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

CRIMINAL APPEAL NO. AAU 035 of 2016
AAU 036 of 2016
[In the High Court at Suva Case No. HAC 251 of 2013S]

BETWEEN	:	**JOSEFA SAQANAVERE** **TUIMOALA RAOGO**
		Appellants
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, RJA** **Gamalath, JA** **Bandara, JA**
Counsel	:	**1st Appellant in person** **Mr. M. Fesaitu with Ms. S. Daunivesi for the 2nd Appellant** **Ms. J. Prasad for the Respondent**
Date of Hearing	:	**06 September 2022**
Date of Judgment	:	**29 September 2022**

JUDGMENT

Prematilaka, RJA

[1] I have had the benefit of reading in draft the judgment of my brother Bandara, JA. While I agree with the proposed orders, I wish to place some of my own observations.

[2] The appeal against conviction has been allowed by my brother Bandara, JA on the single ground of appeal urged by the Legal Aid Commission on behalf of the 02nd appellant.

[3] In **Arora v State** [2017] FJSC 24; CAV0033.2016 (6 October 2017) the Supreme Court declared (though not raised by counsel) that the prosecution should not have proceeded by way of one count alleging some 36 incidents of money laundering (amounting to $472,466.47). In other words it was held that a 'rolled up' charge incorporating many separate acts of the alleged offending in one specimen or representative count is not permitted for money laundering. The charge as preferred in ***Arora*** was as follows:

> *'**Statement of Offence***
>
> ***Money Laundering**: Contrary to Section 69 (3) (b) of the Proceeds of Crime Act 1997*
>
> ***Particulars of Offence***
>
> ***MONICA ARORA**, and Others between 9th December 2005 to 11th may 2007, at Nabua in the Central Division, laundered money by disposing $472,466.47, being proceeds of crime, for her and others benefit, which she ought to reasonably know, derived indirectly from the falsification of Vinod Patel Company's books of account.(emphasis added)'*

[4] Nevertheless, in ***Arora*** the unlawful activity had been described as '*the falsification of Vinod Patel Company's books of account'* not as *'some form of unlawful activity'* as in the present case.

[5] The State may perhaps be excused for not preferring separate charges in respect of each of the transactions in the current case (possibly relying on section 70(2) of the Criminal Procedure Act, 2009) as the trial had been concluded and the appellants had been convicted by 15 March 2016 whereas ***Arora*** was decided on 6 October 2017. However, there is no justifiable reason for not describing the unlawful activity in the charges against the appellants as had been done in ***Arora.***

[6] In **Shyam v State** [2019] FJCA 198; AAU103.2017 (3 October 2019) the State had preferred a single charge against the accused as follows:

> '*Robyn Surya Subha Shyam between the 01st day of March 2008 and the 30th day of September 2010 at Suva in the Central division engaged directly or indirectly in*

*transactions involving the sum of $349,870.63 held in bank accounts **specified in Schedule A**, that is the proceeds of crime, knowing or ought reasonably to have known, that the said sum of money had been derived or realized, directly, from some form of unlawful activity. (emphasis added)*

[7] Schedule A had given details of the names of the account holder, the names of the bank, the account numbers and the amounts withdrawn. There were in all 19 account holders and 19 bank accounts in three banks.

[8] The Court of Appeal dismissed the appeal in ***Shyam*** on the basis that the count could not be classified as a 'rolled up' charge and in any event the objection based on ***Arora*** had been raised 05 years after the sentencing and the alleged defect, if any had not caused any prejudice to the appellant.

[9] The Supreme Court in **Shyam v The State** CAV0024 of 2019 (26 August 2022) affirming ***Arora*** held that the charge is defective in that the 'rolled up' charge was procedurally flawed in terms of section 59 and 61(7) of the Criminal Procedure Act and section 70(2) could not be availed of for the prosecution of money laundering. Having noted that unlike in ***Arora*** there was a schedule attached to the information in ***Shyam,*** it was held that the defect in the charge had not caused prejudice to the petitioner in conducting the defense and in ***Arora*** the appellant was acquitted as one of the elements of money laundering had not been proved and not because of the defective 'rolled up' charge. Thus, though the Supreme Court granted special leave on the ground of 'defective charge', nevertheless proceeded to dismiss the appeal and affirmed the conviction and sentence. In the process, the Supreme Court remarked that the sentencing tariff for money laundering is 'as identified from a few cases' is in the range of 05-12 years.

[10] The Supreme Court in ***Shyam*** in the circumstances of the case did not consider the use of the words *'directly or indirectly, knowing or ought reasonably to have known, derived or realized, or directly or indirectly'* found in the charge to have led to any confusion in the petitioner or counsel.

[11] However, in ***Shyam*** the Supreme Court did not consider whether the use of the bare words '*some form of unlawful activity'* without describing what the unlawful activity was as in the case of ***Arora*** was sufficient compliance with the procedural requirement as to details of a charge under the Criminal Procedure Act, 2009. The Supreme Court did not have to consider that aspect as there was no complaint to that effect by the petitioner. In ***Arora*** that issue never arose as the charge in fact described the unlawful activity.

[12] In the current appeal, neither the appellants nor the counsel had objected to the charge as required under section 214 of the Criminal Procedure Act, 2009. It had been raised in appeal belatedly on behalf of the 02nd appellant by the Legal Aid Commission in its written submissions filed on 14 September 2022 after the hearing where this issue was discussed by the Bench with the counsel on the basis that 'unlawful activity' had not been described at all in the charge. If there was any confusion or difficulty facing the charge because the charges did not particularize the 'unlawful activity' that mater could and should have been raised at the appropriate time in the High Court. Therefore, no acquittal could and should be ordered on the basis of the 'defective charge'.

[13] However, I am in agreement with my brother Bandara, JA that the conviction should not be allowed to stand *inter alia* because in addition to the above defect complained of by the 02nd appellant, the State like in ***Shyam*** had not at least provided a schedule attached to the indictment of all the transactions included in the 'rolled up' charges to give sufficient details to the appellants of the charges they were to meet.

[14] In **Abourizk and another** CAV 0012 of 2019 (25 August 2022) the Supreme Court at paragraph 12 had remarked without, however, making an authoritative pronouncement that section 23 (2) of the Court of Appeal Act gives two options to court while allowing an appeal namely (i) quash the conviction and direct a judgment and verdict of acquittal to be entered, or (ii) if the interests of justice so require, order a new trial.

[15] However, it is clear that without quashing an existing conviction a new trial cannot be ordered. Section 14(1)(b) of the Constitution would be an absolute bar for an accused to be

tried again with an existing conviction for the same offence. Therefore, in my view, if an appeal against conviction is allowed, the Court of Appeal under section 23 (2) of the Court of Appeal Act shall quash the conviction and either (i) direct a judgment and verdict of acquittal to be entered or (ii) if the interests of justice so require, order a new trial. No exceptional circumstances need to be present in order to order a new trial. However, the decision to order a new trial should be done considering the judicial guidelines already established.

[16] In **Laojindamanee v State** [2016] FJCA 137; AAU0044.2013 (30 September 2016) the Court of Appeal laid down some guidance for a retrial to be ordered as follows:

> *'[103] The power to order a retrial is granted by section 23 (2) of the Court of Appeal Act. A retrial should only be ordered if the interests of justice so require. In Au Pui-kuen v Attorney-General of Hong Kong [1980] AC 351, the Privy Council said that the interests of justice are not confined to the interests of either the prosecution or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be brought to justice. Other relevant considerations are the strength of evidence against an accused, the likelihood of a conviction being obtained on a new trial and any identifiable prejudice to an accused whilst awaiting a retrial. A retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (Azamatula v State unreported Cr App No AAU0060 of 2006S: 14 November 2008).'*

[17] Having considered all the circumstances, I am of the view that it is in the interest of justice to order a new trial in this appeal. As Bandara, JA has adverted to there is strong evidence against the appellants. Money laundering is a serious offence. However, since the basis on which the appeal is allowed is the issues relating to the directions in the summing-up and 'rolled up' charge and the details given therein on 'unlawful activity' (neither was taken up at the trial stage), I think that it is nothing but reasonable for both parties that the State is allowed to rectify the defect of a single 'rolled up' charge and present separate charges for each and every transaction with sufficient details along with the unlawful activity/activities so that the appellants have full knowledge, understanding and notice of the case to be met.

Gamalath, JA

[18] I agree with the draft judgment of Bandara, JA.

Bandara, JA

[19] The two Appellants along with the 3rd Appellant Savenaca Batibawa (who is now deceased) were charged with 5 counts of Money Laundering contrary to section 69 (2) of the Proceeds of Crime Act 1997.

[20] The information read 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 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.*
>
> ***Particulars of Offence***
>
> ***JOSEFA SAQANAVERE and TUIMOALA RAOGO*** *with another between the 4th day of May, 2010 and the 3rd day of September, 2012 at Suva in the Central Division, engaged directly or indirectly in transactions involving proceeds of crime amounting to a total sum of $214,736.62 which was channeled through* ***ANZ Bank Account No. 10089840*** *knowing or they ought to have reasonably known that the money is derived directly or indirectly 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 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.*
>
> ***Particulars of Offence***
>
> ***JOSEFA SAQANAVERE and TUIMOALA RAOGO*** *with another between the 31st day of December, 2009 to the 2nd day of August 2012, at Suva in the Central*

*Division, engaged directly or indirectly in transactions involving proceeds of crime amounting to a total sum of $94,387.88 which was channeled through **BSP Bank Account No. 6945606** knowing or they ought to have reasonably known that the money is derived directly or indirectly 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 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.*

Particulars of Offence

JOSEFA SAQANAVERE and SAVENACA BATIBAWA *with another between the 1st day of July 2010 and the 3rd day of September 2012, at Suva in the Central Division, engaged directly or indirectly in transactions involving proceeds of crime amounting to a total sum of $239,407.20 which was channeled through **ANZ Bank Account No. 371087** knowing or they ought to have reasonably known that the money is derived directly or indirectly from some form of unlawful activity.*

FOURTH COUNT
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

JOSEFA SAQANAVERE and SAVENACA BATIBAWA *with another between the 3rd day of October 2011 and the 2nd day of August 2012, at Suva in the Central Division, engaged directly or indirectly in transactions involving proceeds of crime amounting to a total sum of $84,959.46 which was channeled through **BSP Bank Account No. 7703198** knowing or they ought to have reasonably known that the money is derived directly or indirectly from some form of unlawful activity.*

FIFTH COUNT
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

> ***JOSEFA SAQANAVERE and SAVENACA BATIBAWA*** *with another on the 2nd day of September 2011, at Suva in the Central Division, engaged directly or indirectly in transactions involving proceeds of crime amounting to a total sum of $5411.10 which was channeled through* ***BSP Bank Account No. 1242892*** *knowing or they ought to have reasonably known that the money is derived directly or indirectly from some form of unlawful activity.'*

[21] Upon their arraignment the Appellants pleaded not guilty and the matter proceeded to trial. At the conclusion, the assessors unanimously opined that the Appellants (and the 3rd Appellant now deceased) were guilty of all 5 counts preferred against them. The Learned High Court Judge having concurred with the assessors' opinion convicted the Appellants on all 5 counts on the 15th of March 2016.

[22] On the 18th of March 2018 each Appellant was sentenced to 13 years imprisonment with a non-parole period of 12 years. This appeal arises from the said conviction and sentence.

Facts of the Case

[23] At the time in question between 2009 and 2012 the 1st Appellant was heading the Trust Unit of the iTaukei Land Trust Board (TLTB) in the capacity of the Acting Accountant Landowners Affairs (ALA). Six distribution clerks worked under the 1st Appellant.

[24] The TLTB was a statutory trust originally created by statute. It was assigned with the task of controlling and administering all native lands for the benefit of iTaukei landowners. TLTB's duties and functions consisted of leasing out native lands, collecting the lease money and distribute the same to iTaukei landowners. The function of distributing lease money to iTaukei landowners was assigned to the specialized "Trust Unit".

[25] Among the staff of the "Trust Unit" there were six administration clerks commonly known as the "Distribution Clerks". They were entrusted with the task of identifying and verifying the iTaukei landowners unit, the landowners' unit bank accounts and other important

information and feed them into the TLTB Landsoft computer system. Accountant Landowners Affair (ALA) supervised the duties of the Distribution Clerks.

[26] Generally iTaukei Landowners lease money was paid on a monthly basis, and for the purpose the ALA calls the TLTB Department to produce a distribution list for the landowners lease money which the ALA sends by e-mail. The ALA submits information received to his supervisor the Manger Finance for checking, verification and approval.

[27] Once approved, the Manager Finance sends the distribution list to ALA who submits the same to the bank, which upon the receipt of the same debits the TLTB account and pays the landowners their lease money.

[28] However, sometimes landowners make requests for their lease money to be paid earlier than the computer programmed (monthly basis) payment dates. Such requests will have to be paid with TLTB cheques. Such cheques are presented to the ALA Manager Finance for the purposes of checking, verification and approval.

[29] At the time in question the 1st Appellant was a substantive distribution clerk at the TLTB's Trust Unit and also was the Acting Accountant Landowners Affairs. In the capacity of a substantive distribution clerk he was assigned the role of identifying and verifying the name of Landowning Units, their bank accounts and other vital data that should be fed into the TLTB Landsoft computer system. In his capacity as the Acting Accountant Landowners Affairs he was assigned with six distribution clerks under him, whom he should supervise in ensuring that iTaukei landowners receive their lease money through the Landsoft system on a monthly basis or via the cheque payment system when required.

[30] A person by the name of Tukana Levaci worked under the 1st Appellant as a distribution clerk who happened to be the first cousin of the 2nd Appellant. When the police initiated investigation into the instant case in 2012, Levaci fled Fiji.

[31] It was the Prosecution's case that:

1) the 1st Appellant, the 2nd Appellant and Levaci colluded in defrauding the TLTB and iTaukei landowners of $214,736.62 from 4th May 2010 to 3rd September 2012 (as per count 1).

2) that they defrauded the TLTB and iTaukei landowners of $94,387.88 between 31st December 2009 and 2nd August 2012 (as per count 2).

[32] The 1st Appellant and Levaci created false data within the Landsoft payment system and the TLTB cheque payment system, and ensured the passage of lease money gets safely diverted to the 2nd Appellant's bank account mentioned in Count No. 1 and 2. Thereafter, they appropriated the stolen money for themselves. Counts No. 3, 4 and 5 reflects a repetition of the above *modus operandi* of counts 1 and 2. However, the money pertaining to the former two counts were diverted to the 3rd Appellant's bank account mentioned in Count No. 5. The money so stolen were appropriated by the Appellants for themselves.

[33] It was the stance of the prosecution that at all material times all Appellants along with Levaci knew or ought to have reasonably known that the money they received were proceeds of crime and stolen from the TLTB and the iTaukei landowners. After the close of the prosecution case, the 1st Appellant chose to give a sworn statement and proceeded to call three witnesses on his behalf. The 2nd and 3rd Appellants gave sworn evidence and did not call any other evidence.

[34] When the Appellants were called to make their defences the 1st Appellant on oath denied the allegations against him, admitted having worked with Tukana Levaci and stated that he was unaware of the alleged fraudulent activities. He denied having been the master-mind of these fraudulent activities. He further denied having committed any fraud or stealing money from TLTB or the iTaukei landowners.

[35] The 2nd Appellant admitted having received the money mentioned in Count No. 1 and 2 into his bank account. His stance was that Levaci asked him to provide a bank account in order to facilitate the landowners to receive their lease money. He stated that when he withdrew the money and handed them over to Levaci, he had not been aware that the monies were proceeds of crime until Levaci told him in late 2012.

[36] The 3rd Appellant who is deceased now had admitted having received the monies mentioned in Count No. 3 and 4 in his brother's bank accounts. He too had stated that Levaci asked him to use his brother's bank accounts to assist landowners to receive their lease money. In relation to Count No. 5 he also admitted receiving the money mentioned therein in his bank account, without knowing that they were proceeds of crime.

[37] At the trial the defence had attacked the prosecution case on the basis that:

1) there was no direct evidence to link the Appellants to the alleged money laundering allegations as mentioned in the information.

2) there were no eye witnesses produced by the Prosecution to connect the Appellants to the alleged crimes.

3) even in their police caution interview statements (which were tendered in evidence) reflected no confessions to the alleged crimes by the Appellants.

[38] Having regard to this procedure, the Learned High Court Judge in paragraph 36 of the Summing Up states that:

> *"36. According to the prosecution, if the staff at the Trust Unit worked diligently and honestly, payment of landowners' lease money via the TLTB Landsoft computer system and via the TLTB cheque system would work normally and correctly. However, if the staff at the "Trust Unit" begin to "flout the system" and steal the landowners' lease money by fraudulent means, than this would give birth to the crimes of "money laundering".*"

[39] The Trust Unit was under the leadership of the Accountant Landowners Affairs (ALA) and at the time in question it was the 1st Appellant who held that position. Working under him there were six Distribution Clerks and Tukana Levaci was one of them. The latter was the first cousin of the 2nd Appellant. It was the case of the prosecution that under the guidance and approval of the 1st Appellant as the ALA, Tukana Levaci and the 2nd Appellant colluded in stealing $309,124 of the lease money from TLTB (as per count 1 and 2). The 2nd Appellant provided two bank accounts namely ANZ Bank Account No.10089840 and BSP Bank Account No.6945606, to Levaci. The 1st Appellant and Levaci then fraudulently stole the above money from TLTB and deposited the same in the 2nd Appellant's bank account mentioned above.

[40] Prosecution Exhibit No.7 reflects 43 such transactions demonstrating a total sum of $214, 736.62, stolen by the 1st and 2nd Appellants and Levaci at the material time. The three of them had jointly assisted each other in tampering with the Landsoft system of electronic payment of lease money, prepared fraudulent TLTB cheques and diverted the stolen money to the bank accounts that belonged to the 2nd Appellant.

[41] The fraudulent cheques marked as Prosecution Exhibit No. 42,18,12,19,40,41,49, 50,6,7,38,39,36,37,9,17,24,34,35,32,33,51 and 52 consisted of such cheques. Electronic transfer of funds from TLTB bank account to the 2nd Appellant's bank accounts were commonly done by using the 1st Appellant's and Levaci's computer usernames. Having regard to the above fraudulent transactions prosecution claimed, that the 1st and 2nd Appellants and Levaci knew or ought reasonably have known that the money they were dealing with were proceeds of crime.

[42] The prosecution has further placed evidence to show that the above *modus operandi* had been used in carrying out the fraudulent transactions that formed the subject matter of Count No.2 covering 22 such transactions. Money from TLTB bank account was paid to the 2nd Appellant's bank account via fraudulent electronic transfers and fraudulent TLTB cheques. The evidence led by the prosecution shows that operating from TLTB Trust Unit, the 1st Appellant and Levaci had undermined the Landsoft system and created fraudulent

cheques to ensure that TLTB money went to 2nd Appellant's bank accounts which were subsequently withdrawn by the latter and shared with the others.

[43] The fraudulent cheques led in evidence marked as Exhibits No.15, 22, 45,46,13,20, 10,11,43,44,14,21,47 and 48 pertaining to the subject matter of Count No.2 involved $55,717.83. As reflected in the previous transactions, in the instance ones too, when effecting electronic transfer of funds from TLTB Accounts to the 2nd Appellants bank accounts, computer user ID's of the 1st Appellant and Levaci's had been often used.

[44] The same *modus operandi* mentioned above had been used by the 1st Appellant, the 3rd Appellant and Levaci in stealing TLTB trust money in relation to Counts No. 3, 4 and 5. It was the duty of the 1st Appellant as the Acting ALA to vet payments made via electronic transfers or TLTB cheque payments during the material time. The 3rd Appellant aided and abetted by providing his brother's two bank accounts to Levaci to store the stolen TLTB trust money. Count 3 of the information involves 27 fraudulent transactions. Normally the payee in the cheque butt is the same as the payee in the cheques.

[45] However, in relation to the cheques marked as prosecution Exhibit No. 28, 29,16,23,30 and 31, the payee mentioned in the cheque butt and the payee mentioned in the cheque are different. According to the prosecution this had been the common feature in relation to all the TLTB cheque payments forming the subject matter of all counts. This was abnormal and demonstrates that those responsible for preparation and vetting the cheques knew or ought to have reasonably known that they were dealing with proceeds of crime.

[46] In respect of the remaining 24 electronic transactions which diverted monies from TLTB bank accounts to the 3rd Appellant's brother's bank accounts, the 1st Appellant's computer user ID had been widely used. Having tampered with the landowners bank accounts, monies were diverted to the 3rd Appellant's brother's bank accounts. The latter (who was a beggar) maintained two different bank accounts under two names.

[47] In stealing landowners lease money which were the subject matter of count 4 the same *modus operandi* had been used by the 1st Appellant, the 3rd Appellant and Levaci. Accordingly 11 transactions had been done via electronic transfers from TLTB bank accounts to 3rd Appellant's brother's bank accounts involving a total sum of $84,959.46.

[48] There again TLTB Landsoft computer system had been tampered with whilst diverting lease money from landowners' bank accounts to 3rd Appellant's brother's bank accounts. For the latter fraudulent transactions 1st Appellant's computer user ID had been used to tamper with Landsoft data to divert funds to 3rd Appellant's brother's accounts.

[49] Thus, the 3rd Appellant who worked for the TLTB as an administrative clerk had clearly assisted the 1st Appellant and Levaci to carry out the fraudulent transactions in question. Having regard to the above, the prosecution intends to show that the 1st Appellant and 3rd Appellant knew or ought to have reasonably known that they were dealing with proceeds of crime. Count No. 5 pertains to a single fraudulent transaction.

[50] The 1st Appellant had tampered with the Landsoft system data and diverted $5411.10 to 3rd Appellant's BSP Bank Account No. 1242892. The 1st Appellant's computer user ID had been used to divert funds from the landowners account to 3rd Appellant's account. There by prosecution tries to demonstrate that the 1st Appellant being the Acting ALA either knew or ought to have reasonably known that he was dealing with proceeds of crime.

[51] The instant case involves fraudulent transactions that occurred at the TLTB Trust Unit from 31st December 2009 to 3rd September 2012, spanning for an approximate period of 3 years. At the time in question, 1st Appellant was a substantive Distribution clerk at the TLTB's Trust Unit and was also the Acting Accountant Landowners Affairs. Prosecution had led evidence to show, that in the capacity of a substantive Distribution clerk, the 1st Appellant knew his role of identifying and verifying the name of landowning units, their bank accounts and other important data and fed them into the TLTB Landsoft computer system.

[52] In the capacity of the Acting Accountant Landowners Affairs, the 1st Appellant had six Distribution clerks under him, and supervision of their functions was his duty ensuring that iTaukei landowners receive their lease money via the Landsoft system on a monthly basis via the cheque payment system when the need arises. As previously said Levaci, the first cousin of the 2nd Appellant, worked under the 1st Appellant as a Distribution clerk. The Prosecution has led evidence demonstrating that the 1st Appellant and 2nd Appellant along with Levaci colluded in defrauding the TLTB and iTaukei landowners:

1) of $214,736.62 from 4th May 2010 to 3rd September 2012 (as per count 1)
2) $94,387.88 between December 2009 and 2nd August 2012 (as per count 2)

[53] Furthermore, 1st Appellant and Levaci created fake data within the Landsoft payment system and the TLTB cheque payment systems that ensured the passage of stolen lease money to 2nd Appellant's bank accounts (offences that formed the subject matter of counts no. 1 and 2).

[54] Thereafter, they appropriated the stolen money for themselves. The 1st Appellant, 3rd Appellant and Levaci repeated the same fraudulent scheme, in relation to Counts No. 3, 4 and 5 as well. The 3rd Appellant provided his younger brother's bank accounts to receive the monies mentioned in counts 3 and 4. The 1st Appellant and Levaci created false data in the Landsoft lease money system and TLTB cheque payment system in order to divert the passage of stolen lease money to 3rd Appellant's brother's bank accounts.

[55] Appellants also took necessary measures to ensure that the stolen money was diverted to the 3rd Appellant's bank account which forms the subject matter of the 5th count. Thereafter, they appropriated the said money for themselves. It was the stance of the prosecution right throughout that at all material times, all the Appellants and Levaci knew or ought to have reasonably known that the money they were receiving were from TLTB and the iTaukei landowners accounts and hence amounted to proceeds of crime.

Consideration of Ground of Appeal urged before the Full Court by the 1st Appellant

[56] The 1st Appellant filed an appeal before this court advancing 9 grounds of appeal against the conviction and one ground against the sentence. The Single Judge of the Court of Appeal granted leave to appeal against conviction on all grounds, except ground three, and on the ground of appeal against the sentence.

[57] Accordingly, the 1st Appellant appearing in person before the Full Court urged eight grounds appeal in total (seven against the conviction and one against the sentence) for which the Single Judge of Appeal had granted leave.

Appeal Ground 1

"THAT the Learned Trial Judge failed to give a balanced summing up that resulted in the conviction to be unsafe and unsatisfactory."

[58] The Learned Trial Judge had adequately considered both the evidence of the prosecution and the defence in the summing up. In paragraphs 19 to 23 the Learned High Court Judge had adequately summed up the prosecution case, stating in paragraph 23:

> *"Because of the above the prosecution is asking you, as assessors and judges of facts to find all the accused's guilty as charged that was the case for the prosecution."*

[59] From paragraphs 24 to 27 the Learned High Court Judge had summed up the defence case specifically highlighting their line of defences and stated at the end:

> *"Because of the above the accused are asking you as assessors and judges of fact, to find them not guilty as charged. That was the case for the defence."*

[60] Paragraphs 28 to 51 reflects a comprehensive analysis of the evidence.

[61] This ground of appeal has no merit.

Appeal Ground 2

"THAT the Learned Trial Judge failed to properly direct himself and direct the assessors according to law when the assessors gave verdict of guilty in this case largely built on circumstantial evidence of the complainant that under all the circumstances of the case the finding of guilt was wrong unsafe and unsatisfactory."

[62] As has been already indicated the Learned High Court Judge had summarised the evidence led at the trial both by the prosecution and the Defence and also had done an analysis of the evidence presented by both parties.

[63] The Learned Trial Judge had directed the assessors on circumstantial evidence, and further adequately analysed the specific circumstances that were capable of proving guilt as reflected in paragraphs 32 to 48 of the summing up.

[64] The manner in which the two Appellants along with Levaci committed the crime has been discussed in paragraphs 32 to 48 of this summing up. The same has been well analysed by the Learned Trial Judge in paragraphs 12-15, 19-23 and 32-41 in the summing up.

[65] This ground of appeal lacks merit.

Appeal Ground 4

"THAT the Learned Judge failed to properly direct himself and assessors according to law and facts regarding paragraph D (iii) of the Summing Up that the evidence did not provide or link between the Appellant and Accused 2 and Appellant and Accused 3 directly or shown to be engaged directly to indirectly in transactions involving proceeds of crime amounting to $212,736.62, $94,387.88, $239,407.20, $84,959.46 and $5411.10 which under all the circumstances of the case the finding of guilt is unsafe and is unsatisfactory."

[66] In paragraph 13 of the summing up the Learned High Court Judge had drawn the attention of the assessors that the 1st Appellant was engaging in transactions pertaining to money and cheques giving emphasis to the fact that the monies become proceeds of crime when it is stolen.

[67] Furthermore, circumstantial evidence led at the trial reflects the fact that the user ID of the 1st Appellant was used to process the electronic transactions which paved the way to facilitate the payment of monies to the 2nd and 3rd Appellants, clearly linking the 1st Appellant with the activities of the other Appellant.

[68] This ground of appeal lacks merit.

Appeal Ground 5

"THAT the Learned Trial Judge failed to properly direct himself and assessors according to law and facts regarding the performance of duties within the Trust Department and how distribution clerks shared works and usage of each other's passwords and username to enter the TLTB computers, whereby the usage of word computers are usage and is shown to be engaged directly to indirectly in transactions involving proceeds of crime which under all the circumstances of the case, the finding of guilt is unsafe and is unsatisfactory."

[69] Referring to the evidence of PW 12 – Raimuria, the Learned High Court Judge highlighted how the staff of TLTB were not allowed to share user ID for security and accountability reasons in the following manner:

> *"In the report, PW12 said Accused No. 1 and Mr. Levaci's computer user ID was used on most occasions to conduct the fraudulent electronic transfer of TLTB trust money to the fraudulent bank accounts in counts no. 1, 2, 3, 4 and 5. In his evidence, he said, it was TLTB IT Policy for TLTB staff not to share their user ID. This was for security reasons and to encourage accountability among TLTB staff."*

[70] No evidence led at the trial showed that there was sharing of passwords and user IDs. Moreover, the 1st Appellant was in charge of the unit which prepared the payments and he was assigned with the duty of supervising the clerk's work. If payments were going to the wrong accounts the checking process would have blatantly bared it as the system would reflect the correct details. The unit maintained files containing documents to verify the correct payees.

[71] This ground of appeal lacks merit.

Appeal Ground 6

"THAT the Learned Trial Judge failed to direct himself and assessors that the important witness namely Tukana Levaci was absent and which Prosecution failed to provide in court during the proceedings in which all documentary evidence provided in court pointed towards him that proved that money laundering transactions were made by him as the Distribution Clerks and other authorized persons in this particular case; but Prosecution failed to call or provide those witnesses to give evidence, and to allow the Appellant/Defence to cross examined, whereby the witness was not there to confirmed the part he played in the transaction or money laundering and that such non direction placed the Appellant to disadvantage and that the verdict was therefore unsafe."

[72] In paragraph 21 the Learned High Court Judge had stated that, Tukana Levaci had fled Fiji during the investigation phase. The information clearly sets out that the Appellants were charged along with *"another"* by stating *"Josefa Saqanavere and Tuimoala Raogo with* ***another****....."*

[73] The evidence abundantly discloses that Levaci was also a party to the transactions in question. It has been clearly highlighted in the summing up that the 1st Appellant was in charge of the distribution clerks (Levaci being one of them) and he checked and verified the payments made.

[74] This ground of appeal lacks merit.

Appeal Ground 7

"THAT the Learned Trial Judge failed to direct Prosecution to ensure all its witnesses are present and be called to give evidence and be cross examined by the Appellant/Defence for the purpose of a fair trial and that such non-direction placed the Appellant to disadvantage and the verdict was therefore unsafe."

[75] In the absence of any specification as to the witnesses who were not present at the trial this ground of appeal becomes ambiguous. The court record does not indicate absence of any material witness and the Defence had not made any application to call any such witness. If

the investigators were able to trace and arrest Levaci, in all probabilities he would have stood as an accused at the trial and not as a witness.

[76] This ground of appeal lacks merit.

Appeal Ground 8

"THAT the Learned Trial Judge placed undue emphasis and weight in summing up to the evidence at paragraph H- The analysis of the evidence sub paragraph 29, clearly emphasized of the lack of evidence that directly connected the Appellant to the 2nd Accused and 3rd Accused that connected them to the alleged criminal offence of money laundering and even the Police Caution interview statement tendered as Prosecution Exhibit 71 (A) and 71 (B) showed no confession in the case, for that matter to draw any evidential inference which would have impacted the Prosecution's case."

[77] The prosecution is based on circumstantial evidence. The issue of circumstantial evidence in relation to the instant case has been addressed elsewhere in this judgment.

[78] This ground of appeal lacks merit.

Appeal Ground 9

"THAT the Learned Judge failed to properly direct himself and the assessors in law and in fact although the Appellant is employed and work as Distribution Clerk and Acting Trust Accountant at the Trust Department with TLTB, his password and username is known and are used by other Distribution Clerk at the Trust Department that prove that he may have not done the transaction of money laundering therefore the guilty verdict is unsafe."

[79] The issue pertaining to this ground of appeal has been addressed elsewhere in this judgment.

[80] This ground of appeal lacks merit.

Consideration of Grounds of Appeal urged on behalf of the 2nd Appellant

[81] The Appellant filed a timely appeal before this court setting out 10 grounds of appeal. However, subsequently the Legal Aid Commission assisted the Appellant and filed the following ground of appeal for which leave was granted by the Single Judge of Appeal.

Ground of Appeal against Conviction and its Consideration

"THAT the Learned Trial Judge failed to adequately direct the assessors on the law of money laundering."

[82] The Learned High Court Judge in paragraphs 14 and 15 of the Summing Up has directed the assessors on the law of money laundering in the following manner:

> *"14. The money and cheques they handled daily, in the nature of their jobs, can become "proceeds of crime", if they start to "flout the system". If they start to steal the landowners' leasemoney held in TLTB trust account in the banks or elsewhere, the money and cheques they handled immediately become tainted money and cheques, and become "proceeds of crime". When you steal a person's money or cheques, in whatever form or fashion, the money and cheques become "proceed of crime". It is a legal process which converts previously held untained money and cheques to tained money and cheques because of the unlawful activity, that is, stealing the landowners' money.*
>
> *15. The crime of "money laundering" is completed once the prosecution makes you sure that the accused knew or ought reasonably to know that the money or cheques he dealt with, were derived or realized directly or indirectly from some form of unlawful activity. In answering this issue, you will have to look at and examine the total evidence. You will have to look at the accused's background, his skills, what he said and did over the relevant period and the surrounding circumstances, to decide the above issue. Normally, when a person is "flouting the system" and stealing a person's money by various deceptive means, that is often taken as strong inferences that he knew what he was doing or ought reasonably to know that the fruits of his labour were the product of some unlawful activity. If you find that he knew or ought reasonably to know that the money or cheques he dealt with were tainted property, he is guilty as charged. Otherwise, he is not guilty as charged. It is a matter entirely for you."*

[83] However the Learned High Court Judge had failed to properly direct the assessors on the following vital aspects on the law of money laundering, having regard to the circumstances of the present case.

[84] Many jurisdictions seek a predicate offence, the proceeds of which should become the subject of any money laundering offences. Under the international definition, a predicate offence means, any criminal offence as a result of which proceeds were generated, that may become the subject of a money laundering offence. Seeking of a predicate offence, for the constitution of the offence of money laundering, is not a requirement under section 69 (4) of Proceeds of Crimes Act 1997. Establishment of mere acquisition, possession or use of proceeds of crime would constitute the offence. Legislation of Fiji defines predicate offences generically as including all crimes, or all crimes subject to defined penalty threshold.

[85] Article 2 of the Constitution of Fiji declares that, *"This Constitution is the supreme law of the state."*

[86] Article 2 (4) declares that *"This Constitution shall be enforced through the courts to ensure that –*

> *"(a)…….*
> *(b) rights and freedoms are protected*
> *(c)……."*

[87] Article 2 (3) declares:

> *"This Constitution shall be upheld and respected by all Fijians and the State, including all persons holding public office, and the obligations imposed by this Constitution must be fulfilled."*

[88] Article 163 interprets the term law as, *"law includes all written law"* and further interprets, *"written law"* as *"an Act, Decree, Promulgation and subordinate law made under those Acts, Decree or Promulgations".*

[89] Article 14 – (2)(b) under the Chapter ,*"Rights of accused persons status" states that:*

> *"2. Every person charged with an offence has the right –*
>
> > *(b) to be informed in legible writing, in a language that he or she understands, of the nature of and reasons for the charge."*

[90] Section 119 of the Criminal Procedure Code under the Chapter *"offence to be specified in charge or information with necessary particulars"* is to the effect that:

> *"119. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving* ***reasonable information as to the nature of the offence charged."***

[91] Section 4 of the '*Crimes Act'* interprets the term '*offence'* in the following manner:

> *"Offence" is an act, attempt or omission punishable by law."*

[92] Proceeds of crime has been interpreted in the Proceeds of Crime Act 1997 in the following manner:

> *"4 (1A) In this Act, in relation to a serious offence or a foreign offence, "proceeds of crime" means property or benefit that is –*
>
> > *(a) wholly or partly derived or realised directly or indirectly by any person from the commission of a serious offence or a foreign serious offence;*
> > *(b) wholly or partly derived or realised from a disposal or other dealing with proceeds of a serious offence or a foreign serious offence; or*
> > *(c) wholly or partly acquired proceeds of a serious offence or a foreign serious offence."*
>
> *and includes, on a proportional basis, property into which any property derived or realised directly from the serious offence or foreign serious offence is later converted, transformed or intermingled, and any income,*

capital or other economic gains derived or realised from the property at any time after the offence."

[93] Unlawful activity has been defined in the said Act in the following manner:

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

[94] Setting out the particulars of the offence the 1st count of the instant case states:

*"engaged directly or indirectly in **transactions involving proceeds of crime** amounting to a total sum of $214,736.62 which was channeled through **ANZ Bank Account No. 10089840** knowing or they ought to have reasonably known that the money is derived directly or indirectly from some form of **unlawful activity**."*

[95] In terms of Article 14 (2) (b) of the Constitution and section 119 of the Criminal Procedure Code, in the instant case the terms mentioned in the charge, *"transactions involving proceeds of crime",* and *"unlawful activity"* should have been more informative as is reasonably practicable."

[96] In the circumstances of the instant case, the charges should inform the Appellants as to which offences committed by them formed the unlawful activity.

[97] The Appellants had been charged under section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act 1997 which are as follows:

"Section 69 (2) (a):

(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….'

'Section 69 (3) (a):

*(a) the person engages, directly or indirectly in a transaction that involves money, or other property, that is proceeds of crime**,** or…."*

[98] Accordingly, proceeds of a crime should be realised or derived from the commission of a *"serious offence"* or from a disposal of proceeds of a serious offence or acquiring proceed of a serious offence. The Appellants should have been informed in the charge as to what *"serious offence"* constituted the unlawful activity, with which they were charged, in an informative form as is reasonably practicable. This requirement has not been complied with in the charges in the present case, which amounts to a breach of a constitutionally protected right of an accused person, (and a non-compliance with section 119 of the Criminal Procedure Code).

[99] In the instance case, as to what offence formed the unlawful activity is in question. The reference to a substantive *"serious offence",* the commission of which becomes a constituent element for the constitution of the money laundering offence, is not to be found anywhere in the charges.

[100] If proceeds of crime, should be derived from the proceeds of a serious offence, or any property derived directly or indirectly from acts that have constituted a serious offence, *"the charge"* should inform the Appellants, as to what serious offence they have committed. Accordingly, in a summing up the Learned Trial Judge should direct the assessors, as to which serious offence the accused have committed in terms of the interpretation of section 4 of the Crimes Act, read with section 3 of the Proceeds of Crime Act.

[101] In the instant case the mere mentioning in the charge the terms, *"transactions involving proceeds of crime"* and *"from some form of unlawful activity"*, do not meet the requirement of the constitutional provision *"to be informed….of the nature of and reasons for the charge".* Furthermore, it does not meet the requirement set out under section 119 of the Criminal Procedure Code; *"….charge or information shall contain…a statement of the specific offence……together with such particulars as maybe necessary for* ***giving reasonable information*** *as to the nature of the offence charged."*

[102] It is emphasized that the instant charges do not provide the Appellants with the, *"reasonable information as to the nature of the offence charged."* The said failure does not only amount to a violation of section 119 of the Criminal Procedure Code, but also a breach of a *"Rights of accused persons"* as set out in terms of Article 14 (2) (b) of the Constitution.

[103] In paragraph 14 of the summing up the Learned High Court Judge has stated:

> *"If they start to* ***"steal"*** *the landowners' lease money held in trust account in the banks elsewhere, the money and cheques they handled immediately become tainted money and cheques become "proceeds of crime" when you steal a person's money or cheques, in whatever form or fashion the money and cheque become "proceed of crime"."*

[104] In terms of the said direction of the summing up, offence that pertained to the unlawful activity has been 'stealing'. An offence by the name of *'stealing'* does not exist in the Penal Code or under any other legislation. Hence on the instant issue the above direction to assessors is not accurate.

[105] The State in its written submissions addresses the issue in the following manner:

> *"**Issue 2: whether the learned Judge addressed the definition of serious offence***
>
> *2.5 As addressed in the oral hearing, the learned trial Judge did not verbatim quote the definition of serious offence as per the Proceeds of Crimes Act s3.*
>
> *2.6 It is the Respondent's submission that despite not doing so, the learned Judge had identified stealing as the serious offence as he mentions several times in his judgment."*

[106] The States submission on the issue is erroneous, since the given interpretation to the term *"offence"* is, *"an act, attempt or omission punishable by law",* (stealing not falling into the ambit of the interpretation). The same goes with the *"serious offence"* as define in section 3 of Proceeds of Crime Act.

[107] The State further submits that:

> *"2.3 Based on the above, it is apparent that the learned Judge had turned his mind to what the unlawful activity was in this case which is stealing or in other words theft."*

[108] This is not a juridical approach to a contentious issue. In a summing up pertaining to an unlawful homicide, the offence should not be referred to as *"killing of a man",* deviating from the given penal identity.

[109] The State further submits:

> *"At the time of charge there had been no issues raised by the defence to the charge or information as amended."*
>
> *"It is the Respondent's submission that none of the Appellant's had raised any issues with the information once it was amended. Furthermore, they were represented by experienced counsel Mr. Vakaloloma."*

[110] When this court sees a violation of a constitutional protection given to an accused, it should intervene in the matter, even if a party had not raised it as an issue. This court is bound to follow the supreme law of the country. Articles 2 (3) and 2 (4) of the Constitution binds all branches of the State including the Executive, Legislative and the Judiciary.

[111] In **Cakau v State** [2022] FJCA 29; AAU 049.2016 (3 March 2022) this court observed an accused persons right to a fair trial consist of the right *"to be informed of the charge with sufficient detail to answer it; a constituent element of an accused person's right to a fair trial"*, which stands as an unqualified inalienable and a non-derogable right of a person who faces a criminal trial charged with a criminal offence.

[112] In the instant case the prosecution in preferring charges against the Appellants, and the Learned High Court Judge in dealing with the summing up, should have taken guidance from the following observations made by His Lordship Justice Gamalath in **Stephen v The State** [2016] FJCA 70; AAU 53.2012 (27 May 2016).

"14. The money and cheques they handled daily, in the nature of their jobs, can become "proceeds of crime", if they start to "flout the system". If they start to steal the landowners' leasemoney held in TLTB trust account in the banks or elsewhere, the money and cheques they handled immediately become tainted money and cheques, and become "proceeds of crime". When you steal a person's money or cheques, in whatever form or fashion, the money and cheques become "proceed of crime". It is a legal process which converts previously held untained money and cheques to tained money and cheques because of the unlawful activity, that is, stealing the landowners' money."

[113] This ground of appeal succeeds, and hence the necessity does not arise to deal with the grounds of appeal against the sentence.

Orders of the Court:

1. 1st and 2nd appellants' appeal against convictions are allowed.
2. Convictions of the 1st and 2nd appellants are quashed.
3. A new trial is ordered against the 1st and 2nd appellants.
4. The 1st and 2nd appellants to be produced from remand before the High Court within two weeks from today for the High Court to make appropriate orders with regard to the new trial.

.....
Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

.....
Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL