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

CRIMINAL APPEAL NO.AAU 0099 of 2018
[High Court of Lautoka Criminal Case No. HAC 59 of 2013]

BETWEEN	:	**RAHUL RAJAN NAIDU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. G. O' Driscoll for the appellant**
	:	**Mr. S. Babitu for the Respondent**
Date of Hearing	:	**02 June 2020**
Date of Ruling	:	**16 June 2020**

RULING

[1] The appellant had been charged with two others in the High Court of Suva on six counts of money laundering contrary to section 69(2) (a) and (3) of the Proceeds of Crime Act, 1997 an amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012. The charges were as follows.

COUNT 1

Statement of Offence

***MONEY LAUNDERING**: Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act, 1997 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.*

Particulars of Offence

***RAHUL RAJAN NAIDU**, between the 14th day of July, 2011 and the 21st day of July, 2011 at Lautoka in the Western Division, engaged directly or indirectly in*

transactions involving $12,000.00 FJD that were the proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of criminal activity.

COUNT 2

Statement of Offence

MONEY LAUNDERING: *Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act, 1997 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.*

Particulars of Offence

RAHUL RAJAN NAIDU, *on the 1st day of August, 2011 at Lautoka in the Western Division, engaged directly or indirectly in transactions involving $890.00 FJD that were the proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of criminal activity.*

COUNT 3

Statement of Offence

MONEY LAUNDERING: *Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act, 1997 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.*

Particulars of Offence

RAHUL RAJAN NAIDU, *on the 1st day of August, 2011 at Lautoka in the Western Division, engaged directly or indirectly in transactions involving $500.00 FJD that were the proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of criminal activity.*

COUNT 4

Statement of Offence

MONEY LAUNDERING: *Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act, 1997 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.*

Particulars of Offence

RAHUL RAJAN NAIDU, *on the 1st day of August, 2011 at Lautoka in the Western Division, engaged directly or indirectly in transactions involving $145.00 FJD that were the proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of criminal activity.*

COUNT 5

Statement of Offence

MONEY LAUNDERING: *Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act, 1997 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.*

Particulars of Offence

AVENAI RANAMALO DANFORD, *between the 14th day of July, 2011 and the 21st day of August, 2011 at Lautoka in the Western Division, engaged directly or indirectly in transactions involving $12,000.00 FJD that were the proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of criminal activity.*

COUNT 6

Statement of Offence

MONEY LAUNDERING: *Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act, 1997 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.*

Particulars of Offence

RIMAKSHNI RANIGAL, *between the 14th day of July, 2011 and the 1st day of August, 2011 at Lautoka in the Western Division, engaged directly or indirectly in transactions involving $6,500.00 FJD that were the proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of criminal activity.*

[2] After full trial, on 29 August 2019 the assessors had expressed a unanimous opinion of guilty against the appellant on the first four counts. The learned High Court judge in the judgment delivered on 04 September 2018 had agreed with the assessors and convicted the appellant of the first four counts. He was sentenced on 18 September 2018 to 06 years and 09 months of imprisonment on all counts to run concurrently with a non-parole period of 05 years. The learned High Court judge had ordered the appellant as part of the sentence to pay $12,000/- to Westpac Bank by way of restitution in default of which the appellant would face a sentence of 06 more months of imprisonment.

[3] The appellant's solicitors had filed a timely notice of appeal on 16 October 2016 against conviction and sentence. They had later filed an application for bail pending appeal on 31 January 2019 and tendered written submissions on leave to appeal on 24 May 2019 and on bail pending appeal application on 24 January 2020. The State had tendered its written submissions on leave to appeal and bail pending appeal on 18 March 2020.

[4] The grounds of appeal are as follows.

Against conviction

1) *THAT the Learned Trial Judge erred in law and in fact in relying on and/or considering and/or taking into consideration in admissible and/or prejudicial evidence in finding the Appellant guilty.*

2) *THAT the Learned Trial Judge erred in law and in fact in not adequately/sufficiently/ referring/directing himself and the assessors on the circumstantial evidence that was relied by the State.*

3) *THAT the Learned Trial Judge's failure to adequately evaluate the evidence prior to returning a verdict of guilty as charged, and the failure of the Learned Trial Judge to independently assess the evidence before confirming the said verdict, have given rise to a grave and substantial miscarriage of justice.*

4) *THAT the Learned Trial Judge erred in law and in fact in not directing himself and or the Assessors to refer to any Summing Up the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.*

5) *THAT the Learned Trial Judge erred in law and in fact in not taking into consideration adequately that the action of the Appellant was not contrary to Law and further whether he had knowledge that the monies he sent overseas were tainted monies. Such failure to do so caused substantial miscarriage of justice.*

6) *THAT the Learned Trial Judge erred in law and in fact that taking too long to outline all the evidence in his summing up which was unfair, imbalanced, confusing and one sided and hence a substantial miscarriage of justice had occurred.*

7) *THAT the Learned Trial Judge erred in law and in fact in not adequately/sufficiently/referring/directing himself or the Assessors the Prosecution evidence against the Appellant was highly circumstantial which was not adequately supported by Prosecution evidence.*

8) *THAT the Learned Trial Judge erred in law and in fact in misdirecting and/or inadequately directing the Assessor on the Law as to circumstantial evidence and failure to do so caused substantial miscarriage of justice.*

9) *THAT the Learned Trial Judge erred in law and in fact when he did not reconsider before sentence that the Prosecution witness whose evidence the Learned Trial Judge relied on against the Appellant lied on oath and that the evidence that was provided by the Appellant's Counsel was not contradicted by the State and as such there was miscarriage of justice.*

10) *THAT the Learned Trial Judge erred and in fact in not ordering a retrial when the appellant's counsel had raised substantial material non-disclosure by the state, in particular, all the documents were taken by the Police which were favourable to the Appellant was not disclosed to the Defence and as such caused substantial miscarriage of justice.*

Against sentence

11) *THAT the Appellant relies on Grounds 1 to 10 stated herein above.*

12) *THAT the Appellant's appeal against sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case.*

13) *THAT the Learned Trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration.*

14) *THAT the Learned Trial Judge erred in law and in fact in passing sentence of imprisonment was disproportionately severe punishment* ***Contrary to Section 25 of the Constitution of Fiji (1998) (Section 11(1) of the 2013 Constitution of Fiji).***

15) *THAT the Learned Trial Judge erred in law and in fact in ordering the Appellant to pay restitution as well as imposing custodial sentence.*

16) *THAT the Learned Trial Judge erred in law and in fact in not taking into Consideration adequately the provisions of the* ***Sentencing and Penalties Decree 2009*** *when he passed the sentence against the Appellant.*

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

'4.This case is a case where the three persons were involved in a sophisticated online scam having international consequences. Laurel Vaurasi the principal of Shekinah Law and two others namely Sailasa and Alvish, the victims in this case, maintained their bank accounts with Westpac Bank. All accounts had online banking facility. After hacking into their electronic banking facility, unauthorized money transfers were made online to two separate Westpac Bank accounts. The transferred stolen money had come into the account of the 2nd Accused, Avenai Danford and that of another person by the name of Avitesh Chand. The money deposited into those two accounts was withdrawn on the instructions of the 1st Accused Rahul Rajan ***Naidu.*** *Avenai Danford, the 2nd Accused, having withdrawn the stolen money from his account gave it to the 1st Accused. 1st Accused, with the assistance of the third Accused, Rimakshni, a teller at the Western Union, then transferred the stolen money out of the country through Western Union, breaching protocols and procedures of Western Union. The 1st Accused coordinated all illegal transaction as the main culprit or money mule.*

[6] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and against only with leave of court. The threshold test applicable is **'reasonable prospect of success'** to determine whether leave to appeal should be granted (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). This threshold is the same with timely leave to appeal applications against conviction as well as sentence.

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.*
>
> *[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 matters 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

[18] The notice of appeal and written submissions have been filed on behalf of the appellant by Messrs Iqbal Khan & Associates and Mr. Iqbal Khan with two other lawyers had appeared for the 03rd accused in the High Court whereas the appellant had been defended by Mr. Mark Anthony.

[19] At the hearing Mr. G. O' Driscoll appearing for the appellant basically relied on the written submissions and made only some superficial oral submissions and was seen taking instructions from the appellant to make his submissions.

[20] First and foremost, I must mention that the grounds of appeal lack sufficient particulars and the two sets of written submissions filed by Messrs Iqbal Khan & Associates do not elaborate or particularise them either other than setting out the law relating to leave to appeal and bail pending appeal.

[21] Gounder J. who faced a similar situation in **Rokodreu v State** [2016] FJCA 102; AAU0139.2014 (5 August 2016) remarked as follows.

> *'[3] The notice of appeal and the grounds of appeal were filed by the appellant's counsel of choice, Iqbal Khan and Associates. The written submissions on the question of leave were also filed by Iqbal Khan and Associates. At the leave hearing, Mr. Fa appeared on instructions and relied upon the written submissions filed by Iqbal Khan and Associates. Mr. Fa made no oral submissions.*
>
> *[4] I have read the appellant's written submissions. In his submission, apart from reciting case law, counsel for the appellant made no submissions on the grounds of appeal. The grounds of appeal are vague and lack details of the alleged errors. The Notice states that full particulars will be provided upon receipt of the full court record. This is not a reasonable excuse for not complying with the rules requiring the grounds of appeal to be drafted with reasonable particulars so that the opposing party can effectively respond to them.*
>
> *[5] In the present case, the State was not able to effectively respond to the grounds because they were vague and lack details. It appears that the alleged errors concern directions in the summing up. A copy of the summing up, the judgment and the sentencing remarks were made available to the appellant after the conclusion of the trial. In these circumstances, the appellant cannot be excused for not providing better particulars of the alleged complaints in the summing up. Without reasonable details of the alleged errors, this Court cannot assess whether this appeal is arguable.*

[22] I was confronted with similar grounds of appeal, which had been so broadly formulated that neither the court nor the respondent could effectively deal with them, in **Rauge v State** [2020] FJCA 43; AAU61.2016 (21 April 2020) and **Kishore v State** AAU121 of 2017 (05 June 2020) where I quoted a passage from **Gonevou v State** [2020] FJCA 21; AAU068.2015 (27 February 2020). In ***Gonevou*** the Court of Appeal reiterated the requirement of raising precise and specific grounds of appeal and frowned upon the practice of counsel and litigants in drafting omnibus, all-encompassing and unfocused grounds of appeal. The Court of Appeal said

> *'[10] Before proceeding further, it would be pertinent to briefly make some comments on the aspect of drafting grounds of appeal, for attempting to argue all miscellaneous matters under such omnibus grounds of appeal is an unhealthy practice which is more often than not results in a waste of valuable judicial time and should be discouraged.'*

[23] No court is expected to embark on a voyage of discovery to find out why an appellant is complaining against an adverse decision, be it conviction or sentence. It is the sole responsibility of the appellant or his pleader to air any grievance clearly, succinctly and without prolixity for the court and the opposing party to comprehend and respond. Grounds of appeal lacking in these qualities will do no service or favour to the appellant in the end.

[24] Handicapped as I am due to the aforesaid reasons, I shall now attempt to consider the grounds of appeal.

01st ground of appeal

[25] The appellant has not specified what inadmissible or prejudicial evidence the learned trial judge had taken onto account in finding the appellant guilty.

02nd ground of appeal

[26] The appellant has not identified the circumstantial evidence allegedly inadequately directed upon by the learned trial judge.

03rd ground of appeal

[27] The appellant has not elaborated as to why he contends that the learned trial judge had not adequately evaluated and independently assessed evidence in the judgment in agreeing with the assessors and convicting him. The summing-up which too is part and parcel of the judgment and the judgment itself contain a detailed account of all the evidence.

04rd ground of appeal

[28] The appellant has failed to highlight what possible defences were available on evidence for the learned trial judge to direct the assessor. It appears from the judgment that the only dispute had been on the fault element. The learned trial judge had stated:

> *'6.There is no dispute about the identification of each accused person. In regards to the second element, namely that the accused directly or indirectly engaged in a transaction involving proceeds of crime, there is also no dispute that each accused person was engaged directly or indirectly in different transactions in sending money overseas*
>
> *'8.The only dispute in this case is with regards to the last element namely that each accused knew or ought reasonably to have known that the money was derived or realized directly or indirectly from some form of unlawful activity.*

05th ground of appeal

[29] The learned trial judge had clearly dealt with the issue of knowledge on the part of the appellant that the money had been tainted in the judgment.

06th ground of appeal

[30] The appellant's complaint of the learned trial judge having taken too long to address the assessors on evidence in the summing-up has to be considered having the nature of the offence of money laundering which is not commonly prevalent in Fiji in mind, in that the assessors had to be informed of the elements of the offence carefully. In any event I do not think that there would have been any confusion in the minds of the

assessors on the available evidence. The summing-up appears to have been delivered in a balanced and fair manner.

07th and 08th ground of appeal

[31] Contrary to the appellant's complaint, the learned trial judge in the summing-up and in the judgment (for example paragraph 13) drawn attention of the assessors and himself to available circumstantial evidence acknowledging that the case against the appellant was based on circumstantial evidence.

09th ground of appeal

[32] The basis of this ground is not clear at all to me as it has not been elaborated. However, some light is shed by the single judge ruling in his co-appellant's appeal **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019) where Chandra J. had stated on similar grounds of appeal as follows.

> *'[26] In grounds 9 and 10 the Appellant has taken up the position that the learned Trial Judge had erred in law and in fact when he did not reconsider before sentence that the Prosecution witness whose evidence the learned Judge relied on had lied on oath and that the evidence that was provided by the Appellant's Counsel was not contradicted by the State and as such there was a miscarriage of justice.*
>
> *[27] The judgment was delivered by the learned trial Judge on 4th September 2018. When the case had been adjourned for the 10th of September 2018 for sentencing submissions and mitigation. Counsel for the Appellant had filed a notice of motion supported by an affidavit seeking a say of the proceedings and not to proceed with sentencing until further investigation and that the current trial be declared a mistrial.*
>
> *[28] This was an unusual application that was made by Counsel for the Appellant, which was made after the judgment was delivered. However, the learned Trial Judge had considered the application and in a written Ruling given on 10th September 2018 dismissed the application as there was no basis for such an application.*
>
> *[29] It is based on this Ruling regarding the application made by Counsel for the Appellant that these two grounds of appeal 9 and 10 have been formulated. There is no merit in these grounds and are not arguable.*

10th ground of appeal

[33] No particulars have been provided to even attempt to understand the basis of this complaint. In any event, the appellant could make an application to lead fresh evidence before the full court provided he could satisfy court that all legal requirements for such an application can be met (see **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017).

Against sentence

11th, 13th, 12th and 16th grounds of appeal

[34] These grounds are too general without any elaboration and cannot be considered.

12th ground of appeal

[35] The appellant argues that the sentence is manifestly harsh and excessive and wrong in principal. He, however, has not substantiated as to why he contends that the sentence of 06 years and 09 months of imprisonment with a non-parole period of 05 years is harsh and excessive.

[36] However, I gather from the sentencing order of the learned High Court judge the following which I quote verbatim.

> *'5.The maximum sentence for Money Laundering is 20 years' imprisonment or fine not exceeding $ 120,000.00, or both if the offender is a natural person. Prescribed maximum sentence indicates that Money Laundering is a serious offence.*
>
> *6.It appears from a review of decided cases and current sentencing practice, the tariff for the offence of Money Laundering is not well settled in our jurisdiction. It has to be appreciated that it is not feasible to lay down guidelines for sentence of Money Laundering offences given the wide range of culpability factors that may involve in each individual case.'*
>
> *'22.After a review of case law in Fiji, I conclude that the tariff for Money Laundering should range from 5 years to 12 years imprisonment. As in any other case, the final sentence will depend on the aggravating and the mitigating circumstances of each individual case and the appropriate sentence*

may well fall below or above the set tariff depending on culpability and harm factors.'

[37] Thus, the learned trial judge having stated that it is not feasible to lay down guidelines for sentence in money laundering offences, has in fact set a sentencing tariff in the end. It appears that the learned High Court judge had adopted the position that it is not feasible to lay down guidelines for sentence of money laundering offences given the wide range of culpability factors that may involve in each individual case from the Hong-Kong decisions in **HKSAR v Javid Kamran** (CACC 400/2004) as quoted in **State v Stephen** HAC 088 0f 2010 (12 April 2012).

[38] However, as remarked by the learned trial judge it is clear from the sentencing order itself that the tariff for the offence of money laundering is not well settled in Fiji which may have prompted him to set a range of the appropriate sentences. The previous cases examined by the learned trial judge are as follows.

[39] In **O'Keefe v State** [2007] FJCA 34; AAU0029.2007 [25 June 2007] where the value of proceeds of crime was $90,930.78 out of which only $ 1500.00 had been recovered the appellant had entered a plea of guilty in the Magistrates Court to several counts of forgery and false pretences for which he was sentenced to concurrent terms of 02 years and then also one offence of money laundering for which he was sentenced to five years of imprisonment. The Court of Appeal quashed the sentence of five years imprisonment on money laundering and substituted a sentence of 3 ½ years of imprisonment.

[40] ***O'Keele*** was cited in **State v Sinha** [2010] FJHC 480 (29 October 2010) where the accused had withdrawn $187,333.57 out of proceeds of crime amounting to $272,291.57 and $85,000/- had been restored. Goundar J selected a starting point of 4 years and after adjusting for aggravating and mitigating circumstances and the period of remand imposed a final concurrent sentence of 2 years imprisonment on each count including the charge on money laundering with a non- parole period of 18 months.

[41] In **State v Stephen** HAC 088 0f 2010 (12 April 2012) where the laundered amount was about $39,000.00 Madigan J sentenced the accused to 07 years of imprisonment to be served concurrently for 2 counts of money laundering referring to two decisions namely **HKSAR v Javid Kamran** (CACC 400/2004) and **Xu Xia-Li** *(CACC 395/2003)* from Hong Kong.

[42] Madigan J. following ***Xu Xia-Li*** had accepted in ***Stephen*** that in sentencing for an offence of money laundering the paramount consideration is the amount of money laundered over and above the nature of the crime generating the funds so laundered and disagreed with ***O'Keele*** to the extent that the Court of Appeal had purportedly stated in ***O'Keele*** that sentences for money laundering if charged in conjunction with the generating offence(s) must be subordinate to those ancillary criminal offences. Madigan J. had suggested that in light of authority from other jurisdictions the generating crimes are irrelevant to the crime of money laundering and it may be time for the Court of Appeal to revisit its decision in *O'Keefe*. However, ***Xu Xia-Li*** does not seem to suggest that the generating crimes are totally irrelevant to sentencing in crimes of money laundering and indeed recommended that that the accused's knowledge that the money had been received from a serious crime would be an aggravating feature to be considered in sentencing. Madigan J. had suggested in ***Stephen*** that the offence of money laundering charged alone may attract sentences in the range of eight to twelve years.

[43] Once again in **State v Shyam** [2013] FJHC 529; HAC146.2010 (14 October 2013) where the amount laundered stood at $350,000/- Madigan J referring to **Monika Aurora HAC 125 of 2007** and **Johnny Albert Stephen HAC 88 of 2010** identified the tariff for money laundering as between 05 to 12 years imprisonment, then took a starting point of eight years and finally imposed a sentence of 12 years imprisonment with a 10 year non-parole period.

[44] In **State v Singh** [2015] FJHC 865; HAC28.2012 (12 November 2015) where the accused was charged for obtaining money from a FIRCA cheque in the sum of $ 47,734.58 but early stop payment order prevented him from withdrawing any money

from the account the High Court sentenced the offender to 4 years imprisonment with a non-parole period of one year.

[45] The High Court in **State v Lata** [2017] FJHC 927; HAC118.2014 (7 December 2017) where a sum of $285,000.00 had been stolen by the accused's ex-husband who was responsible for FSC payments and the accused had later returned $169,640.00 to the FSC, sentenced the accused for 05 years with a non-parole period of 2 years.

[46] Neither party has brought to my attention any other cases decided in the recent past where the matter of sentence for money laundering had been discussed. Thus, in each of the above cases the accused have been charged for money laundering with or without other offences ('generating crimes') and in some cases parts of laundered money had been returned later on. In addition, there have been a myriad of aggravating and mitigating features. All of these factors have contributed to different sentences.

[47] However, as remarked by the learned trial judge in this case the tariff for the offence of money laundering does not seem to be still well settled in Fiji. However, I do not think that it is not possible to lay down some guidelines (meaning sentencing tariff) for sentencing in money laundering offences purely because of the presence of a wide range of culpability factors in each individual case. Setting guidelines does not mean an absolute limitation of culpability factors that should be taken into account in a particular case as aggravating factors. The same applies to mitigating factors as well. Obviously, one cannot come up with an exhaustive list of such features. They can evolve all the time. Both aggravating and mitigating factors can be considered within an accepted tariff for the time being. Tariff itself can evolve over a period of time.

[48] At this stage I cannot gather due to lack of assistance in that regard from both counsel as to whether the sentencing tariff of 05 to 12 years set by the learned trial judge is widely accepted and implemented among all trial courts in Fiji.

[49] Therefore, I am of the view that it is best that the Court of Appeal or the Supreme Court reconsiders this aspect of sentencing for money laundering offences in the future with a view to come up with a sentencing tariff to ensure certainty and uniformity in the current context and the State is advised to take up it at the first available opportunity after following required procedural steps for seeking a guideline judgment.

[50] Since this is a question of law no leave to appeal is required. However, as a matter of formality I allow leave to appeal on this issue for this matter to go before the full court.

15th ground of appeal

[51] The appellant has not shown why the learned trial judge in law could not have imposed a custodial sentence and an order for restitution failing which a default sentence simultaneously.

[52] None of the grounds of appeal has any reasonable prospect of success at this stage. The appellant has not demonstrated any exceptional circumstances to consider bail pending appeal independent of the above considerations either.

[53] However, leave to appeal against sentence is allowed as a matter of formality as aforesaid for the reasons set out above and bail pending appeal is refused.

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