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

CRIMINAL APPEAL NO. AAU 034 of 2022
[In the High Court at Suva Case No. HAC 282 of 2021
In the Magistrates Court at Nadi Criminal Case No. 208 of 2019]

BETWEEN	:	**FREESOUL REAL ESTATE DEVELOPMENT (FIJI) PTE LIMITED**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Ms. N. V. Tikoisuva for the Appellant**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**09 January 2024**
Date of Ruling	:	**23 April 2024**

RULING

[1] The appellant had been changed at Nadi Magistrates Court with the following counts:

*'**COUNT 1***

Statement of Offence

UNDERTAKING UNAUTHORIZED DEVELOPMENTS: *contrary to section 43 (1) of the* ***ENVIRONMENT MANAGEMENT ACT 2005***

Particulars of Offence

FREESOUL REAL ESTATE DEVELOPMENT (FIJI) PTE LIMITED *between the 8th day of June 2017 and 6th day of December 2018 at Malolo in the Western Division carried out development activity on the dry land at Wacia and the foreshore facing Wacia as per the lease in the attached Annexure A which is subject to the Environmental Impact Assessment process without an approved Environmental Impact Assessment (EIA) Report.*

COUNT 2

Statement of Offence

UNDERTAKING UNAUTHORIZED DEVELOPMENTS: *contrary to section 43 (1) of the* ***ENVIRONMENT MANAGEMENT ACT 2005***

Particulars of Offence

FREESOUL REAL ESTATE DEVELOPMENT (FIJI) PTE LIMITED *between the 8th day of June 2017 and 6th day of December 2018 at Malolo in the Western Division carried out development activity on the dry land at Qalilawa and the foreshore facing Qalilawa as per the lease in the attached Annexure B which is subject to the Environmental Impact Assessment process without an approved Environmental Impact Assessment (EIA) Report.*

COUNT 3

Statement of Offence

FAILURE TO COMPLY WITH A PROHIBITION NOTICE: *contrary to section 21 (4) and 46 of the* ***ENVIRONMENT MANAGEMENT ACT 2005***

Particulars of Offence

FREESOUL REAL ESTATE DEVELOPMENT (FIJI) PTE LIMITED *between the 1st day of June 2018 and 6th day of December 2018 at Malolo in the Western Division failed to comply with a Prohibition Notice issued against the Company on the 1st of June 2018 to prohibit from undertaking foreshore and any construction activity at Wacia (Part of) Malolo Levu Island.'*

[2] Upon conclusion of the trial, the learned Magistrate had acquitted the appellant of count 03 and convicted it for the 01st and 02nd counts[1]. On an application by the respondent the matter was then transferred to the High Court for sentencing. In the matter of sentence on 06 October 2022[2] the High Court judge *inter alia* fined the appellant to an aggregate sum of 01 million dollars.

[3] The appellant's appeal against conviction and sentence is timely.

[1] **State v Freesoul Real Estate Development (Fiji) Pte Ltd** [2021] FJMC 22; Criminal Case 208 of 2019 (9 April 2021)
[2] **State v Freesoul Real Estate Development (Fiji) Pte Ltd** [2022] FJHC 201; HAC282.2021 (28 April 2022)

[4] In terms of section 21(1) (b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[5] Further 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].

[6] The trial judge has summarised the basic facts in the sentencing order as follows:

> *'[11] The facts are that between 2017 and 2018 the offender was involved in a tourism development project at Malolo Island in the Western Division. While carrying out the development, the offender dug a channel in the sea and cleared mangroves from the shore, without first carrying an environmental impact assessment, in order to access the land leased by the offender for the purpose of development.*
>
> *[12] The offender was granted approval for land based development after an environmental bond was paid to the Department of Environment, but not for any foreshore development. Any development to the foreshore or the sea were subject of separate EIA approvals from the Department.*
>
> *[13] When the Department of Environment discovered that the offender had carried out unauthorized developments to the foreshore, they issued a Prohibition Notice on 1 June 2018 and stopped the development project.*

[14] At trial, the offender did not dispute that a channel was dug and mangroves removed, but argued that they were not responsible. This contention was rejected by the learned trial magistrate, because after the offender was issued with the Prohibition Notice on 1 June 2018, Mr Peng wrote to the Department of Environment, apologizing for 'all that has transpired' and promising to take rehabilitative measures.

[7] The appellant urged the following grounds of appeal against conviction and sentence at the LA hearing.

*'**Conviction:***

Ground 1

***THAT** the Learned Trial Magistrate erred in law in failing to give the appellant the right of election which is mandatory to section 5 and section 174 of the Criminal Procedure Act 2009 and the legal principles governing right of election.*

Ground 2

***THAT** the Learned Trial Magistrate erred in law in allowing the application of the State to transfer the proceedings to the High Court for Sentencing when the Trial Magistrate had already made orders for sentencing under section 183 of the Criminal Procedure Act 2009.*

Ground 3

***THAT** the Learned Trial Magistrate and Sentencing Judge erred in law in its analysis of Section 190, 191 and Section 5 of Criminal Procedure Code to justify transfer of the case to the High Court for sentencing.*

SENTENCE:

Ground 4

***THAT** in all the circumstances of the case the sentence imposed upon the appellant was wrong in principle and manifestly excessive.*

Ground 5

***THAT** the Learned Sentencing Judge erred in fact and in law in failing to properly consider all the relevant facts required under the sentencing principles in the Sentencing and Penalties Act 2009 in sentencing the appellant. In particular,*

a. The Sentencing Judge failed to consider the mitigating factor that the appellant had already paid compensation of $57,609.53 for the first 5 years to the Ministry of Lands Trust Account for any damages that might arise from the development at the foreshore.

b. *The Sentencing Judge failed to consider the environmental bond paid by the appellant to the iLTB Nadi Office and $402,182.44 paid to Department of Environment which includes both dryland and foreshore anticipated damages.*

c. *The Sentencing Judge failed to consider the sum of $11,445.00 paid to iLTB as a penalty for the prohibition notice and the breaches contained in the two counts of the offence that the appellant was charged with.*

d. *The Sentencing Judge failed to consider Ms. Sykes report stating that the coral were dug up were already dead.*

e. *The Sentencing Judge erred in suggesting that there was no impact to the environment by the construction of the asphalt plant and access road to distinguish the appellant's case from the case of DPP v China Railway First Group (Fiji) Ltd, Criminal Case No. 788 of 2017.*

Ground 6

THAT *the Sentencing Judge erred in fact and in law in imposing a further refundable bond of $1,400,000.00 against the appellant without considering all the regulatory payments previously made and without considering the financial means of the appellant.*

Ground 7

THAT *the Learned Sentencing Judge erred in fact and law when rejecting the details of the appellant's income submitted in its sentencing submissions or enquire into the means of the appellant before imposing the fine.*

Ground 8

THAT *the Learned Sentencing Judge erred in fact and law sentencing the appellant to $1,000,000.00 aggregate fine without considering the appropriate environment sentencing guidelines reflect restorative justice approach and rejecting the various case law submitted by the appellant in its sentencing remarks at paragraph 19.*

Ground 9

THAT *the Learned Sentencing Judge erred in fact and law in not considering a concurrent sentence when imposing the aggregate fine given that the offence was committed in the same period and the total fine exceeded that maximum term of the offence.*

Ground 10

THAT *the Learned Sentencing Judge erred in fact and law in failing to consider the circumstances for each of the count of offence in determining the appropriate fine.*

Ground 11

THAT *the overall sentence imposed is wrong in principle as it failed to reflect all the appropriate mitigating factors and the totality principle.*

Ground 1

[8] The appellant, FREESOUL REAL ESTATE DEVELOPMENT (FIJI) PTE LIMITED (FRED) argues that since the Environment Management Act 2005 (EMA) did not prescribe whether offences under section 43(1) with which it was charged was an indictable offence or summary offence or an indictable offence triable summarily, the effect was to make it an 'indictable offence triable summarily' and therefore the right of election under section 4(1)(b) of the Criminal Procedure Act (CPA) should have been given to it and the failure to do so resulted in a miscarriage of justice. The appellant also seems to argue that the penalty for an offence under section 43(1) of the EMA (*i.e.* a fine not exceeding $750,000 or to a term of imprisonment not exceeding 10 years or both) as being beyond the jurisdiction of the Magistrates court sentencing powers and therefore the Magistrates court had not jurisdiction to try the appellant.

[9] When no court is prescribed in any law (such as EMA) creating an offence and such offence is not stated to be an indictable offence or summary offence, it may be tried in the Magistrates Court in accordance with any limitations placed on the jurisdiction of the Magistrates court [section 5(2) of the CPA]. The limitation is that a Magistrate *inter alia* may pass *(a)* imprisonment for a term not exceeding 10 years (subject to a limitation of 14 years for consecutive sentences for more than one offence) or *(b)* fine not exceeding 150 penalty units *i.e.*$150,000.00 [section 7 of the CPA].

[10] Thus, there is no bar for the Magistrates Court to try an accused for an offence under section 43(1) of the EMA but if it proceeds to consider and imposes any sentence or penalty on the convicted person the sentences will have to remain within section 7 of the CPC. It is also clear that a fine *not exceeding* $750,000 or to a term of imprisonment *not exceeding 10 years* is still within sentencing powers of the Magistrates Court as long as the fine or the imprisonment ordered does not exceed limitations in section 7 of the CPC. Thus, there is no question of section 43(1) offence or the prescribed sentence being beyond the jurisdiction of the MC.

[11] It is well-settled that when the statute that creates the offence does not prescribe the court nor state whether the offence is an indictable or a summary offence, the offence

is triable by the Magistrate's court pursuant to section 5(2) of the CPC only subject to the sentencing limitations set out in section 7 pertaining to sentence [see **Ratuyawa v State** [2016] FJCA 45; AAU121.2014 (26 February 2016), **State v Laveta** [2019] FJCA 258; AAU65.2013 (28 November 2019) and **State v Mata** [2019] FJCA 20; AAU0056.2016 (7 March 2019) **Charan v State** [2022] FJCA 99; AAU41.2021 (29 August 2022) and **State v Wakeham** [2010] FJHC 54; HAC001.2010 (23 February 2010)]. It has already been held in **State v Prasad** [2019] FJCA 18; AAU123.2014 (7 March 2019) that it is the offence that determines the venue and not the sentence. If the offence is neither an indictable offence nor a summary offence nor an indictable offence triable summarily, then section 5(2) of the CPC activates and the Magistrates Court becomes vested with jurisdiction to try that offence subject to sentencing limitations in section 7.

[12] Therefore, right of election under section 4(1)(b) of the Criminal Procedure Act, 2009 does not arise at all in the case of an offence under section 43(1) of the EMA.

Ground 2 and 3

[13] Under the second ground of appeal, the appellant states that the Magistrate had already made orders to proceed with sentencing in terms of section 183 of the CPA and directed parties to file submissions when the respondent made an application to transfer the case for sentencing to the High Court in order to have a higher fine imposed on the appellant at the instance of the Department of Environment.

[14] The appellant argues under the 04th ground of appeal that the transfer order made by the Magistrate is erroneous in that the prosecutor did not have the right to seek a transfer pursuant to section 190 and 191 of the CPA and there must be independent assessment by the Magistrate to do so. He relies on section 222 of the Criminal Procedure Code (CPC) **Cama v State** [1995] 41 FLR 121 (22 May 1995).

[15] In terms of section 222(1) of the old CPC, upon conviction of an accused above 17 years, if on obtaining information as to his *character and antecedents*, the Magistrate is of opinion that they are such that greater punishment should be imposed than the

Magistrate has power to inflict, the Magistrate may, commit him to the High Court for sentence. In ***Cama*** although the Magistrate had received information as to the accused's character and antecedents, there was nothing to show that that he had given his mind to the question whether their antecedents were such that a sentence of more than five years' imprisonment should be imposed but the Magistrate had considered that he had to commit them to the High Court for sentence because the offence itself called for a sentence of seven years' imprisonment. The Court of Appeal held that the Magistrate's purported exercise of his power of committal, therefore, miscarried and in consequence the trial judge lacked the power to sentence the appellants and stated that the judge should have remitted the case to the Magistrates' Court for the Resident Magistrate to consider afresh, after addressing his mind to the proper questions, whether he should commit one or both of the appellants to the High Court for sentence or sentence one or both of them himself.

[16] In terms of section 190 (1)(b) of CPA 2009 where an accused over the age of 18 years is convicted and the Magistrate is of the opinion (*whether by reason of the nature of the offence, the circumstances surrounding its commission or the previous history of the accused person*) that *the circumstances of the case* are such that greater punishment should be imposed in respect of the offence than the Magistrate has power to impose he may, by order, transfer the accused to the High Court for sentencing. See also paragraph [25] in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019)

[17] The respondent in its written submissions had quoted from the order dared 06 October 2021 made by the Magistrate transferring the appellant to the High Court for sentencing. However, neither party had submitted the order itself to this court for perusal. Nevertheless, the order appears to be a reasonably considered one containing 54 paragraphs where according to the paragraphs quoted by the respondent the Magistrate had considered (i) maximum penalty of $750,000 for one offence prescribed by EMA as opposed to the maximum limit of $150,000 that a Magistrate could impose in terms of section 7 of the CPA (ii) different sentencing regimes or guidelines suggested by both parties (iii) State seeking a fine exceeding $150,000 and the appellant not advancing a particular quantum (iv) nature, seriousness and circumstance of the crime requiring a higher penalty than permitted by section 7 of the

CPA (v) in the interest of justice and (vi) capacity of the High Court to impose a fine up to the maximum fine, as reasons for her decision to transfer the case to the High Court for sentencing. The Magistrate had also added that it would protect the rights of both parties.

[18] In **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court referring to section 190 of the CPA held that:

> *'[30] ……. Section 190 of the Criminal Procedure Decree however is much wider and not limited to character and antecedents of the Accused……. In future this section could be considered by a Magistrate faced with such a* ***serious sentencing matter****, and the matter could properly in these circumstances be referred to the High Court for sentence. The artificiality of making the sentence consecutive to another in order to arrive at suitably condign punishment for serious crime could be avoided.'*

[19] Therefore, I cannot say like in ***Cama*** that the Magistrate had not considered the matters set out in section 190 (1)(b) in transferring the appellant for sentencing to the High Court and I see no legal error in the transfer order.

[20] I also find that the appellant had indeed canvased the transfer order in the High Court by way of a revision application in Criminal Misc No. HAM 181 of 2021. The High Court had for reasons given dismissed the application for review of the transfer order on 07 February 2022[3]. The appellant does not seem to have challenged that order in appeal before this court. Therefore, by taking up the same issue under the 02nd and 03rd grounds of appeal in this appeal against conviction the appellant attempts to have a second bite at the cherry which it cannot do under the guise of the conviction appeal.

[21] In Criminal Misc No. HAM 181 of 2021, the High Court judge had analysed section 190 and 191 of the CPA and in my view correctly held that the transfer order was justified under section 190 of the CPA and ruled out the application of the general provisions in section 191 to the matter at hand.

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[3] **Freesoul Real Estate Development (Fiji) Pte Ltd v State** [2022] FJHC 37; HAM181.2021 (7 February 2022)

Grounds 4 and 11 (sentence)

[22] The appellant argues that the sentence is excessive not having taken into account the mitigating factors and breaches the totality principle.

[23] The sentence orders are as follows:

> *'[26] After taking all these matters into consideration, I make the following orders:*
>
> *(a) The offender is fined an aggregate sum of $1m for two counts of carrying out unauthorized developments.*
>
> *(b) The offender is to post a refundable environmental bond of $1.4m with the Department of Environment and rehabilitate the affected areas to the satisfaction of the Department of Environment at its own expenses. Once the affected areas have been rehabilitated to the satisfaction of the Department of Environment the bond may be refunded to the offender.*
>
> *(c) It is a matter for the Department of Environment to lift the Prohibition Notice that was issued to the offender on 1 June 2018.*
>
> *(d) There will be no order for costs.'*

[24] In terms of section 43(1) of the EMA the penalty for an offence under section 43(1) is a fine not exceeding $750,000 or a term of imprisonment not exceeding 10 years or both.

[25] The appellant submits that the fine of 01 million dollars and the imposition of $1.4 million in bond together with rehabilitation cost is manifestly excessive. The appellant also submits that there are no sentencing guidelines in Fiji for environment offences (the respondent agrees with this position) and the Court of Appeal should pronounce such guidelines in this appeal.

[26] From paragraphs 11-23 of the sentencing order the trial judge had adduced his reasons for the final sentences imposed as follows:

> *'[15] By pleading not guilty to the charges, the offender elected to exercise a right to trial. That means the offender cannot claim any credit for remorse.*

[16] The land based tourism project if completed may have benefited the community, but the harm that the offender has caused to the environment has diminished the benefits of that development.

[17] The offender had no regard for the marine life and corals that existed in the area where the channel was dug. The structural damage done to the area is irreversible. The affected area cannot be restored to its original state, but the damage can be mitigated by stabilizing the channel by installing Geofabric and Geogrid and putting boulders on the edge of the reinstated area (seaside only). The estimated cost of channel revetment stabilization is about $830,000 VIP (PE 2).

[18] Similarly, the offender had no regard to the marine life affected by the removal of the mangroves from an area of about 1.9 hectares. A detailed assessment of the impact of this conduct is contained in the report of the Marine Ecology Consultant, Ms Sykes (PE 4). The affected area cannot be restored to its natural state but the damage can be mitigated by carrying out restoration works which may cost about $479,600.00.

[19] There is no comparable case in Fiji for the purpose of sentence, but the Director, Environment in her evidence has said that the harm that was caused to the environment by the unauthorized development was significant. The overseas guidelines for sentencing of environmental crimes are based on different sentencing regimes.

[20] In the other local case, DPP v China Railway First Group (Fiji) Limited, Criminal Case No 788 of 2017, the offender was sentenced to a fine of $10,000.00 after pleading guilty to undertaking unauthorized development by constructing an asphalt plant and access road without first carrying out an environmental impact assessment as required by the Act. In that case there was no impact to the environment by the construction of the asphalt plant and access road.

[21] I am bound by the Sentencing and Penalties Act when exercising my sentencing discretion. The Sentencing and Penalties Act provides for a number of purposes of sentence. They are deterrence, rehabilitation and denunciation of the crime (s 4 (1)). Ultimately the sentence must be just in all the circumstances.

[22] The hefty fine and imprisonment term indicate the offences of unauthorized developments are to be treated seriously. The main aim of the sentence ought to be deterrence. In this particular case, general deterrence is more relevant than special deterrence because this is the offender's first offence.

[23] Imprisonment is out of question because the offender is a corporation. There is no suggestion that the offender does not have means to comply with monetary sanctions.

[24] The offender's previous clean record mitigates the offence. The aggravating factor is that the offender had caused substantial harm to the environment. The monetary cost of rehabilitating the environment for the harm done is about $1.4m.

[25] The total fine that this court can impose for the two counts ($750,000 per count) is $1.5m. Although the offending is not the most serious type, the offender's culpability is high. The offender was involved in a large scale tourism development for economic gain, causing damage to the environment. The sentence must reflect the community's disapproval of the offender's lack of respect for the environment.'

[27] The sentencing judge had justified the imposition of $ 01 M as an aggregate fine for both offences, I do not see any provision in section 43(1) which permits orders in the nature mentioned in (b). However, imposition of '*a refundable environmental bond of $1.4m with the Department of Environment' and* an order to *'rehabilitate the affected areas to the satisfaction of the Department of Environment at its own expenses'* could be made under section 47(1)(c) & (d) and (f) & (h) of the EMA. Yet, as long as the Prohibition Notice that was issued to the offender on 1 June 2018 by the Department of Environment remains in force, the appellant cannot engage in rehabilitating the affected areas to the satisfaction of the Department of Environment. If the appellant fails to do restoration the Department may undertake it at its own cost and the cost will become a debt recoverable in court [section 47(2) of EMA].

[28] Therefore, I do not see any illegality in orders (a) and (b) of the sentencing order. According to what the judge had stated at paragraph 17 and 18 of the sentencing order the estimated cost of rehabilitation and restoration itself is about $ 1.3 M. Thus, the value of the refundable bond for $1.4 M is justified. I cannot at this stage assess the complaint of lack of the totality/proportionality in the fine of $1M or it being excessive and harsh for any sentencing error without the complete record, for the material provided to the High Court at the sentencing hearing is not before this court. This is particularly so due to lack of a sufficient number of previous sentencing decisions for offences of this nature and guidelines given by appellate courts in Fiji.

[29] The appellant will have to take the matter before the full court for any further deliberations on this matter and apply for a guideline judgment if this court thinks it fit to do so in this appeal.

Ground 5

[30] The appellant submits that the sentencing judge had not considered the matters set out from sub-paragraphs (a) to (e) under the 05th ground the gist of which is that the appellant had already made certain payments to the authorities under the EMA which were ignored in the sentencing order.

[31] The respondent submits that the payments mentioned in (a) and (b) were regulated payments under regulation 32 of Environment Management (EIA Process) Regulations 2007 that had to be accompanied with the appellant's initial application itself.

[32] The Environmental Bond (EB) contemplated under regulation 32 of the Environment Management (EIA Process) Regulations 2007 is *inter alia* against the cost of restoration, improvement or remediation work. Regulation 32 has a specific reference to section 47 of the EMA and an EB includes one ordered by court under section 47 of EMA. Therefore, as to why the value of the EB [$402,182.44 – see (b)] already given could not have been taken into account in determining the value of the refundable bond for $1.4 M ordered by the High Court judge is not clear from the sentencing order or from the respondent's written submissions (unless, of course, regulation 32 EB is meant to cover cost of restoration, improvement or remediation work associated with the legitimate development activity and not for unauthorised development prohibited under section 43 of EMA). Therefore, this could be looked into by the full court and I am inclined to grant leave to appeal on this ground of appeal.

[33] I cannot gather much from the written submissions of both parties (no mention of them is made in the sentencing order) about payments said to have already been made by the appellant as stated at (a) and (c) and therefore make any comment whether any one or both of them should have been considered in mitigation.

[34] Similarly, I cannot consider the submission based on the case cited in the sentencing order namely **DPP v China Railway First Group (Fiji) Ltd** Criminal Case No. 788 of 2017, for neither party has submitted the same to this court.

Ground 6 and 7

[35] Part of the submissions under this ground of appeal is based on the Environmental Bond referred to at (b) under the 05th ground and this matter has already been addressed under the 05th ground of appeal.

[36] As for the second part of the submission about the judge not inquiring into the financial capacity of the appellant it appears from paragraph 23 of the sentencing order that the appellant had not even suggested that the offender did not have means to comply with monetary sanctions.

[37] However, the appellant has submitted under the 07th ground of appeal that the judge failed to consider the appellant's income submitted as part of sentencing submissions, as required by section 32(4) of the Sentencing and Penalties Act. I have no evidence of that before me and therefore cannot have doubts of the judge's statement above stated.

Ground 8

[38] The appellant argues that it is the restorative approach that should be adopted for offences under the EMA as has been done in other jurisdictions. The appellant also alleges that the sentencing judge has failed to consider the decisions cited from other jurisdictions in the matter of sentence in ordering an aggregate fine of $01M.

[39] The sentencing order does not indicate that the appellant has indeed urged the judge to go in the said direction. Without all proceedings I am not in a position to verify this aspect of the appellant's claim. In any event, decisions from different jurisdictions are only of persuasive value and sentencing in every case depends on the unique facts and circumstances of each and every case and must be catered to that individual case in the local context.

[40] However, as admitted by both parties there is little guidance a sentencing judge can derive by way of previous sentences locally under EMA and therefore, if an application is made by either party or on its own the court of appeal may decide to formulate some guidelines for sentencing under the EMA where the decisions cited by the appellant may also be considered. Subject to that, the complaint under this ground of appeal could be considered s pert of the 04th & 11th grounds of appeal if the appellant renews the appeal before the full court.

Grounds 9 and 10

[41] The appellant complains that the sentencing judge had not considered concurrent sentences as opposed to an aggregate sentence.

[42] Concurrent or consecutive sentence provisions in section 22 of the Sentencing and Penalties Act (SPA) apply only to terms of imprisonment and not fines. Aggregate fines are regulated by section 33 of the SPA *i.e.* if a person is found guilty of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose one fine in respect of those offences that does not exceed the sum of the maximum fines that could be imposed for each of them.

[43] The sentencing judge correctly referred to section 33 at paragraph 25 of the sentencing order and instead of imposing $750,000 maximum fine on each of the offences totalling $1.5M, the judge in his discretion imposed an aggregate fine of $01M for both offences. There is no sentencing error in that and the aggregate sentence favourable to the appellant.

Orders of the Court:

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is allowed on the 05th ground of appeal.

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

Solicitors:

Toganivalu Legal for the Appellant
Office of the Director of Public Prosecution for the Respondent