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

CRIMINAL APPEAL NO. AAU 143 of 2016
[In the High Court at Suva Case No. HAC 250 of 2014]

BETWEEN	:	**SAVITA SINGH**
		Appellant
AND	:	**STATE**
		Respondent

Coram	:	**Prematilaka, RJA**
	:	**Bandara, JA**
	:	**Rajasinghe, JA**
Counsel	:	**Mr. K. Singh for the Appellant**
	:	**Ms. J. Prasad for the Respondent**
Date of Hearing	:	**01 February 2023**
Date of Judgment	:	**24 February 2023**

JUDGMENT

Prematilaka, RJA

[1] The appellant was jointly charged with two others on one count of money laundering in the High Court at Suva. The information read as follows:

'***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

SAKIUSA VAKAREWA, MUKESHWAR NARAYAN SINGH and SAVIT SINGH *between the 1st day of February 2007 and the 31st March 2007, at Suva in the Central Division, engaged directly or indirectly in transactions involving $ 2400.00 that were the proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of unlawful activity.'*

[2] The appellant had pleaded guilty to the charge at the first reasonable opportunity. On 19 October 2015, she was sentenced to 05 years' imprisonment with a non-parole period of 12 months. One of her accomplices was her husband. The other accomplice was a former employee of the Fiji Revenue and Customs Authority (FRCA). The summary of facts had been recorded by the learned High Court judge as follows:

1. *On 2011, Fiji Revenue and Customs Authority (FRCA) noticed anomalies in its database known as FITS. The anomaly was that there were 27 taxpayers using the same postal address which is P.O. Box 1671, Nabua. Due to this, FRCA conducted its investigations and discovered that fraudulent transactions had taken place and money had been paid out.*

2. *Mukeshwar Singh was married to you in 2008. Prior to marriage, you were in a relationship in or about 2004.*

3. *Sometimes between the 1st of February and 31st of March you negotiated a cheque number 187890 for the sum of $ 2400.*

4. *The cheque number 187890 was deposited by you in your ANZ bank account number 7150266.*

5. *Cheque number 187890 was issued by FRCA due to fraudulent tax return being lodged in your name. This tax return contained a false contractor slip.*

6. *As a result of fraudulent tax return, FRCA made cheque 187890 in your name. Therefore the cheque and, upon it being deposited in your account, the money were proceeds of a fraudulent tax return.*

7. *At the time of engaging in the above transaction you ought to have reasonably known that the cheque and the resultant money were from an unlawful activity based on the facts known to you that;*

    a. *The cheque you processed through your bank account was a FRCA cheque in your name,*

b. You were not registered as a tax payer at the time of offending; and
c. You were not entitled to receive any monies or cheques from FRCA.

8. Upon encashment of cheque number 187890, the monies were withdrawn and used.

[3] The appellant's appeal to the Court of Appeal against sentence on the sole ground that *'the sentence is harsh and excessive in all the circumstances of the case'* is timely. A judge of this Court granted leave to appeal against sentence and enlarged the appellant on bail pending appeal on 18 March 2016.

[4] Guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011)].

[5] Based on the past decisions, the learned High Court judge had taken the sentencing tariff for money laundering as 05-12 years. The Supreme Court in **Shyam v The State** CAV0024 of 2019 (26 August 2022) remarked that the sentencing tariff for money laundering is 'as identified from a few cases' is in the range of 05-12 years. The High Court judge had taken the starting point as 06 years and given a 1/3 discount for the early guilty plea making it 04 years. 03 years had been added for the following aggravating factors and the trial judge had deducted 03 years for mitigating factors and stated the final sentence as 05 years.

Aggravating factors

i. 'The proceeds of crime in relation to the offence committed are funds of a Government agency,
ii. Your involvement in the commission of the offence is not limited to being a mere accessory to a grand scheme of fraud, but as an active participant at its several stages,

iii. Your involvement in the fraud is spread over several years of activity.

[6] There is clearly a mathematical error in the calculation in that the final sentence should have been 04 years (06-02+03-03 = 04) instead of 05 years.

[7] With regard to the increase of the sentence by 03 years to reflect the aggravating factors, the appellant rightly argues that she was charged with one offence and that the facts she admitted showed that she was involved in one transaction only, namely, depositing one of the tainted cheques into her bank account, unlike her accomplices who were involved in multiple transactions and were charged with multiple offences. Therefore, there was no basis to consider that the appellant was an active participant or involved in a grand scheme of fraud over several years as aggravating factors. The counsel for the State at the leave to appeal stage as well as at the hearing of the appeal have conceded that apart from the money being public funds the rest of the aggravating factors had no factual basis in the summary of facts. Thus, the increase of the sentence by 03 years appears ill-founded.

[8] There is another issue that I am troubled with though not raised by the appellant or by the State. This is whether there had been some form and degree of double counting in selecting the starting point at 06 years and adding 03 years for aggravating factors.

[9] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) where the Supreme Court raised concerns regarding the 'starting point' in the two-tiered approach to sentencing in the face of criticism of 'double counting'. The Supreme Court said that there is a difference in judicial opinion on the starting point among judges in Fiji in that on the one hand in **Koroivuki v The State** [2013] FJCA 15 the Court of Appeal observed that as a matter of good practice, the starting point should be picked from the lower or middle range of the tariff but on the other hand, a number of trial judges choose the lower end of the range as a matter of routine. The Court said that this difference of approach has to be resolved at some stage. Unfortunately, it is yet to be resolved and I hope that the

DPP or the Legal Aid Commission would seek an authoritative pronouncement from the Supreme Court on this sooner than later.

[10] Once again, Keith, J said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) on the same topic of 'starting point' and 'double counting' as follows:

> *[56] ……If judges take as their starting point somewhere within the range, they will have factored into the exercise at least some of the aggravating features of the case. The ultimate sentence will then have reflected any other aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise any of the aggravating factors, and they will then have to factor into the exercise all the aggravating features of the case as well as the mitigating features. Either way, you should end up with the same sentence. If you do not, you will know that something has gone wrong somewhere.*
>
> *[57] .....First, a common complaint is that a judge has fallen into the trap of "double-counting", i.e. reflecting one or more of the aggravating features of the case more than once in the process by which the judge arrives at the ultimate sentence. If judges choose to take as their starting point somewhere in the middle of the range, that is an error which they must be vigilant not to make. They can only then use those aggravating features of the case which were not taken into account in deciding where the starting point should be.*
>
> *[58] Secondly,..... But it also means that the many things which make these crimes so serious have already been built into the tariff. That puts a particularly important burden on judges not to treat as aggravating factors those features of the case which will already have been reflected in the tariff itself. That would be another example of "double-counting", which must, of course, be avoided. (emphasis mine)*

[11] The concern on double counting was echoed once again by the Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019):

> *'[38] The challenge to the sentence is that the judge unwittingly double-counted some of the aggravating features. The argument runs like this. Having identified the tariff for the rape of a child as 10-16 years' imprisonment, the judge must have reflected some of the features which made this a serious case by taking 12 years as his starting point. ……..These were unquestionably all aggravating factors, but the difficulty is that we do not know whether all or any of these aggravating factors had already been*

taken into account when the judge selected as his starting point a term towards the middle of the tariff. If he did, he would have fallen into the trap of double-counting.

[39] This illustrates the pitfalls inherent in the mechanistic way judges arrive at an appropriate sentence in Fiji – assigning a particular additional term for any aggravating features and a particular lesser term for any mitigating features. In many jurisdictions, the court identifies its starting point, states the aggravating and mitigating factors and then announces the ultimate sentence without saying how much was added for the aggravating factors and how much was then taken off for the mitigating factors. But the real problem which this case illustrates is the danger of a span of years representing the tariff without identifying where the judge should start within that tariff for a case without any aggravating or mitigating features. This problem has been highlighted before by the Supreme Court: see Seninolokula v The State [2018] FJSC 5 at paras 19 and 20 and Kumar v The State [2018] FJSC 30 at paras 55 and 56.' (emphasis mine)

[12] In this case too it cannot be ascertained what made the trial judge adopt 06 years as the starting point instead of 05 years except following the remarks in ***Koroivuki.*** The concern is whether any of the aggravating factors used to enhance the sentence by 03 years had wittingly or unwittingly contributed to the selection of the starting point at 06 years, for no reasons could be found in the sentencing order therefor. If so, there is a danger or risk of a sentencing error occurring based on double counting.

[13] Thus, it is clear that had the learned trial judge taken 05 years as the starting point keeping the rest of the considerations static and adjusted it upwards and downwards for aggravating and mitigating factors and given the same discount for the guilty plea, he would still have ended up with a sentence of 04 years and when the mathematical error is corrected it would have come down to 03 years.

[14] The only reason why the trial judge had refused to suspend the sentence was because no sentence over 03 years could be suspended in view of the provisions contained in section 26(2)(a) of the Sentencing and Penalties Act, 2009. It appears that had the final sentence come down to 03 years the judge in all probability would have considered suspending it.

[15] The appellant argues that insufficient discount had been given for mitigating features some of which were of course mere personal matters not deserving any concessions. However, the early admission of guilt and the guilty plea at the first reasonable opportunity had earned 1/3 remission for the appellant and no complaint could be made thereof. The appellant had got the full discount for the utilitarian value of her early guilty plea.

[16] Restitution, if made genuinely in a spirit of remorse, can reduce the harshness otherwise due in final sentences. Thus, the making of restitution is regarded as an expression of sorrow for what has admittedly been done, and as a demonstration of regret and remorse. The restitution should be accompanied by a manifestation of true remorse at the earliest opportunity, for otherwise the prospective offenders would be tempted to wait until they get caught and convicted to offer to effect restitution knowing that they could buy themselves out of incarceration. They cannot defend their innocence all the way, and simultaneously say that they regret what they did and argue that repayment of the monies found to have been dishonestly obtained or utilized, was an act of remorse [vide **Khera v State** [2016] FJSC 2; CAV0003.2016 (1 April 2016)]

[17] There is evidence of genuine remorse and expression of sorrow on the part of the appellant demonstrated by admission of guilt at the stage of investigation itself, tendering a guilty plea at the first opportunity available in the High Court and restitution of the laundered money. The single judge had remarked in the leave to appeal ruling on 18 March 2016:

> *'[11] .....She admitted the offence under caution and maintained that position when she appeared in the High Court. When she pleaded guilty she must have realized that her teaching profession is going to come to an end and that she is unlikely to secure any other meaningful employment because of the criminal conviction. All these factors when taken together show that the appellant was genuinely remorseful for her poor judgment and conduct that occurred eight years ago…….'*

[18] The Court of Criminal Appeal Supreme Court New South Wales in ***R v Huang; R v Siu*** (2007) 174 A Crim. R 370; [2007] NSWCCA 259, pointed to two significant factors to be considered when sentencing for this type of offence: first, the amount of money involved and second, the number of transactions, with a greater number signifying greater criminality. The appellant was involved in a one-off transaction of $2400.00 unlike her accomplices who were involved in multiple transactions and were charged with multiple offences. Therefore, it looks as if that the appellant deserved a higher discount for remorse and genuine sorrow.

[19] Therefore, given the above sentencing errors, the sentence imposed on the appellant seems unjustified. However, the matter does not end there, for this court has to decide what the appropriate sentence should be in this instance. In doing so, the approach suggested by the Supreme Court in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015) appears to be the best guide. The Supreme Court held that it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it and when a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered. It was also held that the approach taken by appellate courts is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge.

[20] This single transaction had occurred when the appellant was a student at the University of South Pacific and studying to become a school teacher. At that time she was also in a relationship with one of her accomplices whom she married later and had a child. At the time of the sentencing the appellant had been teaching in a High School for three years which had ended with her conviction. Her accomplice husband has fully served his custodial sentence and now a free person. The appellant herself had served 05 months of custodial sentence when she was released on bail pending appeal. The offence had been committed in February/March 2007, some 16 years ago and the appellant had been sentenced in October 2015, 07 years and 04 months ago. She has complied with the bail conditions since March 2016. Except for the one-off offence, the appellant has had an

unblemished character. Even if the appellant had served her custodial sentence fully, she by now would be a free person.

[21] In all the above circumstances, I am of the view that the sentence imposed on the appellant should be set aside and substituted with a sentence of 03 years of imprisonment and I am satisfied that it is appropriate in the circumstances to suspend that sentence for 05 years according to section 26(1) of the Sentencing and Penalties Act, 2009, for any further incarceration of the appellant at this stage would not serve the purposes of sentencing. However, I am not unmindful of the fact that the sentencing tariff for money laundering is taken to be between 05-12 years and the substituted sentence is less than the lower end of the tariff. However, I am convinced that given all the circumstances this sentence will meet the ends of justice and serve the purposes for which sentencing may be imposed in terms of section 4 of the Sentencing and Penalties Act, 2009. Therefore, this sentence should be confined to the totality of the facts and circumstances of this case as they currently stand and not be taken as a precedent for future sentencing for money laundering offences.

[22] In coming to this conclusion I have also considered the remarks in the decision of the New Zealand Court of Appeal in **R v. Petersen** [1994] 2 NZLR 533 (which contains a discussion of the process which should be undertaken when a court is considering a suspended sentence) adopted by the Fiji Court of Appeal in **State v Chand** [2002] FJCA 50; AAU0027U.2000S (01 March 2002). They are as follows:

> '*The principal purpose of [the relevant section] was to encourage rehabilitation and to provide the Courts with an effective means of achieving that end by holding a prison sentence over an offender's head. It was available in cases of moderately serious offending but where it was thought there was a sufficient opportunity for reform, and the need to deter others was not paramount. The legislature had given it teeth by providing that the length of the sentence of imprisonment was fixed at the time the suspended sentence was imposed, that it was to correspond in length to the term that would have been imposed in the absence of power to suspend, and that the Court before whom the offender appeared on further conviction was to order the suspended sentence to take effect, unless of the opinion it would be unjust to do so. So, there was a presumption that*

upon further offending punishable by imprisonment the term previously fixed would have to be served (see p.537 line 4).

The Court's first duty was to consider what would be the appropriate immediate custodial sentence, pass that and then consider whether there were grounds for suspending it. The Court must not pass a longer custodial sentence than it would otherwise do because it was suspended. Equally, it would be wrong for the Court to decide on the shorter sentence than appropriate in order to take advantage of the suspended sentence regime (see p.538 line 47, p.539 line 5). R V. Mah-Wing (1983) 5 Cr App R (S) 347 followed.

The final question to be determined was whether immediate imprisonment was required or whether a suspended sentence could be given. If, at the previous stages of the inquiry, the Court had applied the correct approach, all factors relevant to the sentence were likely to have been taken into account already; the sentencer must either give double weight to some factors, or search for new ones which would justify suspension although irrelevant to the other issues already considered. Like most sentencing, what was required here was an application of commonsense judgment, in which the sentencer must stand off and decide whether the imposition of a suspended sentence would be consonant with the objectives of the new legislation (see p.539 line 8, p.539 line 37).

"Thomas at pp. 245-247 lists certain categories of cases with which suspended sentences have become associated, although not limited to them. We do not propose to repeat those in detail since broadly all can be analysed as relating either to the circumstances of the offender or alternatively the offending. In the former category may be the youth of the offender, although this does not mean the sentence is necessarily unsuitable for an older person. Another indicator may be a previous good record, or (notwithstanding the existence of a previous record, even one of some substance) a long period of free of criminal activity. The need for rehabilitation and the offender's likely response to the sentence must be considered. It is clear that the sentence is intended to have a strong deterrent effect upon the offender; if the latter is regarded as incapable of responding to a deterrent the sentence should not be imposed. As to the circumstances of the particular case, notwithstanding the gravity of the offence, as such, there may be a diminished culpability, arising through lack of premeditation, the presence of provocation, or coercion by a co-offender. Cooperation with the authorities can be another relevant consideration. All the factors mentioned are by way of example only and are not intended as an exhaustive or even a comprehensive list. The factors may overlap and more than one may be required to justify the suspension of the sentence in any particular case. Finally, any countervailing circumstances have to be considered. For example, in a particular case the sentence may be regarded as failing to protect the public adequately.

In concluding our consideration of the principles, we wish to add this. Understandably, the form of the legislation requires the sentencer to pass through a series of statutory gates, before reaching the point of availability of a suspended sentence. Subject to that however, like most sentencing what is required in the end

is an application of commonsense judgment, in which the sentencer must stand off and decide whether the imposition of a suspended sentence would be consonant with the objectives of the new legislation. In many instances an initial broad look of this kind will eliminate the possibility of a suspended sentence as an appropriate response."

Bandara, JA

[23] I agree with the conclusions and orders proposed by Prematilaka, RJA.

Rajasinghe, JA

[24] I have read in draft the judgment of Prematilaka, RJA and agree with his reasons and orders proposed.

Orders of the Court:

1. Appellant's appeal against sentence is allowed.
2. Sentence passed in the High Court on the appellant is quashed.
3. A sentence of 03 years of imprisonment is passed in substitution thereof on the appellant and it is suspended for a period of 05 years, both to be effective from 19 October 2015.

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

COURT OF APPEAL FIJI

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

.....
Hon. Mr. Justice R.D.R.T. Rajasinghe
JUSTICE OF APPEAL

Solicitors:

KS Law for the Appellant
Office for the Director of Public Prosecutions for the Respondent