tikoduadua also knew) came into the office and she provided assistance to the Chinese men with interpretation of what Mr Tikoduadua was saying.

b. Mr Tikoduadua installed the second (JTC) EFTPOS machine on 17 June 2015, also at 160 Waimanu Road. He said that Guangwu Wang and the other man were present again. On this occasion, the other man claimed to be the owner of the business, that is, of JTC.

c. Mr Tikoduadua returned to the JTC office on 19 June 2015 to respond to a complaint that the machine installed on 17 June was not working. On this occasion, the other Chinese man (not Guangwu Wang) was present.

d. In her evidence, Ms Gu said that Mr Ling and another Chinse man had been present on 5 June when Mr Tikoduadua delivered the CTC EFTPOS machine. She denied that Guangwu Wang was that man. As I will explain, the Magistrate accepted that Guangwu Wang had been there. No innocent explanation was offered at trial for his presence on this occasion and, in particular, why he wished to be trained in the use of a machine that was only ever used for fraudulent purposes.

The scam in operation

19. By the end of 17 June 2015, the CTC bank account stood at $33,838.65 which, with the exception of the $2,000 cash deposit by Ms Gu, was entirely made up of the initial proceeds of the fraudulent use of the EFTPOS machine. The next day, on 18 June 2014, two cheques for a total of $30,300 were cashed at the ANZ, one by Guangwu Wang and the other by Xuhuan Yang. On Friday, 19 June 2015 (by which stage the account had been credited with additional fraudulently obtained money), two further cheques were cashed, one for $28,000 and the other for $45,000. This was by Hai Ming Xu. The last two cheques that were

successfully cashed were presented on the following Monday, 22 June 2015 by Mr Wang. They were both for $5,000.

20. There was far less activity involving the JTC EFTPOS machine, and the only withdrawal from the JTC account with ANZ was by means of a cheque for $6,800 that was cashed on 18 June 2015, presumably by Hai Ming Xu.

21. Ms Singh's evidence was that the offices rented in the names of CTC and JTC were locked up and not occupied in June 2015. So, no business was being transacted from them and presumably the EFTPOS machines were used somewhere else.

The explanations for the four cheques cashed by Mr Wang and his co-defendants and Mr Wang's payment of rent on 23 June 2015

22. In their evidence, Mr Wang and Lijun Liu gave an explanation for the cheques which Messrs Wang, Guangwu Wang and Xuhuan Yang cashed on 18 and 22 June 2105. They both said that pursuant to four different transactions, YI had sold "bags and shoes" to CTC which were loaded into a white car. They were able to produce invoices for these sales that correspond in their totality to the cash that was obtained. YI had imported stock from China from which it is conceivable that $40,300 worth of goods might have been sourced but no other documentary records as to the "sales" was produced. The $40,300 that was obtained was not banked and the evidence as what happened to it was in general terms, with the only specifics being Mr Wang's claim that he had paid for airfares for friends. No documentary confirmation of this explanation was provided.

23. Mr Wang's explanation for his payment of rent on 23 June 2015 was that he had been asked to do so by Hai Ming Xu on what was presumably 22 June.

The basis of the State's case against Mr Wang

24. Section 69(2)(a) of the Proceeds of Crime Act 1997 creates an offence of money laundering, the elements of which are specified in s 69(3) in this way:

> (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

> 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.

25. Mr Wang faced two counts at trial. The first alleged offending involving the CTC ANZ account and the second, the JTC account with the same bank. For count one, the particulars were as follows:

> HANNAM WANG and GUANGWU WANG between the 9th day of June 2015 and the 24th day of June 2015 at Suva ... engaged directly or indirectly in transactions involving [the CTC bank account] to the total sum of $675,774.98 that are the proceeds of crime, knowing or ought reasonably to know that the money is derived directly or indirectly from some form of unlawful activity.

The date range encompasses the entire period from when the EFTPOS machine was first used until the account was frozen. The $675,774.98 in the particulars is the total amount that was credited to the account.

26. Count two was similarly worded in relation to the operation of the JTC account.

27. The third count was against Xuhuan Yang. It alleged money laundering in the same general terms as counts one and two but the particulars were confined to the cheque that he cashed (for $8,500) of 18 June 2015.

28. It is obvious that Mr Wang and Guangwu Wang were charged in relation to the operation of both accounts and not just the cheques they cashed; this given:

a. The date range of the offending.

b. The financial particulars which encompass all proceeds of the EFTPOS machine offending.

c. The fact that they did not cash any cheques drawn on the JTC account.

d. The differently wording and focus of the charge against Xuhuan Yang which was confined to the cashing of a single cheque.

29. That Mr Wang and Guangwu Wang were charged in relation to all activities in relation to the accounts of CTC and JTC whereas Xuhuan Yang was charged only in relation to the cheque he cashed was presumably because the evidence:

a. pointed to Mr Wang and Guangwu Wang having been involved in the set-up of the scam as well as the cashing up of the proceeds; but

b. in respect of Xuhuan Wang was confined to his cashing of a single cheque.

30. In her judgment, the Magistrate did not explicitly analyse the basis on which the case against Mr Wang and his co-defendants had been presented. However, my impression from what she said is that she saw the State's case as confined to their cashing of the cheques.

31. In the High Court, Ranasinghe J held that because the particulars did not refer to s 46 of the Crimes Act 2009 (which provides for "common purpose liability", what he called "joint enterprise" was not alleged. On this basis, he concluded:

> ... the allegation against the three Accused was based upon the contention that they have cashed the four cheques drawn from the account of CTC. When cashing those cheques, they knew or ought reasonably to have known that the money had been derived or realised, directly or indirectly, from the alleged crime of credit card skimming.

This meant:

a. Mr Wang could be liable in relation only to the cheques he had cashed; and

b. because he never cashed cheques drawn on the JTC account, he could not be found guilty on count two.

32. As will be apparent, I consider that this approach was not correct. As I see it, the charges against Mr Wang and his co-defendants were drafted with s 45(1) of the Crimes Act in mind. This provides:

> A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

Although best practice is to refer to s 45(1) where party liability is alleged, this is not a prerequisite to conviction on this basis (*cf Criminal Law of Fiji*, 2nd edit (2022) at [14.6]). However, the approach adopted by Ranasinghe J not having been challenged by the State, it must now form the basis of our consideration of the petition This means that the focus of the case must be on the two cheques cashed by Mr Wang. What follows in these reasons is premised on that basis.

33. With exception of a $2,000 cash deposit into the CTC account made by Ms Gu, all money in the CTC account was derived by the fraudulent use of the CTC EFTPOS machine. It follows that by cashing two cheques drawn on that account, Mr Wang engaged in transactions that involved the "proceeds of crime". This means that the only live issue as to his guilt is whether, at the time he cashed those cheques, he either knew, or ought reasonably to have known, that this was so.

34. Despite Ranasinghe J's approach to joint enterprise in relation to what was alleged, he did, as I will show, take into account against Mr Wang the evidence that Guangwu Wang was trained in the use of EFTPOS machines. He was entitled to do so. Guangwu Wang's training in the use of those machines along with his cashing of two of the CTC cheques were legitimate components of the circumstantial case against Mr Wang. This is because (a) they were business partners (b) both were proved to have taken part (albeit separately) in the set-up of the scam and (c) both received some of the proceeds of the scam. When two people engage separately in actions that are part and parcel of the implementation of a criminal purpose, it may be, and in this instance is, open to inference that they were doing so in concert, with the result that the actions of one may be taken into account in relation to the other.

The judgment of the Magistrate

35. The case was heard over 13 days between 2 October and 24 November 2017. The Magistrate's judgment was delivered just under 15 months later, on 22 February 2019,

36. When dealing with the facts, the Magistrate began by summarising the State's case against each of the defendants. In the case of Mr Wang, that summary was as follows:

> In detail the State alleges that [Mr Wang's] connection to [CTC] and [JTC] is proved by the fact that he paid rent for the two office spaces rented out in the name of these companies at 160 Waimanu Road, Suva. In addition, the State alleges that his links to the ANZ accounts is provided by the fact that two draws from [CTC's] ANZ account had been made via Cheques cashed by him at ANZ Bank .... The State also relied on evidence that he had told the Police that his mobile number was 8021999 and Ms Annie Gu said in evidence that she received instructions from a Chinese man who telephoned her from that number.
>
> For the sake of [completeness, Ms Gu also said that while she received instructions from a person speaking to her from a phone using the number that belonged to the [Mr

> Wang], that person was not [Mr Wang]]. Regardless State Counsel argues, it was his phone that was used

This was a significant understatement of the case against Mr Wang.

37. Having summarised in like manner what she saw as the essence of the cases against Mr Wang's two co-defendants, she reviewed the prosecution case. This she did by reference to the evidence of each prosecution witness in the order in which they had been called. She carried out a similar exercise in relation to the evidence led by and on behalf of Mr Wang. There are two aspects of her analysis of the evidence that I should mention:

    a. She did not determine whether Mr Wang had been present at the meeting with Ms Singh on 26 May 2015 (when the deposit was paid) and the following week when the keys were picked up. On this aspect of the case there had been a sharp conflict between the evidence of Ms Singh on the one hand and that of Mr Wang and Ms Gu on the other. This conflict was not addressed in her judgment.

    b. She accepted Mr Tikoduadua's evidence that Guangwu Wang had been present on 5 June 2015 when the first EFTPOS machine was installed This means she must have rejected Ms Gu's evidence to the contrary, although she did not say this specifically. She did not make any reference to whether Guangwu Wang was also present when the second machine was installed, on 17 June 2015, as Mr Tikoduadua had said in evidence.

38. In a section of her judgment headed "Analysis of Evidence" the Magistrate accepted that in cashing cheques drawn on the CTC account, Mr Wang and his co-defendants had engaged directly in transactions that involved the proceeds of crime. But she said that she was not satisfied that Mr Wang and his co-defendants knew or ought to have known that they money they received had been "derived or realised, directly or indirectly, from some form of unlawful activity"

39. The reasons she gave that for that conclusion in relation to Mr Wang were as follows.:

> ... this Court believes [Mr Wang's] and Ms Lijun's testimony, their personal relationship notwithstanding, that a representative of CTC purchased goods wholesale from them and paid for those purchases via cash cheques. This Court believes [Mr Wang's] testimony that he loaded goods for this customer and cashed the Cheques at Ms Lijun's instructions. This Court believes Ms Lijun's and [MrWang's] testimony that Ms Lijun dealt with customers, received payments and

> directed her co-directors to do the heavy lifting and undertake important bank runs while she stayed back to look after the shop. The Court accepts that this is what happened in respect of the Cheques that the [co-defendants] cashed. …
>
> This Court accepts that [Mr Wang] paid rent for the premises … on 23rd June 2015. He proffers an explanation for doing so that this Court finds reasonable and believes.

40. She then reviewed the evidence of Mr Tikoduadua that Guangwu Wang had been present on the occasion when he installed the EFTPOS machine allocated to CTC. She accepted that this was so but said that she was not satisfied that Guangwu Wang had been introduced as the owner of CTC.

41. After dealing briefly with the case against Xuhuan Yang, she went on:

> This Court finds that there is an innocent explanation for [Mr Wang's] and [Guangwu Wang's] presence at 160 Waimanu Road at the office spaces for [CTC] and [JTC] and for [Mr Wang's] role in paying rent for Ling on or around 23rd June 2015. Minority communities will often band together and work to help make life a little easier for themselves and each other. … But at the end of the day, a spirit of general cooperation and goodwill does not mean that the expatriate Chinese community, or indeed any community in Fiji, runs as a pack. In Fiji still, as with all countries founded on the English system of criminal justice, one cannot be found guilty by mere association.

The Magistrate did not refer explicitly to the law as to when judges may take judicial notice of facts that have not been proved.

42. Under the heading "conclusion" she said:

> The evidence points overwhelmingly to [Mr Wang's] Mr Guangwu Wang's and Mr Xuhuan Yang's innocence … .

The High Court judgment

43. The State exercised the right of appeal conferred by s 246 of the Criminal Procedure Act 2009. By reason of s 246(4), such an appeal may extend to findings of fact as well as law. Mr Wang's co-defendants having returned to China following their acquittals in the Magistrates Court, the State's appeal against the Magistrate's judgment was confined to the acquittal of Mr Wang,

44. In his judgment, Rajasinghe J saw the appeal as depending on whether:

> the Learned Magistrate has erroneously failed to take proper consideration of the circumstantial evidence presented by the Prosecution to establish that [Mr Wang]

> knew or ought reasonably to have known that the money that he had cashed had been derived from an unlawful activity.

He noted:

> In an appeal like this, the Court is very reluctant to intervene in the judgment delivered by the lower court. The Appellate Court must recognise and indeed must keep in mind the advantage that the Learned Magistrate had in seeing and hearing the witnesses and all the material exhibits presented before her. This Court had no such advantage of seeing the witnesses and observing their demeanour in giving evidence. Hence, this Court must not lightly intervene unless it has scrutinised the impugned Judgment of the Learned Magistrate in order to determine whether she had erred in fact and law in concluding that [Mr Wang] and two Accused were not guilty. In doing that, the Appellate Court must not substitute its own view about the evidence presented in the trial.

45. In reviewing the evidence, he particularly referred to:

a. Shop one, Sabrina Building being identified as the business address of CTC and JTC. This and associated evidence had not been referred to by the Magistrate.

b. The significance of the telephone number 8021999. He noted that the evidence of Ms Gu's communicating with Mr Ling on this number:

> could lead to a further positive inference that whenever Mr. Ling communicated with Anny Gu using 8021999 or vice versa that either [Mr Wang] was present with Mr. Ling for him to use [Mr Wang's] mobile phone or it was the [Mr Wang] who had actually communicated with Anny Gu, giving her instructions about CTC and JTC.

c. The evidence of Ms Singh about her involvement with the Mr Wang. Ranasinghe J noted that her evidence had been challenged and its inconsistency with the evidence of Ms Gu. But after discussing Ms Gu's proximity to the offending and her willingness to be a surety in relation to bail for Mr Wang, he said this:

> The evidence that Mr. Ling had used the mobile number of [Mr Wang] to communicate with Anny Gu, the business address of CTC and JTC was the same address that [Mr Wang's] company previously rented, and [Mr Wang] knew that Mr. Ling's office was beside his shop, does not corroborate the evidence of Anny Gu in relation to [Mr Wang's] visits to Ms. Singh's office. Hence, the Court can safely conclude that the evidence of Anny Gu is not credible in respect of [Mr Wang's] visit to Ms. Singh's office. Accordingly, the Court finds the evidence of Ms. Singh in relation to [Mr Wang's] visits to her office is credible, reliable and truthful evidence.

d. The evidence of Mr Tikoduadua. He considered that the fact that Mr Tikoduadua had trained Guangwu Wang in the use of the EFTPOS machine:

> leads to a further inference that [Guangwu Wang] knew or ought reasonably to have known about the purpose of installing EFTPOS at the CTC office.

e. He took the view that the Magistrate's discussion of the practices of expatriate minority communities could only have been justified on the basis of the legal principles as to when a judge may take "judicial notice" of facts that have not been proved. He did not see those principles as applying and held:

> I find the Learned Magistrate's finding that the presence of [Guangwu Wang] at CTC's office and the payment of the rent by [Mr Wang] were due to the innocent networking in the Chinese expatriate community in Fiji is founded on a wrong principle of judicial notice.

46. He then said:

> On account of the above-discussed reasons, I find that the Learned Magistrate has failed to consider the following evidence, that:
>
> i) CTC and JTC have used Shop One Sabrina Building, Victoria Parade, Suva as their business address, which is the same address previously used by YI.
>
> ii) Mr. Ling had told Anny Gu to put the address of Shop 1, Sabrina Building, Victoria Parade as the business address of CTC and JTC as the said address belongs to one of Mr. Ling's Chinese Friends.
>
> iii) Soon after the incorporation and opening of the two bank accounts, CTC and JTC had moved to No 160, Waimanu Road, which is a few meters away from the shop of YI at No 134, Waimanu Road,
>
> iv) [Mr Wang] had accompanied Anny Gu to Hari Investment's office to rent the office at 160 Waimanu Road and that he had paid the deposit for the lease and later paid the office's monthly rent on the 23rd of June 2015
>
> v) The evidence of [Mr Wang] confirming 8021999 is his mobile phone number,
>
> vi) The evidence of Anny Gu that she corresponded with Mr. Ling on the mobile number 8021999,
>
> vii) [Mr Guangwu Wang] was present at CTC's office when Mr. Tikoduadua came to install EFTPOS machines. Mr. Tikoduadua had trained [him] on how to use EFTPOS machines,
>
> viii) [Mr Wang] knew the office of Mr. Ling was beside the shop,

ix) [Mr Wang] and [Guangwu Wang] were directors of YI and did business together at YI shop at No 134, Waimanu Road,

x) Ms. Singh's evidence that the office spaces of CTC and JTC had always been closed and no customers were present.

If the above incidents, events, the proximity of the events, and communication between parties are taken together, they cannot be explained as coincidence, but the rational conclusion is that [Mr Wang] and Guangwu Wang knew or ought reasonably to have known the matters and the transactions of CTC and JTC. This conclusion will lead to a further inference that the [Mr Wang] and Guangwu Wang knew or ought reasonably to have known that the money in CTC's bank account had been derived or realised from the credit card skimming or any unlawful activities involving the EFTPOS machines.

47. Rajasinghe J made no finding as to the genuineness of supposed sales of stock by YI that were put forward as the innocent explanation for the cheques cashed by Mr Wang and his co-defendants. This is because he considered that the State's case against Mr Wang was made out irrespective of whether those sales were genuine.

48. He concluded his judgment in this way:

In view of the reasons discussed above, I find that the Learned Magistrate had erroneously failed to consider the above-discussed evidence with the applicable legal principles and the concepts regarding the count one as charged in the Magistrate's Court. The acquittal on the basis of the finding of not guilty for the first count is therefore contrary to the evidence presented in the Magistrate's Court. It constitutes an error of law and of fact. It must be quashed and substituted with a finding of guilt and a conviction. It is in that context; I find there is a reason for me to intervene in the Judgment of the Learned Magistrate pursuant to Section 256 (2) of the Criminal Procedure Act. I do not find this is an appropriate case to have a re-trial before another Magistrate. I accordingly make the following orders that:

i) The Appeal is allowed,

ii) The order of the acquittal of [Mr Wang] in respect of the first count, based on the finding of not guilty is quashed,

iii) The above-stated order of acquittal of [Mr Wang] is replaced with a conviction on the basis of the finding of guilt for the first count of Money Laundering, contrary to Section 69 (2) (a) and 3 (a) of the Proceeds of Crime Act.

iv) Accordingly, [Mr Wang] is convicted for the first count of Money Laundering, contrary to Section 69 (2) (a) and 3 (a) of the Proceeds of Crime Act.

The ruling of the single Judge of the Court of Appeal

49. Under s 22(1)) of the Court of Appeal Act:

> Any party to an appeal from a magistrate's court to the Supreme Court may appeal, under this Part, against the decision of the Supreme Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only

50. In his ruling delivered on 17 September 2012, Prematilika ARJA concluded that Mr Wang's notice of appeal to the Court of Appeal against the judgment of Ranasinghe J as to conviction had not identified a point of law and, for this reason, he dismissed it under s 35(2) of the Court of Appeal Act as "vexatious or frivolous or ... bound to fail".

The proposed appeal to this Court

51. Given s 22(1) of the Court of Appeal Act, we could only grant leave to appeal if satisfied that Mr Wang's appeal to the Court of Appeal against the judgment of Ranasinghe J raised a question of law.

52. The grounds of appeal that were before Prematilaka ARJA were mainly variations on the theme that Ranasinghe J had erred in law in substituting his findings of fact and inferences for those made or drawn by the Magistrate. Some, but not the only instances of this, were in relation to the credibility conflict between Ms Singh and Ms Gu and the Magistrate's resort to the doctrine of judicial notice.

53. Given the way the notice of appeal was expressed, I am not surprised at the conclusion reached by Prematilaka ARJA. However, I think it was at least implicit in the grounds of appeal that Ranasinghe J had erred in principle and thus in law in his extremely robust approach to the findings of fact made by the Magistrate. For this reason, I have given careful consideration to the evidence in the case and the judgments of the Magistrate and Ranasinghe J.

The problems I have with the judgment of the Magistrate

54. The Magistrate's judgment is expressed in terms that suggest she never stepped far enough away from the detail of the evidence she reviewed to identify the overall picture that emerged from it. In the passage from his judgment that I have cited at [46] above, Ranasinghe J carried out what I see as an appropriate exercise of describing the case in the round. I have carried

out a broadly similar exercise, in my review of the evidence at [5] – [21] above. There is no indication in the judgment of the Magistrate that she ever looked at the case in this way.

55. Aspects of the Magistrate's analysis of the evidence are incomplete or wrong. By way of examples:

a. No reference was made to the significance of the Shop one, Sabrina Buildings address. Ms Gu's explanation of this is that Mr Ling said it was the shop of a friend. But the transcripts of Mr Wang's evidence and his caution interview) at least as I read then, suggest that he did not know Hai Ming Zu then. To same effect is the evidence of Lijun Liu, which was that Mr Ling (as she referred to him) came to her attention when he came to the YI shop to buy goods, something which on her narrative cannot have been until June 2015. No innocent explanation was offered at trial as to how and why Mr Ling would have known of this address in early May 2015.

b. The Magistrate's did not refer to Mr Ling having, at the outset, given Ms Gu the telephone number 8021999. Ms Gu confirmed that she could contact Mr Ling on that number. There was no point in Mr Ling giving her the number unless he expected to be contactable on it. No innocent explanation of this was offered a trial.

c. The involvement by Mr Wang with Ms Singh was not adequately addressed in her judgment. There was no obvious innocent explanation for Mr Wang being involved in arranging the tenancies on 26 May 2015 and a week later. So, this was significant issue in the case but the Magistrate did not engage with it and in particular did not resolve the evidential dispute between Ms Singh, on the one hand and Mr Wang and Ms Gu on the other.

d. On the evidence accepted by the Magistrate, Guangwu Wang received training on the EFTPOS machine allocated to CTC. No innocent explanation was offered at trial as to why he wanted such training. The significance of this was not referred to by the Magistrate. As well, the acceptance of Mr Tikoduadua's evidence on this issue meant a rejection of Ms Gu's evidence to the contrary. The significance of this in relation to Ms Gu's credibility was not referred to.

e. There is no indication in the Magistrate's judgment of a common-sense plausibility assessment of the sale of goods explanation for the cheques cashed by Mr Wang and his co-defendants. The CTC/JTC scams were inevitably going to be shut down once fake debits started to appear on credit card statements. This was likely to occur within a couple of weeks of 9 June 2015. By 18, and particularly, 22 June 2015, the scam was nearing an end; something that would have been obvious to those behind it. There were practical limits to the fraudsters' ability to present cash cheques without attracting suspicion. This meant that there would be limited cheque cashing opportunities (as it happened, only six). CTC being just a front for fraud and not a legitimate business, there was no sensible reason why Hai Ming Zu would waste four cheque cashing opportunities buying stock from YI for which he had no need or purpose. As it happened, he left Fiji on 26 June 2015.

f. More generally, there is no acknowledgement in the Magistrate's judgment that Mr Wang was involved in the set up and operation of the scam from start to finish. His telephone number was given to Ms Gu as contact number for Mr Ling, a business address he had just vacated was used as the address for CTC and JTC, on the evidence of Ms Singh at least, he had taken part in arranging tenancy arrangements for the offices at 160 Waimanu Road, his business partner in YI, Guangwu Wang received training on 5 June 2015 on the use of the CTC EFTPOS machine, on 22 June 2015, Mr Wang cashed two CTC cheques which were honoured using money dishonestly obtained and on 23 June 2015, he paid rent for the CTC and JTC premises.

Possible issues with the judgment of Ranasinghe J

Initial concerns

56. My initial concerns with the judgment of Ranasinghe J were:

a. The stark difference between the result he arrived at and the very strong credibility findings made by the Magistrate in favour of Mr Wang.

b. An apparent credibility finding in relation to the conflict in the evidence of Ms Gu and Ms Singh (set out above at [45(c)], which extended to an acceptance of Ms Singh's evidence as to Mr Wang's involvement in the tenancy arrangements.

c. His treatment of the judicial notice point, noted at [45](e) above.

d. The substitution of a conviction for the acquittal, instead of an order for a new trial.

I will discuss his judgment by reference to these concerns. But before I do so, I will refer briefly to the role of an appellate judge in relation to findings of fact.

The role of an appellate Judge reviewing findings of fact

57. This was recently discussed by the New Zealand Supreme Court in *Sena v Police*:[1]

> Since it is an appeal, it is for the appellant to show that an error has been made. Further, in assessing whether there has been an error, an appellate court must take into account any advantages a trial judge may have had. Because of this, where the challenge is to credibility findings based on contested oral evidence, an appellate court will exercise "'customary' caution". There are two main, overlapping, reasons for this.
>
> The first is that a slow-paced trial, at which the evidence emerges gradually, provides a good opportunity for evaluating the strengths and weaknesses of a case. In assessing the plausibility of what is said by the witnesses, the judge has the advantage of being also able to form a view as to what sort of people they are. This is an appreciable consideration despite the now well-recognised difficulties with demeanour-based credibility assessments.
>
> The second consideration, in effect the other side of the coin to the first, is that appellate judges dealing with a case on the basis of a written record of what happened at trial and the submissions of counsel are unlikely to be as well-placed as a trial judge to determine contested questions of fact based on contested oral evidence. For instance, what a witness means may be conveyed, at least in part, by gesture or intonation, something which will not be apparent on the written record. More generally, the appellate process in which appellate judges are taken, sometimes rather selectively, to the aspects of the evidence on which counsel rely does not replicate the advantages of a trial judge which we have just described.

58. In the passage of his judgment that I have set out above at [44], Ranasinghe J accurately summarised the appropriate approach to appellate review of factual findings. The essence of the argument advanced by Mr Wang is that Ranasinghe J did not apply that approach when he reversed the Magistrate's decision in relation to count one.

Sena v Police [2019] NZSC 59; [2022] 1 NZLR 575 at [38] – [40].

The stark difference between the result Ranasinghe J arrived at and the very strong credibility findings made by the Magistrate in favour of Mr Wang

59. Section 142 of the Criminal Procedure Act relevantly provides:

> (1) Subject to sub-section (2), every such judgment shall, except as otherwise expressly provided by this [Act], be written by the judge or magistrate in English, and shall contain —
>
> (a) the point or points for determination.
>
> (b) the decision and the reasons for the decision; and

60. In his reasons, Ranasinghe J referred to the judgment of Grant ACJ in *Pal v R*[2] and cited the following passage:

> I would take the opportunity, as the judgment of the lower court in this case is a clear example, of drawing attention to what appears to be a trend on the part of some Magistrates to set out in a judgment a summary of the evidence of the witnesses in the order in which they were called regardless of the fact that this bears no relationship to the sequence of events which is the subject matter of the trial; and a tendency to omit reasons for the decision reached.
>
> Witnesses very often give evidence out of order, but one does not expect a Magistrate to simply restate same seriatim in his judgment. In order to arrive at a proper conclusion, the Magistrate must have considered the matter in its logical progression, and have formulated reasons for his ultimate conclusion, and the judgment should be expressed accordingly.
>
> As a general rule, the judgment should commence with a description of the charge, followed by the relevant events and the material evidence set out in correct sequence in narrative form, the identifying number of each pertinent witness being incorporated at the appropriate places, after which the Magistrate should state what witnesses he believes and whose evidence he accepts or rejects, and should proceed to make his findings of fact, apply the appropriate law to those facts, and give his reasoned decision; bearing in mind throughout the provisions of Section 154 (1) of the Criminal Procedure Code.
>
> If these considerations are kept in view, not only will it make the task of an appellate court easier, it might well lead to fewer decisions being upset.

61. I see the advice offered in *Pal* as being as apposite today as it was when provided, nearly 50 years ago. The Magistrate's decision in this case largely followed the model deprecated by Grant ACJ in that it involved a summary of the evidence in the order it was given and a failure to analyse the case in terms of what Grant ACJ called "logical progression".

Pal v R [1974] Fiji LR 1.

62. Also relevant is another passage from *Sena*:[3]

> [Reasons] should show an engagement with the case, identify the critical issues in the case, explain how and why those issues are resolved, and generally provide a rational and considered basis for the conclusion reached. *Reasoning which consists of a conclusory credibility preference is unlikely to suffice.* The language of [the New Zealand section corresponding to s 142(1)(b) of the Criminal Procedure Act] reflects an assumption that the reasons given by a judge will reflect that judge's assessment of the evidence and why that assessment resulted in a conviction. … [A] reasoned judgment is essential to a fair trial. *A failure to provide a reasoned resolution of a significant evidential dispute may … suggest a misapprehension of the effect of the evidence, for instance a misapprehension of the significance of the dispute.*
>
> Emphasis added

63. I accept that the result reached by the Magistrate was in a sense justified by "reasons" in the form of credibility findings, but, these were in conclusory terms and did not reflect engagement with the totality of the State's case, as I have explained at [55], above. And, as I have noted, there was no "reasoned resolution" of the evidential dispute whether Mr Wang had been present with Ms Gu at the meeting with Ms Singh on 26 May 2015. So the reasons given were not adequate to the occasion.

64. In light of the failure by the Magistrate to give adequate reasons, Ranasinghe J was entitled to approach the case on a basis that was not controlled by the Magistrate's credibility findings.

The apparent credibility finding by Ranasinghe J

65. Ranasinghe J concluded that Mr Wang had been with Ms Gu at the meeting with Ms Singh on 26 May 2105 and had paid the deposit for the CTC and JTC tenancies at 160 Waimanu Road (see [45(e)] above). In doing so, he described Ms Singh's evidence as "credible, reliable and truthful", language that is customarily used by trial judges (who have had the advantage of seeing and hearing witnesses) and not appellate judges (whose exposure to evidence is confined to reading transcripts). This led to my concern, already noted, that he may have gone outside the role of an appellate judge in relation to findings of fact.

Sena, above, fn at [36]

66. Having given this aspect of the case anxious consideration, I have reached the view that my initial concerns were semantic (relating primarily to the adjectives Ranasinghe J used in relation to Ms Singh's evidence) and not substantive. This is for the following reasons:

a. The Magistrate simply did not address this issue in her judgment. So there is not credibility finding in favour of Ms Gu's evidence that had to be overcome.

b. Ms Gu's evidence that Guangwu Wang was not present on 5 June 2015 must have been rejected by the Magistrate, casting a significant shadow over her credibility. As well, as Ranasinghe J noted, she was close to the offending and sufficiently close to Mr Wang to be his surety for bail purposes. All of this is apparent from the record.

c. Mr Singh's identification of Mr Wang as the person who paid rent on 23 June 2015 was plainly right. Mr Wang acknowledged as much himself. That provides some, perhaps considerable, support for Ms Singh's identification of him as having been present on the two earlier occasions.

d. If Mr Wang was not the man who accompanied Hai Ming Zu to see Ms Singh on 26 May 2015 and also picked up the keys a week later, there must have been another Chinese man sufficiently involved in the scam to have done so and be noted on the tenancy agreements as "Ken". But there is no evidence of anyone other than Mr Wang, Guangwu Wang, Xuhuan Yang and Mr Ling/Hai Ming Zu being involved. As I have noted, Ms Gu's evidence of another person being present on 5 June 2015 must have been rejected by the Judge.

e. The nomination of Shop 1, Sabrina Building as the business address of CTC and JTC, Ms Gu having Mr Wang's telephone number as a contact for Mr Ling, the 160 Waimanu Road premises being sufficiently close to the YI shop for Mr Wang to have seen Ms Singh's A4 advertisement, Guangwu Wang receiving training on at least one EFTPOS machine and Mr Wang having obtained $10,000 of the proceeds of the fraud and making the rent payment on 23 June 2015 provide, in their totality very substantial support for Ms Singh's evidence that Mr Wang accompanied Mr Ling/Hai Ming Zu on 26 May 2015.

67. In the result, I am satisfied that, in the extremely unusual context of this case, it was open to Ranasinghe J to find that Mr Wang was present with Ms Gu and Ms Singh on 26 May 2015 and that he paid the deposit.

Judicial notice

68. Ranasinghe J took what I see as an unnecessarily formalistic approach to the ability of judges to take into account the cultural backgrounds of those who appear before them as witnesses or parties. As to this, I refer to what was recently said by Supreme Court of New Zealand in *Donglin Deng v Lu Zheng*:[4]

> (a) Cases in which one or more of the parties have a cultural background which differs from that of the judge are common … and are likely to become more common in the future.
>
> (b) Judges should approach such cases with caution. This has been well explained by Emilios Kyrou, writing extra-judicially, in his advice to judges to develop:
>
> > … a mental red-flag cultural alert system which gives them a sense of when a cultural dimension may be present so that they may actively consider what, if anything, is to be done about it.
>
> (c) A key to dealing with such cases successfully is for the judge to recognise that some of the usual rules of thumb they use for assessing credibility may have no or limited utility. For instance, assessing credibility and plausibility on the basis of judicial assumptions as to normal practice will be unsafe, if that practice is specific to a culture that is not shared by the parties.
>
> (d) Most of the usual ways that judges assess credibility remain available: consistency of a narrative over time and with other evidence (particularly contemporaneous documents) and general plausibility; … . It is critical that judges and counsel maintain a sense of proportionality and recognise that many, perhaps most, cases, in which the parties operate within a social and cultural framework that differs from that of the judge, can be dealt with in the in the manner just outlined. As Emilios Kyrou has put it: "[i]n many cases, managing a cultural dimension in evidence may require no more than the most basic of all tools in a judge's toolkit, namely, context and common sense." For this reason, we do not wish to be taken as suggesting that in all cases with a "cultural dimension", the parties should feel obliged to call social and cultural framework evidence (and incur the costs of doing so).

The extrajudicial writing of Justice Emilios Kyrou referred to in that passage is an article accurately titled, "Judging in a Multicultural Society".[5]

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4 *Donglin Deng v Lu Zheng* [2022[NZSC 76.

5 See Emilios Kyrou "Judging in a Multicultural Society" (2015) 24 JJA 223 at 226.

69. I think that the Magistrate was entitled to have regard to the cultural background of Mr Wang and Guangwu Wang in assessing the plausibility their defence and, in respectful disagreement with Ranasinghe J, I do not see that this required resort to the law as to judicial notice. On the other hand, and in respectful agreement with at least the conclusion of Ranasinghe J, I do not see the cultural factors she referred to as explaining away the features of their conduct relied on by the State. By way of obvious example, these factors do not provide an innocent explanation for Guangwu Wang being trained in the use of the EFTPOS machine allocated to CTC

The substitution of a conviction for the acquittal

70. The options open to Ranasinghe J were as prescribed under s 256(2) of the Criminal Procedure Act . This relevantly provides

> The High Court may —
>
> (a) reverse or vary the decision of the Magistrates Court; or
>
> (b) remit the matter with the opinion of the High Court to the Magistrates Court; or
>
> (c) order a new trial; or
>
> (d) order trial by a court of competent jurisdiction; or
>
> (e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

71. Having satisfied myself that Ranasinghe J was entitled to conclude that Mr Wang accompanied Ms Gu to see Ms Singh (and paid the deposit) on 26 May 2015, I am also satisfied that he was entitiled to find Mr Wang guilty on count one. This is because the evidence, in its totality, placed Mr Wang so close to the operation of the scam as to leave it open to Ranasinghe J to be satisfied beyond reasonable doubt that he knew or ought to have known that the money he drew on when he cashed the cheques was the proceeds of crime.

Conclusion

72. The contrast between the factual findings of the Magistrate and those of Ranasinghe J were so stark as to raise, at least in my mind, the possibility that Ranasinghe J had gone beyond the proper role of an appellate judge in reviewing findings of fact. For this reason, I have

given the petition consideration that I would normally reserve for a case in which leave was granted, As a result of this full consideration, I am satisfied that, as a matter of law, Ranasinghe J was fully entitled to allow the appeal and enter a conviction and that any error of law he may have made in relation to judicial notice was of no materiality to the result he arrived at.

73. Being satisfied that there was no material error of law on Ranasinghe J's part, I would dismiss the petition for leave to appeal.

Qetaki J

74. I have read His Lordship Young JA's Judgment in draft. I agree with it, the reasoning and conclusion.

The Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court

SUPREME COURT FIJI

The Hon. r. Justice William Young
Judge of the Supreme Court

The Hon. Mr. Justice Alipate Qetaki
Judge of the Supreme Court