IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0102 of 2018
[High Court of Suva Criminal Case No. HAC 185 of 2017S]

BETWEEN : **RINE MUNIVAI SORBY**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. D. Toganivalu for the Appellant**
: **Ms. S. Kiran for the Respondent**

Date of Hearing : **16 July 2020**

Date of Ruling : **07 August 2020**

RULING

[1] The appellant had been charged with another (appellant in AAU 0096/2018) in the High Court of Suva on two counts of money laundering (second and third counts) contrary to section 69(2) (a) and (3)(a) of the Proceeds of Crime Act, 1997. The charges were as follows.

FIRST COUNT

Statement of Offence

MONEY LAUNDERING: Contrary to section 69(2)(a) and (3)(a) of the Proceeds of Crime Act 1997.

Particulars of Offence

ROSHEEN PRAVEENA RAJ between the 1st day of June 2006 and the 16th day of February 2011 at Suva in the Central Division, engaged directly or indirectly in transactions involving Pacific Theological Westpac Bank Account

71127300, as a finance officer of Pacific Theological College responsible for preparing documents in relation to payment of wages of Pacific Theological College staff, paid herself in excess of her normal salary or wage from the said Westpac Bank Account 71127300 by falsifying documents and obtained a total sum of $96, 576.86, that were proceeds of crime knowing or ought to have reasonably known that the said sum money is derived from some form of unlawful activity.

SECOND COUNT

Statement of Offence

MONEY LAUNDERING: *Contrary to section 69(2)(a) and (3)(a) of the Proceeds of Crime Act 1997.*

Particulars of Offence

RINE MUNIVAI SORBY *also known as Lily Sorby between the 1st day of June 2006 and 16th day of February 2011 at Suva in the Central Division engaged directly or indirectly in transactions involving Westpac Bank Account 71127300, as a finance officer of Pacific Theological College responsible for preparing documents in relation to payment of wages of Pacific Theological College staff, paid herself in excess of her normal salary or wage from the said Westpac Bank Account 71127300 by falsifying documents and obtained a total sum of $73,099.93, that were proceeds of crime knowing or ought to have reasonably known that the said sum of money is derived from some form of unlawful activity.*

THIRD COUNT

Statement of Offence

MONEY LAUNDERING: *Contrary to section 69(2)(a) and (3)(a) of the Proceeds of Crime Act 1997.*

Particulars of Offence

ROSHEEN PRAVEENA RAJ and RINE MUNIVAI SORBY *also known as Lily Sorby between the 1st day of March 2010 and 30th day of November, 2012 at Suva in the Central Division, engaged directly or indirectly in transactions involving Westpac Bank Account 71127300 in relation to cheques of Pacific Theological College payable to various body corporates (Fiji National Provident Fund, Fiji Electricity Authority, Inland Revenue Department, HP Kasabia, Fiji Gas, Water Authority of Fiji, Telecom, Rups Investment and Mechanical Supplies) which had the payees altered to fictitious names and by cashing the falsified cheques obtained a total sum of $412, 567.61 that were proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of unlawful activity.*

[2] After full trial, on 17 September 2018 the assessors had expressed a unanimous opinion of guilty against the appellant on the second and third counts. The learned High Court judge in the judgment delivered on 18 September 2018 had agreed with the assessors and convicted the appellant of the same counts. She was sentenced on 19 September 2018 to 10 years of imprisonment each on the first and third counts to run concurrently with a non-parole period of 09 years.

[3] The appellant's solicitors had filed a timely notice of appeal on 18 October 2018 against conviction and sentence. Her new solicitors had filed amended grounds of appeal and written submissions on 11 May 2020 and an application for bail pending appeal on 27 May 2020 followed by written submissions on 23 June 2020. The state had tendered its written submissions on leave to appeal and bail pending appeal on 27 May 2020 and 09 July 2020 respectively.

[4] The grounds of appeal are as follows.

Against conviction

1. That the Learned Trial Judge erred in fact and in law by failing to correctly direct the Assessors on the elements of the offending; especially that the Appellant engaged, directly or indirectly in a transaction that involved money that was proceeds of crime. This is evidence on paragraphs 10, 11 and 12 of the Summing Up [SU].

2. That the Learned Trial Judge erred in fact and in law in misdirecting the Assessors on the facts of the case in the Summing Up [SU]. Especially after referring to paragraph 16 and 31 [SU] that the Accused was responsible for all accounts payable and then suggesting to the Assessors at paragraph 34 [SU] that both Accused deposited large sums of money into their accounts.

3. That the Learned Trial Judge erred in fact and in law in not directing the Assessors to consider the Appellant guilty of the lessor offence of possession of property suspected of being proceeds of crime contrary to section 70 of the Proceeds of Crime Act 1997. Especially when there was no iota of evidence tampering or collusion or payment made by the Appellant as she was only responsible for receiving payments at their work place.

Against sentence

4. That the Learned Trial Judge erred in fact and in law in not handing down an appropriate sentence in law to reflect the gravity of the offending of the Appellant and the other co-accused. Especially when the Learned Trial

Judge stated at paragraph 5(iv) of the Sentence that Accused No.1 was the main instigator and received more money than Accused No. 2 (the Appellant).

[5] The learned High Court judge has summarized the facts of the case as follows in his judgment.

> *'6. The sum total of the evidence leads me to the following findings. During the material time, both accused were employed by Pacific Theological College (PTC) as finance officers in their Finance Section. Accused No. 1 was responsible for Accounts Payable, while Accused No. 2 was responsible for Accounts Receivable. As such both accused had information on how much Pacific Theological College owed to its employees and other providers of goods and services. They co-ordinated the receiving of Pacific Theological College bills and the payments of the same. Pacific Theological College was a donor funded non-profit educational entity, and always had thousands of dollars in its account. Both accused were supervised and answerable to Pacific Theological College's Director of Finance and Administration.*
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> *7. For their services to Pacific Theological College, Accused No. 1 was paid $8,000 per year, while Accused No. 2 was paid $10,000 per year. Both accused appeared to have worked for Pacific Theological College since 1998. Life for both accused was proceeding as "normal" until Mr. Nilesh Avinesh Sharma (PW2) came in to work for Pacific Theological College as a project finance officer in 2010. PW2 was working with both accused in Pacific Theological College's Finance Section. In 2012, PW2 became Pacific Theological College's Director of Finance and Administration. He became aware that Pacific Theological College's financial records were in a mess. He started an internal investigation and audit. He found a massive financial rot in the system. He found that Accused No. 1 and 2 were tampering with the financial records and cheques and overpaying themselves as alleged in counts no. 1, 2 and 3. The financial documents examined in this case proved beyond reasonable doubt the charges against both accused. I found, on the evidence, that the two accused became greedy and hood-winked their supervisors and the cheque signatories, into stealing a total of $582,244.42 from Pacific Theological College from 2006 to 2012.'*

[6] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015

(12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds. This threshold is the same with leave to appeal applications against sentence as well.

Law on bail pending appeal

[7] In **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015) the Court of Appeal reiterated the applicable legal provisions and principles in bail pending appeal applications as earlier set out in **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100 and repeated in **Zhong v The State** AAU 44 of 2013 (15 July 2014) as follows.

*'[5] There is also before the Court an application for **bail pending appeal** pursuant to section 33(2) of the Act. The power of the Court of Appeal to grant **bail pending appeal** may be exercised by a justice of appeal pursuant to section 35(1) of the Act.*

*[6] In **Zhong –v- The State** (AAU 44 of 2013; 15 July 2014) I made some observations in relation to the granting of **bail pending appeal**. It is appropriate to repeat those observations in this ruling:*

> *"[25] Whether **bail pending appeal** should be granted is a matter for the exercise of the Court's discretion. The words used in section 33 (2) are clear. The Court may, if it sees fit, admit an appellant to **bail pending appeal**. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in the earlier decisions of this court and other cases determining such applications. In addition, the discretion is subject to the provisions of the Bail Act 2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act.*
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> *[26] The starting point in considering an application for **bail pending appeal** is to recall the distinction between a person who has not been convicted and enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Bail Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Bail Act, the presumption in favour of granting bail is displaced.*
>
> *[27] Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the*

exercise of the discretion. In the first instance these are set out in section 17 (3) of the Bail Act which states:

> *"When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take into account:*
>
> *(a) the likelihood of success in the appeal;*
>
> *(b) the likely time before the appeal hearing;*
>
> *(c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard."*

[28] Although section 17 (3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that ***bail pending appeal*** *should only be granted where there are exceptional circumstances. In* ***Apisai Vuniyayawa Tora and Others –v- R*** *(1978) 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:*

"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."

[29] The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17 (3), there may be exceptional circumstances which may be sufficient to justify a grant of ***bail pending appeal.*** *Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.*

[30] This second aspect of exceptional circumstances was discussed by Ward P in ***Ratu Jope Seniloli and Others –v- The State*** *(unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:*

"The likelihood of success has always been a factor the court has considered in applications for ***bail pending appeal*** *and section 17 (3) now enacts that requirement. However it gives no indication that there has been any change in the manner in which the court determines the question and the courts in Fiji have long required a very high likelihood of success. It is not sufficient that the appeal raises arguable points and it is not for the single judge on an application for* ***bail pending appeal*** *to delve into the actual merits of the*

*appeal. That as was pointed out in Koya's case (**Koya v The State** unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."*

*[31] It follows that the long standing requirement that **bail pending appeal** will only be granted in exceptional circumstances is the reason why "the chances of the appeal succeeding" factor in section 17 (3) has been interpreted by this Court to mean a very high likelihood of success."*

[8] In **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004) the Court of Appeal said that the likelihood of success must be addressed first, and the two remaining matters in S.17(3) of the Bail Act namely *"the likely time before the appeal hearing"* and *"the proportion of the original sentence which will have been served by the applicant when the appeal is heard"* are directly relevant *' only if the Court accepts there is a real likelihood of success'* otherwise, those latter matters *'are otiose'* (See also **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019)

[9] In **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013) the Court of Appeal said *'This Court has applied section 17 (3) on the basis that the three matters listed in the section are mandatory but not the only matters that the Court may take into account.'*

[10] In **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012) the Court of Appeal stated

'It would appear that exceptional circumstances is a matter that is considered after the matters listed in section 17 (3) have been considered. On the one hand exceptional circumstances may be relied upon even when the applicant falls short of establishing a reason to grant bail under section 17 (3).

On the other hand exceptional circumstances is also relevant when considering each of the maters listed in section 17 (3).'

[11] In ***Balaggan*** the Court of Appeal further said that *'The burden of satisfying the Court that the appeal has a very high likelihood of success rests with the Appellant'*

[12] In ***Qurai*** it was stated that:

> *"... The fact that the material raised arguable points that warranted the Court of Appeal hearing full argument with the benefit of the trial record does not by itself lead to the conclusion that there is a very high likelihood that the appeal will succeed...."*

[13] Justice Byrne in **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008 in his Ruling regarding an application for bail pending appeal said with reference to arguments based on inadequacy of the summing up of the trial [also see **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017)].

> *"[30].....All these matters referred to by the Appellant and his criticism of the trial Judge for allegedly not giving adequate directions to the assessors are not matters which I as a single Judge hearing an application for* ***bail pending appeal*** *should attempt even to comment on. They are matters for the Full Court ....."*

[14] ***Qurai*** quoted **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004) where Ward P had said

> *"'The general restriction on granting* ***bail pending appeal*** *as established by cases by Fiji _ _ _ is that it may only be granted where there are exceptional circumstances. That is still the position and I do not accept that, in considering whether such circumstances exist, the Court cannot consider the applicant's character, personal circumstances and any other matters relevant to the determination. I also note that, in many of the cases where exceptional circumstances have been found to exist, they arose solely or principally from the applicant's personal circumstances such as extreme age and frailty or serious medical condition."*

[15] Therefore, the legal position is that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act and thereafter, in addition the existence of exceptional circumstances. A very high likelihood of success of the appeal would be deemed to satisfy the requirement of exceptional circumstances. However, an appellant can rely only on 'exceptional circumstances' including extremely adverse personal circumstances even when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.

[16] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no practical purpose or result.

[17] Therefore, when this court considers leave to appeal or leave to appeal out of time (*i.e.* enlargement of time) and bail pending appeal together it is only logical to consider leave to appeal or enlargement of time first, for if the appellant cannot reach the threshold for either of them, then he cannot obviously reach the much higher standard of 'very high likelihood of success' for bail pending appeal. If an appellant fails in that respect the court need not go onto consider the other two factors under section 17(3). However, the court would still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

Consideration of grounds of appeal

Against conviction

01st ground of appeal

[18] The appellant had been charged under section 69 (2)(a) and (3)(a) of the Proceeds of Crimes Act. Section 69 is as follows

> *Money laundering*
>
> *(1) In this section:*
>
> *"transaction" includes the receiving, or making, of a gift.*
>
> *(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) if the offender is a body corporate - a fine not exceeding $600,000.*
>
> ***(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

(b) the person receives, possesses, conceals, disposes of or brings into Fiji any money, or other property, that is proceeds of crime,

***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**.*

[19] Section 3 of the Proceeds of Crimes Act interprets the following terms as follows:

***"proceeds"**, in relation to an offence, means any property that is derived or realised, directly or indirectly, by any person from the commission of the offence;*

***"proceeds of crime"** means:*

(a) proceeds of a serious offence; or

(b) any property that is derived or realised, directly or indirectly, by any person from acts or omissions that occurred outside Fiji and would, if the acts or omissions had occurred in Fiji, have constituted a serious offence;

"property" includes money or any other property, real or personal, things in action or other intangible or incorporeal property;

***"serious offence"** means an offence of which the maximum penalty prescribed by law is death, or imprisonment for not less than 12 months;*

***"unlawful activity"** means an act or omission that constitutes an offence against a law in force in Fiji or a foreign country.*

[20] The appellant argues on the one hand that the trial judge' directions on the elements of the offence of money laundering in paragraph 10 of the summing-up are quite exhaustive and have the possibility creating confusion in the assessors and on the other hand argues that the explanation of the trial judge of the elements of the offending in paragraphs 12 and 13 are inadequate and lacks objectivity.

[21] The appellant also complains referring to paragraphs 31 and 13 of the summing-up that the trial judge had failed to direct the assessors whether she had been directly involved with money that were proceeds of crime.

[22] The respondent has submitted that the trial judge had adequately explained the elements of money laundering in paragraphs 10-13 of the summing-up. However, it appears that paragraph 10 could be somewhat difficult for assessors, being laymen, to comprehend but paragraphs 11-13 the trial judge had put those elements into the factual context of this case.

> *11. 'In order to understand the terms used in describing the elements of "Money Laundering" as described above, you must consider them within the context of this case. Here we are dealing with a complainant, which is a non-profit educational organization, that is, Pacific Theological College (PTC). Pacific Theological College is a donor funded organization. It is headed by a principal, and Pacific Theological College employs people to perform its task. In paying its employees, Pacific Theological College does the same through its Finance Section, which is headed by a Director and three finance officers. At the material time, both accused were Pacific Theological College finance officers. The finance officers prepares cheques for Pacific Theological College and pays out Pacific Theological College's bills, that is, the wages and Pacific Theological College's bills.*
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> *12. The phase "engages directly or indirectly in a transaction that involves money" meant the accused must be involved in an activity that concerns money. The accused's involvement can either be directly or indirectly. The money involved in the activity or transaction must be proceeds of crime. It therefore follows that the activity or transaction the accused directly or indirectly involved themselves in must be a crime, or alternatively, an unlawful activity. The word "engages" could also mean "receiving and disposing of any money". It must also be proven by the prosecution beyond reasonable doubt that the accused knew, or ought reasonably to have known that, the money, involved in the activity or transaction, was derived directly or indirectly from some form of unlawful activity.*
>
> *13. In the context of this case, both accused are responsible for preparing the documents, the payroll details, the payments vouchers, the cheques and the instructions to the bank for the payment of wages and Pacific Theological College bills. They are in fact engaged directly or indirectly with Pacific Theological College's financial transactions that involved Pacific Theological College money. If they falsify the financial documents and Pacific Theological College cheques to overpay themselves, then the money received are proceeds of crime, and they must be shown to have known or ought to reasonably know that the overpayments were derived directly or indirectly from some form of unlawful activity. Money laundering is basically dealing with tainted money, which are proceeds of crime, and they knew or ought to have reasonably known that the money was derived from some form of unlawful activity.*

[23] The state argues that the above paragraphs have to be read with paragraphs 34 and 31 of the summing-up.

> *'31. In the payment of staff wages, Accused No. 1, in her evidence said, she prepared Payroll details spreadsheet, the payment voucher, the instruction to the banks, the cheques and she obtains the necessary approval through the Director of Finance, the Principal and/or other cheque signatories. In the Agreed Documents File 1 (Prosecution Exhibit No. 4) and File No. 2 (Prosecution Exhibit No. 5), which relate to Pacific Theological College staff wages and salaries, Accused No. 1 said, she prepared all the relevant cheque butts, cheques, payroll details spreadsheets, Pacific Theological College's instruction to the bank for the payment of staff wages into their accounts, the payment vouchers and maintains Pacific Theological College's financial records. Yet in some of the documents, for example, Pacific Theological College instructions to the Colonial National Bank (now Bank of South Pacific), the same had been tampered with. Two copies of the same were made. The correct copy was kept at Pacific Theological College Finance office, while the bank copy which contains extra $1,000 payments to both accused, was kept at the bank. The bank copy was only obtained by Pacific Theological College when the Director of Finance (PW2) conducted his internal investigation after 2010. The above behavior was prevalent in how Pacific Theological College staff were paid via Pacific Theological College Westpac Bank Account No. 71127300.'*
>
> *'34. In Agreed Documents file 3 (Prosecution Exhibit no. 3(B), in the spreadsheet at the front, summarized the purported payment to Fiji Electricity Authority (FEA). There were approximately 28 cheques. The payee recorded in the cheque butts showed that the payee was FEA, however, in the Pacific Theological College Westpac cheques, the payee had been altered to fictitious names. The relevant cheques were cashed at Westpac Bank. A total of $100, 362.28 was cashed at the Bank. In Agreed Document File 4 (Prosecution Exhibit No. 3(c), in the spreadsheet in the front, summarized the purported payments to Fiji National Provident Fund (FNPF). There were approximately 37 cheques. The payee recorded in the cheque butts were mostly Fiji National Provident Fund. However, in the Pacific Theological College Westpac cheques, the payee had been altered to fictitious names. The relevant cheques were cashed at Westpac Bank. A total of $138,627.32 were cashed at the Bank In Agreed Document File 5 [Prosecution Exhibit 3(D)], in the spreadsheet in the front, Tab A summarized the purported payment to Inland Revenue, Fiji National Provident Fund, Fiji Electricity Authority and others. The payee recorded in the cheque butts were mostly the above entities. However, in the Pacific Theological College cheques, the payee were cash. Six cheques were involved and a total of $17,861.82 were en-cashed. In Tab B, 26 cheques were involved. The payee recorded in the cheque butts were Fiji National Provident Fund, Fiji Gas, Carpenters Motors and others. However, in the Pacific Theological College Westpac cheques, the payee had been altered to fictitious names. A total of $55,406.38 were en-cashed at the Westpac Bank. Both Accuseds BSP Transaction History in Agreed Documents File 6, Tab 3,4 and 5 were examined. It was found that both accused deposited***

large sums of money into their accounts at the material time. With full time employment at Pacific Theological College, where do these money comes from? How you treat the above evidence is entirely a matter for you.'

[24] Therefore, the trial judge seems to have addressed the assessors on all physical and fault elements of section 69(3)(a) of the Proceeds of Crimes Act.

[25] There is no reasonable prospect of success in this ground of appeal.

02nd ground of appeal

[26] The appellant's contention is that it was misdirection on the part of the trial judge to have informed the assessors in paragraph 16 and 31 that the co-appellant was responsible for all accounts payable but suggesting in paragraph 34 that both appellants had large amounts of money deposited into their accounts.

[27] Paragraph 16 of the summing-up is as follows.

'16. In attending to its financial obligations, Pacific Theological College has a Finance Section. The section employs both accused as its finance officers. They are supervised by the Director of Finance, Mr. Nilesh Sharma (PW2). Accused No. 1 was responsible for all Account Payable, while Accused no. 2 was responsible for all Accounts Receivable. For the payment of wages and bills, the procedure was somewhat similar. For the weekly wages, Accused no. 1 prepares the weekly payroll spreadsheet, the payment voucher, the cheques and the instruction to the bank for the payment of wages into each employee's bank accounts. For Pacific Theological College's bills, Accused no. 1 prepares the payment voucher, the cheques and ensures payment to the outside body corporate. Payment of the above bills must be approved by the Director of finance and the cheques are signed by the principal (PW1) and other cheque signatory. The above system operates on the basis of trust between Pacific Theological College officers.

[28] I have previously quoted paragraph 31 and 34 of the summing-up. It is clear that there is no contradiction between the trial judge's directions in paragraphs 16, 31 and 34 of the summing-up. In paragraph 16 and 31 the trial judge sets out the functional responsibility of the co-appellant and the appellant at Pacific Theological College and in paragraph 34 he had directed the assessors on the fact that both of them having had large sums of money deposited into their respective accounts unexplained by their legitimate incomes.

[29] The appellant also argues under this ground of appeal based on paragraphs 28 and 13 of the summing-up that the trial judge had contradicted himself and misdirected the assessors. Paragraph 13 was quoted above and paragraph 28 is as follows.

> *'28. As far as count no. 1 and 2 of the Information was concerned, the prosecution was unable to produce any witness to say that he or she saw both accused falsifying documents to obtain the sums of money alleged in count no. 1 and 2. Neither was the prosecution able to obtain a confession from both accused as to the allegations in counts no. 1 and 2. On count no. 3, the prosecution had no witness to say that he or she saw both accused altered the payee in the relevant Pacific Theological College cheques to fictitious names and later en-cashed the relevant cheques and obtained the sum alleged in count no. 3. The above were obviously difficulties for the prosecution.'*

[30] The appellant had picked paragraph 28 without reading the rest of the paragraphs that had followed. The trial judge had as a prelude to going into circumstantial evidence against the appellant had commented in paragraph 28 to inform the assessors that the prosecution had produced no direct evidence in support of some elements of the charges whereas what he had stated as to the duties and responsibilities of the appellant in paragraph 13 appears to have been based on direct evidence of Mr. Nilesh Avinesh Sharma (PW2) and that of the appellant herself.

[31] There is no reasonable prospect of success in so far as this ground of appeal is concerned.

03rd ground of appeal

[32] The appellant's grievance is that the trial judge had erred in not directing the assessors on the alternative and lesser offence of possession of property suspected of being proceeds of crime contrary to section 70 of the Proceeds of Crimes Act 1997. The genesis of her argument is that there was no evidence of the appellant having tampered or colluded with making any forged documents to make payments or making any payments as she was only responsible for the receivables at Pacific Theological College. According to her the only evidence against her was that she had received monies into her bank account. The appellant cites paragraphs 16 and 28 of the summing-up to demonstrate what her responsibilities were and lack of direct evidence to implicate her with the charges.

[33] The state has replied by stating that the appellant had received over $1000/- each day knowing that she was not entitled to such money in excess of her salary and the appellant need not have been necessarily involved in committing 'generating' or predicate offence/s in order to be liable for the offence of money laundering as long as the appellant had engaged directly or indirectly in a transaction involving money which were proceeds of crime with the required fault element. While submitting that there was sufficient evidence to convict the appellant for money laundering, the state has submitted that the assessors and the judge were free to acquit her of money laundering if the charges had not been proved as a result of insufficiency of evidence.

[34] However, it appears that the state has directly not met the issue whether the trial judge should have directed the assessors to consider the lesser charge of possession of property suspected of being proceeds of crime contrary to section 70 of the Proceeds of Crimes Act 1997.

[35] The appellant admits that the complete appeal record is still necessary to consider this purported question of law. Therefore, I refrain from expressing any view on the issue raised by the appellant at this stage.

[36] However, I must place on record that the appellant had been defended by her counsel who apparently had not raised any redirections on this aspect with the trial judge. Therefore, technically the appellant is not even entitled even to raise this point in appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)].

04th ground of appeal (sentence)

[37] The appellant's argument here is that her co-accused had been treated as the main instigator of the alleged crimes and received more money than the appellant and therefore she should have been treated more leniently than the co-accused. She contends that she should have received a sentence in the lower range of the sentencing tariff of 5-12 years of imprisonment applied by the trial judge.

[38] In fact the appellant had received a lesser sentence of 10 years of imprisonment compared to the sentence of 11 years of imprisonment imposed on her co-accused. The appellant's non-parole period too had been reduced by one year.

[39] The trial judge had taken sentencing tariff for money laundering as between 05 to 12 years and started with a sentence of 09 years having already set out the aggravating and mitigating factors. Thereafter, 05 years had been added for aggravating features and after giving discount for mitigating factors and time in remand, the trial judge had arrived at the final sentence of 10 years.

[40] However, the sentencing process does seem at odds with guidance provided in **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008), **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013) and **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019).

[41] In ***Naikelekelevesi*** it was held by the Court of Appeal

> *22. 'In Fiji sentencing now involves a more structured approach incorporating a two tier process. The first involves the articulation of a starting point based on guideline appellate judgments, **the aggravating features of the offence [not the offender]**; the seriousness of the penalty as set out in the act of parliament and relevant community considerations. **The second involves the application of the aggravating features of the offender** which will increase the starting point, then balancing the mitigating factors which will decrease the sentence, leading to a sentence end point. Where there is a guilty plea, this should be discounted for separately from the mitigating factor in a case.*
>
> *23. In determining the starting point for a sentence the sentencing court must consider the nature and characteristic of the criminal enterprise that has been proven before it following a trial or as in this instance the facts that were outlined to the appellant after his guilty plea was entered and he was convicted, to which he voluntarily admitted. In doing this the court is taking cognizance of the aggravating features of the offence.*

[42] The Court of Appeal without citing ***Naikelekelevesi*** said in ***Koroivuki:***

> *"[27] **In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage**. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term*

should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.'

[43] The Supreme Court remarked in ***Nadan*** particularly on double counting as follows:

> *''The application for leave to appeal against sentence*
>
> *[38] The challenge to the sentence is that the judge unwittingly double-counted some of the aggravating features. The argument runs like this. Having identified the tariff for the rape of a child as 10-16 years' imprisonment, the judge must have reflected some of the features which made this a serious case by taking 12 years as his starting point. That is because he said that one of the factors which had caused him to choose that starting point was "the seriousness surrounded with the circumstances of the offence". He then set out the aggravating factors which caused him to increase the length to 15 years. They were the age of the girl when the abuse began, the breach of trust which the abuse involved, the threats Nadan made to deter her from speaking out, and the impact which the abuse had on her. These were unquestionably all aggravating factors, but the difficulty is that we do not know whether all or any of these aggravating factors had already been taken into account when the judge selected as his starting point a term towards the middle of the tariff. If he did, he would have fallen into the trap of double-counting.*
>
> *[39] This illustrates the pitfalls inherent in the mechanistic way judges arrive at an appropriate sentence in Fiji – assigning a particular additional term for any aggravating features and a particular lesser term for any mitigating features. In many jurisdictions, the court identifies its starting point, states the aggravating and mitigating factors and then announces the ultimate sentence without saying how much was added for the aggravating factors and how much was then taken off for the mitigating factors. But the real problem which this case illustrates is the danger of a span of years representing the tariff without identifying where the judge should start within that tariff for a case without any aggravating or mitigating features. This problem has been highlighted before by the Supreme Court: see **Seninolokula v The State** [2018] FJSC 5 at paras 19 and 20 and **Kumar v The State** [2018] FJSC 30 at paras 55 and 56.*
>
> *[40] Two other things which the Supreme Court said in Kumar at paras 57 and 58 in this context are relevant to the present case:*
>
> > *"57. ... First, a common complaint is that a judge has fallen into the trap of 'double-counting', i.e. reflecting one or more of the aggravating features of the case more than once in the process by which the judge arrives at the ultimate sentence. If judges choose to take as their starting point somewhere in the middle of the range, that is an error which they must be vigilant not to make. They can only then*

use those aggravating features of the case which were not taken into account in deciding where the starting point should be.

58. Secondly, the lower [end] of the tariff for the rape of children and juveniles is long. Sentences of 10 years' imprisonment represent long periods of incarceration by any standards. They reflect the gravity of these offences. But it also means that the many things which make these crimes so serious have already been built into the tariff. That puts a particularly important burden on judges not to treat as aggravating factors those features of the case which will already have been reflected in the tariff itself. That would be another example of 'double-counting', which must, of course, be avoided."

[41] Seninolokula and Kumar were, of course, decided well after the High Court passed sentence in Nadan's case, and the judge cannot therefore be criticised if he did not heed this advice. The fact is, though, that we just do not know whether the judge in arriving at his starting point of 12 years had already reflected any of the aggravating factors which caused him to go up to 15 years before allowing for mitigation. In case he had done that, and had therefore fallen into the trap of double-counting, I have considered for myself what the proper sentence in this case should be.

[42] It was, on any view, a bad case of its kind. I have already identified the factors which the judge rightly regarded as aggravating Nadan's offending. In addition there was the fact that there were three separate incidents, and they spanned almost two years. The girl would continually have been in fear with Nadan continuing to live under the same roof. In my opinion, concurrent sentences totaling 14 years' imprisonment for the totality of Nadan's offending would have been appropriate.

[44] I get the feeling that the trial judge may have unwittingly indulged in double counting in the process of deciding the appellant's final sentence. I dealt with this aspect in detail in **Salavavi v State** AAU0038 of 2017 (03 August 2020) and do not wish to repeat those remarks here. However, as I said in ***Salavavi*** the final sentence will be tested in appeal in the legal framework pronounced in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006).

*'13. ..... This argument misunderstands the sentencing process. It is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and recognising that the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. **It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the***

reasoning process that must be considered. *Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence.'*

[15] Further, even if the starting point was too high, it does not follow that the sentence ultimately imposed will be one that falls outside an appropriate range for the offending in question.....'

[45] Similar sentiments had been expressed earlier in **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015) where the Court of Appeal stated:

*'[39]..... The present process followed by the courts in Fiji emanated from the decision of this Court in **Naikelekelevesi –v- The State** (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in **Qurai –v- The State** (CAV 24 of 2014; 20 August 2015) at paragraph 48:*

> *"The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case."*

[40] In the same decision the Supreme Court at paragraph 49 then briefly described the methodology that is currently used in the courts in Fiji:

> *"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the (court) first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one) and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two) before deriving the sentence to be imposed."*

[41] The Supreme Court then observed in paragraph 51 that:

> *"The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability ___."*

[45] In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the

permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust.'

[46] However, when the final sentence is reviewed by the Court of Appeal one of the essential matters that would be considered is the range of sentences for money laundering. In **Naidu v State** [2020] FJCA 80; AAU0099.2018 (16 June 2020), I looked at this aspect in somewhat detail as the trial judge had remarked that the tariff for money laundering was not well settled in Fiji and it was difficult to lay down guidelines for sentencing in money laundering cases but the trial judge in the end had concluded that the tariff for money laundering should range from 05 years to 12 years of imprisonment. Having examined all the decisions cited by the trial judge, I found that not all judges in the High Court have applied the above range of sentences and the sentences imposed on accused in money laundering cases have varied considerably across a wide range depending on the individual cases. Therefore, I felt that it would be better for the state to seek a guideline judgment from the Court of Appeal on the appropriate tariff in money laundering cases to ensure that there is some degree of uniformity as remarked in ***Koroivuki.*** [See paragraph 33 of **Nadavulevu v State** [2020] FJCA 14; AAU119.20215, 115.2015, 129.2015 (27 February 2020) for similar comments]

'[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.'

[47] In the circumstances above discussed, it is difficult to state at this stage that the appellant has a reasonable prospect of success in appeal on the sentence appeal even if the full court is to hold that there is a sentencing error based on double counting in terms of the guidelines in **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim**

Nam Bae v The State Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011).

[48] The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal.** The aforesaid guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

[49] However, in order for the full court to set down appropriate sentencing guidelines in terms of applicable tariff regarding money laundering cases, if taken up by the respondent, I allow leave to appeal against sentence.

[50] However, it should be clear from the above discussion on several grounds of appeal against conviction and sentence that the appellant cannot be said to have a *'very high likelihood of success'* in her appeal at this stage and therefore, she is not entitled to bail pending appeal. No other exceptional circumstances including extremely adverse personal circumstances have been demonstrated on behalf of the appellant either. Therefore, it is futile to consider the rest of matters set out in section 17(3) of the Bail Act.

Order

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is allowed.
3. Bail pending appeal is refused.

.....

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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