

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

CRIMINAL APPEAL NO. AAU 016 of 2020
[In the High Court at Suva Case No. HAA 19 of 2019]
[In the Magistrates Court at Suva Criminal Case No.25 of 2010]

BETWEEN : **THE STATE**

AND : **ASHWIN PRASAD**

Appellant

Coram : **Prematilaka, RJA**

Respondent

Counsel : **Ms. M. Konrote for the Appellant**
: **Respondent absent**

Date of Hearing : **23 October 2023**

Date of Ruling : **24 October 2023**

RULING

[1] The respondent had been convicted in the Magistrates' Court at Suva with two counts of corrupt practices under the Penal Code and two counts of money laundering under the Proceeds of Crime Act 1997. The charges read as follows:

'FIRST COUNT

Statement of Offence

CORRUPT PRACTICES: *Contrary to section 376 (a) of Penal Code, Cap 17.*

Particulars of Offence

ASHWIN PRASAD, between 1st day of January 2002 to the 31st day of December 2002 at Suva in the Central Division, being employed as a Clerk with Carpenters Hardware Ltd corruptly obtained \$13,078.18 from Overseas Suppliers of Carpenters Hardware as rewards for placing orders for

Carpenters Hardware Ltd with the said Overseas Companies for supply of items to Carpenters Hardware Ltd.

SECOND COUNT

Statement of Offence

CORRUPT PRACTICES: *Contrary to section 376 (a) of Penal Code, Cap 17.*

Particulars of Offence

ASHWIN PRASAD, between 1st day of January 2003 to the 31st day of December 2003 at Suva in the Central Division, being employed as a Clerk with Carpenters Hardware Ltd corruptly obtained \$58,443.05 from Overseas Suppliers of Carpenters Hardware as rewards for placing orders for Carpenters Hardware Ltd with the said Overseas Companies for supply of items to Carpenters Hardware Ltd.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

ASHWIN PRASAD, between 1st day of January 2002 to the 31st day of December 2002 at Suva in the Central Division, engaged directly in a transaction that involved money to the total \$13,078.18, that were the proceeds of crimes, knowing that the said sum of money is realized from unlawful activity.

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

ASHWIN PRASAD, between 1st day of January 2003 to the 31st day of December 2003 at Suva in the Central Division, engaged directly in a transaction that involved money to the total \$58,443.05, that were the proceeds of crimes, knowing that the said sum of money is realized from unlawful activity.'

- [2] On 07 June 2019 the Magistrate had sentenced the respondent to 05 months' imprisonment for counts one and two and for 03 years imprisonment for counts three and four; the sentences to run concurrently without a non-parole period.
- [3] The respondent has appealed against his conviction and sentence, and the appellant had also appealed against the sentence to the High Court. The learned High Court judge on 07 February 2020 had dismissed both appeals against sentence and affirmed the conviction on 01st and 02nd counts and quashed the convictions on the 03rd and 04th counts.
- [4] The appellant had preferred a second tier appeal to this court on the following grounds of appeal against the acquittal of the respondent of the 03rd and 04th counts on money laundering. The appellant had served the notice of appeal on the respondent at his usual address but he never appeared in this court on any of the 10 days when the appeal came up for consideration since March 2020. The appellant's several subsequent attempts to locate him at the same address or his work place had proved futile and the police had reported that the respondent was not residing at the address where he had initially accepted the petition of appeal. Currently his whereabouts are unknown.

'Grounds of Appeal:

Ground 1:

THAT the Learned Appellate Judge erred in law in importing an additional element in the offence of money laundering in section 69 3(a) and (b) of the Proceeds of Crimes Act of concealment or disguising.

Ground 2:

THAT the Learned Appellate Judge erred in law in holding that the approach by the Director of Public Prosecutions in laying charges for money laundering is discriminatory and lacks fairness at paragraph 55 of the judgment when section 117 (8) of the Constitution provides full prosecutorial discretion to the Director of Public Prosecutions on whether to institute proceedings or not.

Ground 3:

THAT the Learned Appellate Judge erred in law at paragraph 68 of the judgment by finding that to prove money laundering the State needs to prove

an intention or motive that is different from what the appellant has when he committed the predicate offence.

Ground 4:

THAT the Learned Appellate Judge erred in law in finding that soliciting a commission is not an offence under the Penal Code when he had agreed that the conviction for corrupt practices was correct which in essence is soliciting within the meaning of section 375 – of the Penal Code.

Ground 5:

THAT the Learned Appellate Judge erred in law in finding that the convictions for money laundering and corrupt benefit was based on the same facts.’

Scope under section 22 of the Court of Appeal Act

- [5] The appellant’s appeal to this court is against the High Court judgment in terms of section 22 of the Court of Appeal Act as a second tier appeal. In a second tier appeal, a conviction or an acquittal could be canvassed on a ground of appeal involving a question of law only [also see: **Tabekusi v State** [2017] FJCA 138; AAU0108.2013 (30 November 2017)]. A sentence could be canvassed only if it was unlawful or passed in consequence of an error of law or if the High Court had passed a custodial sentence in substitution for a non-custodial sentence [vide section 22(1)(A) of the Court of Appeal Act].
- [6] Though, leave to appeal is not required under section 22, a single judge could still exercise jurisdiction under section 35(2) in order to determine whether the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal [vide: **Kumar v State** [2012] FJCA 65; AAU27.2010 (12 October 2012) and **Rokini v State** [2016] FJCA 144; AAU107.2014 (28 October 2016)]. In doing so, a single judge is required to consider whether there is in fact a question of law that should go before the full court, for designation of a point of appeal as a question of law by the respondent or his pleader would not necessarily make it a question of law [see: **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014)]. It is therefore a counsel’s or an appellant’s duty to properly identify a discrete question (or questions) of law in prosecuting a section 22(1) appeal (vide: **Raikoso v State** [2005] FJCA 19; AAU0055.2004S (15 July 2005)).

- [7] What is important is not the label but the substance of the appeal point. This exercise is undertaken by the single judge not for the purpose of considering leave under section 35(1) but as a filtering mechanism to make sure that only true and real questions of law would reach the full court. If an appeal point taken up by the respondent in pith and substance or in essence is not a question of law then the single judge could act under section 35(2) and dismiss the appeal altogether [vide: **Bachu v State** [2020] FJCA 210; AAU0013.2018 (29 October 2020) and **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014)].
- [8] A question of law is a legal issue that deals with the interpretation and application of existing laws or legal principles. It does not involve disputes over facts or evidence presented in a case. Instead, it focuses on how the law should be interpreted and applied to a specific set of circumstances. Questions of law are typically resolved by judges and can arise at various stages of legal proceedings, including pre-trial motions, during a trial, or on appeal. In contrast, a question of fact involves disputes about the actual events, circumstances, or evidence in a case. These issues are typically resolved by a jury or, in some cases, assessors with a judge or if there is no jury or assessors by a trial judge.
- [9] The phrase ‘a question of law alone’ is one of pure law to the satisfaction of the court [vide: **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013)].
- [10] In a second tier appeal under section 22 of the Court of Appeal an appellant cannot seek to re-open and re-argue facts or mixed fact and law of the case or re-agitate findings of pure facts or mixed fact and law. The narrow jurisdiction under section 22 of the Court of Appeal Act is for the court to rectify any error of law or clarify any ambiguity in the law and not to deal with any errors of fact or of mixed fact and law which is the function of the High Court. That is the intention of the legislature and this court must give effect to that legislative intention.
- [11] The learned High Court judge had summarised the evidence as follows:

‘7. *‘The facts in this case are simple. The appellant was employed as a clerk at Carpenters Hardware Limited and was the ‘overseas buyer’ in*

2002 and 2003. Accordingly, he was handling the purchases made by the company from overseas suppliers. During the period from 01 January 2002 to 31 December 2002 the appellant received a sum of FJD 13,078.18 directly into his bank account from several overseas suppliers and from 01 January 2003 to 31 December 2003 he received a sum of FJD 58,443.05. The appellant who had given evidence has not disputed receiving the money and during his cross-examination has admitted receiving the money from the overseas suppliers as commission. According to the evidence, the appellant was not entitled to receive any payment from any overseas supplier and there was a company policy where accepting a commission was prohibited.'

01st and 03rd grounds of appeal

- [12] The appellant has dealt with the 01st and 03rd grounds of appeal together. Under the 01st ground of appeal the appellant argues that the learned High Court judge had erred in law by importing an additional element of concealment or disguising into the offence of money laundering under section 69 (3)(a) and (b) of the Proceeds of Crimes Act 1997. The questionable reasoning is supposed to be found at paragraph 64 of the judgment.
- [13] However, to understand the trial judge's thinking one should read from paragraph 57 onwards. Having looked at money laundering in general, the trial judge had analysed section 69(3) – money laundering under the Proceeds of Crimes Act 1997 - along with section 4(1A) – proceeds of crime - and concluded that section 69(3) (a) and (b) cover almost all aspects of dealing with proceeds of crime including the two situations envisaged in section 69(3) (c) and (d), and he had asked himself the question therefore what application section 69(3) (c) and (d) would have.
- [14] Whether, section 69(3) (a) and (b) cover almost all aspects of dealing with proceeds of crime including the two situations envisaged in section 69(3) (c) and (d) is open to debate, argument and interpretation. Similarly, the High Court judge's position that 'proceeds of crime' - section 4(1A) is not found in limbs (c) and (d) [as in limbs (a) and (b)] is also open to interpretation. While it is true that limbs (c) and (d) do not specifically use the word 'proceeds of crime' unlike in limbs (a) and (b), they still mention 'money or other property derived from a serious offence or foreign serious offence' which appears to be a reference to proceeds of crime.

- [15] Be that as it may, the High Court judge had answered the above question on section 69(3) (c) and (d) stating that if an offender who had committed the predicate offence (serious offence or the foreign serious offence) is to be charged for the offence of money laundering, it is more appropriate for him to be charged under either limb (c) or limb (d) [instead of limbs (a) or (b)] as the former is intended to deal with ‘self-money laundering’, for they require proof of either concealing or disguising the money or property. In other words, the High Court judge seems to think that limbs (a) and (b) are more appropriate to be applied where no connection can be established between the offender who had dealt with proceeds of crime in question and the relevant predicate offence.
- [16] The above line of reasoning by the High Court judge seems to restrict the application of limbs (a) and (b) of section 69 only to cases where the offender could not be held liable for the predicate offence. If not, according to the High Court judge, the offender should be charged under limbs (c) or (d) for acts aimed at concealing or disguising the ‘money or other property derived from a serious offence or foreign serious offence’ *i.e.* the illicit origins of the money or property (placement, layering and integration).
- [17] However, section 69(4) states that the offence of money laundering is not predicated on proof of the commission of the serious offence or foreign serious offence. This does not mean that an offender against whom the commission of the serious offence or foreign serious offence (‘predicate offence’) can be proved, cannot be charged for money laundering as well. It only means that the offence of money laundering could be proved without proving a predicate offence. Money laundering is a stand-alone offence. In that context, the kind of distinction sought to be drawn by the High Court judge between limbs (a) and (b) on the one hand and limbs (c) and (d) of section 69 on the other, seems untenable. However, I do not think that that High Court judge had imported any additional elements of concealing and disguising to section 69(3)(a) and (b).

- [18] In my view, limbs (a), (b), (c), (d) and (e) of section 69(3) deal with different scenarios of money laundering and an accused could be charged under any of those limbs depending on the availability of material with or without him being charged for a predicate offence relating to proceeds of crime.
- [19] The matters discussed above are questions of law alone and should be allowed to be examined and pronounced upon by the Full Court.
- [20] Under the 03rd ground of appeal, the appellant argues that the High Court judge had wrongly introduced at paragraph 68 of the judgment a new fault element/s to the offence of money laundering namely a motive or an intention on the part of the accused that is different from what he initially had when he committed the crime of corrupt practices ('predicate offence'). The broader legal issue here is the fault element of the offence of money laundering.
- [21] A predicate offence refers to a crime that is a component of a more complex or serious criminal activity, often involving money laundering or organized crime. In the context of money laundering, a predicate offence is the original criminal activity that generates the funds that are later laundered to make them appear legitimate.
- [22] Money laundering laws in many jurisdictions target not only the act of laundering money but also the underlying criminal activity that generates the illicit funds. These underlying crimes, such as drug trafficking, terrorism, corruption, fraud, human trafficking, and organized crime, are known as predicate offences. When individuals or organizations engage in these illegal activities and generate proceeds, they can then attempt to legitimize or "clean" the money through various money laundering techniques.
- [23] Law enforcement agencies and financial institutions use the concept of predicate offences to track and prosecute individuals involved in organized criminal activities. By targeting both the predicate offence and the subsequent money laundering activities, authorities can disrupt and dismantle criminal networks and prevent the integration of illegal funds into the legitimate economy.

- [24] Needless to say that the fault element of the predicate offence can often be different to that of money laundering. It is clear from section 69 that the fault element of money laundering is actual or constructive knowledge denoted by the words '*knowledge*' or '*ought reasonably to know*' that the money or property *i.e.* proceeds of crime is from some form of unlawful activity *i.e.* an act or omission that constitutes an offence in Fiji or a foreign country.
- [25] What the trial judge had said at paragraph 68 is that the respondent was only attempting to use the money derived from the predicate offence of corrupt practice and not to engage in a transaction involving proceeds of crime knowing that the said proceeds were derived from an illegal activity. In other words, the judge was looking for a separate motive or a different intention to establish money laundering. This reasoning had only muddied the waters. The fault element of money laundering is clear and there is no need to look for separate motives or intentions beyond actual or constructive knowledge on the part of the offender.
- [26] Since this poses a legal question alone, I would allow it to be considered by the Full Court.

02nd ground of appeal

- [27] The appellant joins issue with the High Court judge's statement at paragraph 55 that there appeared to be an element of discrimination and lack of fairness in the DPP's approach in preferring two charges based on corrupt practice and money laundering. However, the judge had added at paragraph 56 that he was mindful of the fact that it was not within the court's jurisdiction in the case to review the prosecution policy of the Office of the Director of Public Prosecutions and the judge did not intend to do so. All what the judge wanted was to see that the prosecutorial discretion should always be exercised in a fair and equitable manner.
- [28] I do not think there is a pure question of law arising from the above comments deserving the consideration of the Full Court as it involves no determination or a final decision justiciable under second tier appellate jurisdiction of this court. If the Full

Court thinks it necessary it could consider this aspect of the matter as part of other issues of law.

04th and 05th ground of appeal

[29] The complaint by the appellant is that the High Court judge had erred in stating at paragraph 44, 66 and 69 that:

‘44. First, if that be the case, then the appellant had been convicted of two offences (both corrupt practices and money laundering) by the Learned Magistrate based on the same facts. Secondly, I was unable to come across an offence titled ‘soliciting a commission’ in the Penal Code or any other relevant law.....’

66. Coming back to the two money laundering charges, the charges three and four in the case at hand, firstly, I find that the Learned Magistrate had erred by convicting the appellant on those two charges for the reason that his reasoning does not support the convictions on the said charges.

69. Therefore, I am inclined to come to the conclusion that, if the appellant is to be convicted of the offence of money laundering under section 69(3) of the Proceeds of Crime Act in this case, that conviction will essentially be based on the same facts and circumstances that was taken into account in his conviction for the offence of corrupt practices.’

[30] The question of law involved under the 04th ground of appeal is whether soliciting a commission could constitute accepting, obtaining, or agreeing to accept or attempts to obtain a ‘gift’ or ‘consideration’ as part of physical element of the offence of corrupt practice under section 376(a) of the Penal Code.

[31] The question of law to be determined by the Full Court under the 05th ground of appeal is whether it is obnoxious to any provision of law to enter convictions under section 376 of the Penal Code and section 69 (3) of the Proceeds of Crimes Act simultaneously assuming, as the High Court judge had stated, that both convictions were based on same facts. However, the appellant submits that the two offences had their separate and distinct physical and fault elements and they were two separate and distinct offences

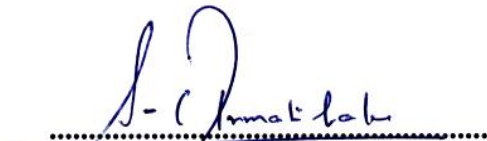
and therefore separate and different facts and circumstances were relevant to the two offences though all the facts formed part of the prosecution case.

[32] I am inclined to allow both the 04th and 05th grounds of appeal to be considered by the Full Court.

Order of the Court:

1. Appeal may proceed to the Full Court on the 01st, 03rd, 04th and 05th grounds of appeal.




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