IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 317 OF 2015

STATE

v

NOUSHEEN MEZBEEN HUSSAIN

Counsel:	**Ms. M. Khan with Ms N. Shankar for State**
	Mr. T. Toganivalu for Accused
Date of Hearing	**22 November 2019**
Date of Ruling :	**25 November 2019**

RULING

1. At the end of the Prosecution's case, the Counsel for Defence has made two applications. The first application concerns the validity or maintainability of the third count which is Money Laundering. The second application is one of a no case to answer pursuant to Section 231(1) of the Criminal Procedure Act in respect of the 2nd and 3rd counts.

2. The accused is charged with three counts on the following information:

First Count

Statement of Offence

THEFT: Contrary to section 291 of the Crimes Decree No. 44 of 2009.

Particulars of Office

NOUSHEEN MEZBEEN HUSSAIN also known as Nousheen Mezbeen Ali, between the 1st day of January, 2012 and the 31st day of May, 2012, at Suva, in the Central Division dishonestly appropriated $15,362.78 belonging to Art and Soul Limited with the intention of permanently depriving the said Art and Soul Limited of the said amount.

Second Count

Statement of Offence

OBTAINING PROPERTY BY DECEPTION: Contrary to section 317 of the Crimes Decree No. 44 of 2009.

Particulars of Office

NOUSHEEN MEZBEEN HUSSAIN also known as Nousheen Mezbeen Ali, between the 8th day of February, 2012 and the 2nd day of March, 2012, at Suva, in the Central Division dishonestly obtained $1,772.10 from Fiji Revenue and Customs Authority with the intention of permanently depriving Fiji Revenue and Customs Authority of the said amount.

Third Count

Statement of Offence

MONEY LAUNDERING: Contrary to section 69(2)(a) and (3)(b) of the Proceeds of Crime Act 1997.

Particulars of Office

NOUSHEEN MEZBEEN HUSSAIN also known as Nousheen Mezbeen Ali, between the 1st day of January, 2012 and the 31st day of May, 2012, at Suva, in the Central Division used a total of $17,134.88, that are the proceeds of crime, knowing or ought reasonably to have known that the $17,134.88 is derived or realised directly or indirectly from some form of unlawful activity.

Is the Money Laundering Charge Defective?

3. The Defence argues that the Money Laundering charge is defective because it has rolled up separate money transactions to represent a gross sum, without separate transactions being particularised. This argument is based on the Supreme Court decision in Monika Arora v. State [2017] FJSC Special Petition No. CAV33 of 2016, (6 October 2017) which states that rolling-up of money laundering charges is not permissible under Section 70(2) of the Criminal Procedure Act. The Defence further says that the accused would be prejudiced in conducting her defence if this charge is allowed to stand.

4. The State on the other hand argues that the money laundering charge is not defective and that no prejudice or embarrassment would be caused to the accused in conducting her defence.

5. The State has submitted that the information was filed and served to the accused on the 16th day of February 2017 and, until the close of the prosecution's case, no objection had been raised that the information was defective. As per Section 214 of the Criminal Procedure Act 2009, any objection to information should have been made immediately after the infor-

mation was read and not later [Shyam v State [2019] FJCA 198; AAU103.2017 (3 October 2019)]. Objection in this case has been raised for the first time after more than two years since the information was read.

6. Having taken judicial notice of the Supreme Court decision in Monika Arora (supra), this Court at a pre-trial conference specifically asked from the State Counsel whether, in light of the said Supreme Court decision, the money laundering count could be prosecuted. Ms. J. Prasad, the State Counsel at that time, was confident it could be. Mr. I. Khan who was the then Defence Counsel on record was not present in Court to express his view and Mr. Toganaivalu later took over the file. Mr. Toganivalu had ample time and opportunity to raise this issue before the trial started. But he did not choose to do that.

7. If a charge in law is defective, it is likely that the judgement entered on a defective charge may be quashed on appeal if it appears that a grave prejudice had been caused to the defence by court not considering an objection taken to the charge during the course of the trial [Shyam (supra) P24]. Therefore, before proceeding any further it is appropriate to address this issue at this stage.

8. The State argues that one money laundering charge alleging several incidents of money laundering can lawfully be prosecuted by specifying the gross amount of money in respect of which the offence is alleged to have been committed. The State claims that the observation made by the Supreme Court in Arora (supra) on 'rolling up' of charges is *obita dicta* and therefore, it is suggested that, by considering the factual differences in the two cases, this case should be distinguished from Arora.

9. The Supreme Court observed at [38] and [39]:

> "In my judgment the offence of money laundering under section 69 of the Proceeds of Crime Act 1997 does not fall within the description of an *"offence involving theft, fraud, corruption or abuse of office."* To come with-

in section 70(2) of the Criminal Procedure Act the many separate acts of alleged offending that it is sought to have "rolled up" into one specimen or representative count must all have as their essential element either theft, fraud, corruption or abuse of office. Since the Criminal Procedure Act came into effect in 2010 it can reasonably be assumed that the offence of money laundering under section 69 of the Proceeds of Crime Act 1997 had been intentionally excluded.

In the present case it is not necessary to say more than that the prosecution should not have proceeded by way of one count alleging some 36 incidents of money laundering"

10. Section 70 of the Criminal Procedure Act under the heading 'Gross sum may be specified in certain cases of stealing and sexual offences' states as follows:

"70 (1) When a person is charged with any offence involving the theft or other misappropriation of property, it shall be sufficient to specify the gross amount of property in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed without specifying particular times or exact date.

(2) When a person is charged with any offence involving theft, fraud, corruption, or abuse of office, and the evidence points to many separate acts involving money, property or other advantage, it shall be sufficient to specify a gross amount and the dates between which the total of the gross amount was taken or accepted"

11. With all due respect to the Supreme Court, the above provision in my view allows the Prosecution, in this case, to roll up the separate acts of the alleged offending and specify the gross sum in one count.

12. Upon a plain reading of the Section 70 it is clear that the Parliament has used the words *"involving theft, fraud, corruption or abuse of office"*..... and *"other misappropriation of property"*. By using the word "*involving*", the Parliament in my view has not identified specific offences but a class of offences. It seems to suggest that the intention of Parliament was that where the offence involves theft, fraud, corruption, abuse of office or misappropriation of property, many separate acts or transactions of alleged offending could be 'rolled up' and the gross amount specified in one count.

13. This articulation is further bolstered by the fact that the offences of Fraud and Misappropriation of Property are not standalone offences in Fiji in that the Crimes Act 2009 does not have specific offences of "fraud" or "Misappropriation of Property". There are of course numerous offences which involve fraud such as conversion, obtaining property by deception, general dishonesty and conspiracy to defraud which would appear to be within the ambit of section 70 of the Criminal Procedure Act 2009.

14. In the case at hand, Theft and Obtaining Property by Deception are the alleged predicate serious offences that are involved in the offence of Money Laundering. At its heart this case necessarily involves theft (a misappropriation of property) and fraud putting itself into the ambit of Section 70.

15. The purpose of section 70 appears to allow the charges to be framed specifying the gross sum in order for the matter to be dealt in a more manageable way. As the State has submitted, if Section 70 of the Criminal Procedure Act was not applied to the current information, the number of counts would have exceeded 24.

16. Section 69 (4) of the Proceeds of Crimes Act provides that the offence of money laundering is not predicated on proof of the commission of a serious offence or foreign serious offence. Dispensing with a requirement to prove a predicate offence is by no means an unusual approach to the problems of proof that money laundering offences can present [The Director

of Public Prosecutions v A.A. Bholah [2011] UKPC 44 Privy Council Appeal No 0059 of 2010].

17. It was necessary in order to suppress the crime of money laundering which, by its very nature, was one where the particular criminal activity that produced the illegal proceeds was not always easy to identify. Indeed, the very purpose of money laundering is to conceal the provenance of illegally acquired wealth. It can be notoriously difficult to gather evidence of the specific criminal origin of the laundered property. The ability to follow the money trail in such offending can be a tedious and difficult task. By adding Section 69(4) to the description of the offence, the Parliament in my view has acknowledged the difficulty to prove a predicate offence involved in money laundering.

18. In some jurisdictions, there is no need even to specify a predicate offence. For example, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005 Council of Europe Treaty Series, No 198 (the Warsaw Convention) provides in article 9(6) that each of the parties to the Convention:

> "... shall ensure that a conviction for money laundering under this Article is possible where it is proved that the property ... originated from a predicate offence, without it being necessary to establish precisely which offence."

19. Article 14(2) (b) of the Fiji Constitution states:

> "Every person charged with an offence has the right …to be informed in legible writing, in a language that he or she understands, of the nature of and reasons for the charge"

20. Section 58 of the Criminal Procedure Act states:

"Every charge or information shall contain:

(a) statement of the specific offence or offences with which the accused person is charged; and

(b) such particulars as are necessary for giving reasonable information as to the nature of the offence charged."

21. In my opinion, in a money laundering case, a proportionate restriction will inevitably be placed on the right of an accused to receive full information about the charge against him. While the Fiji Constitution recognises as absolute the right to a trial which is fair in an overall sense, individual elements of the trial designed to secure that outcome need not be protected in absolute terms. They may be subject to proportionate qualification in the public interest. A money Laundering charge in my view imposes just such a restriction.

22. If a predicate offence involving money laundering need not be proved in Fiji, it can be argued that the Parliament has not intended the prosecution to specify in the information all the particulars of the predicate offences of the offence of money laundering.

23. In the present case, the predicate offences of course are specified in the information and in fact form the counts that are sought to be proved by the Prosecution. There is no challenge by the Defence whatsoever to the theft count, which concerns one of the predicate offences, although it involves 23 separate transactions.

24. In Shyam v State (supra) the appellant in the Court of Appeal challenged the validity of rolled up money laundering charges he was convicted of. Having distinguished the facts of that case from those of Monika Arora (supra), the Court of Appeal held that the appellant was not prejudiced because the prosecution had annexed a schedule to the information giving details of the names of the account holder, the name of the bank and account numbers.

Having analysed the factual scenario of that case, the Court also found that the charge cannot be classified as one of a "rolled up".

25. In the present case, although no such schedule is attached to the information, all necessary particulars of each transaction have been disclosed to the Defence. It is not disputed that on the 15th day of June 2017 the learned Counsel (at that time) for Defence wrote to the Prosecution requesting for further particulars of the charge and the State had then responded on 16th June 2017 with an attached schedule outlining the summary of impugned transactions.

26. The accused does not deny those transactions and that the money was received into her bank account from the complainant's company. The agreed facts numbered 12 to 36 reflect the amounts that are alleged to have been laundered by the accused. The particulars as are necessary for giving reasonable information as to the nature of the offence charged have been disclosed to the Defence. Therefore, no prejudice will be caused to the accused. She will not be embarrassed in conducting her defence.

Ruling on No Case to Answer Application

27. This application is made pursuant to Section 231(1) of the Criminal Procedure Act which states;

> " When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that 'there is no evidence' that the accused person (or any one of several accused) committed the offence"

28. The test applicable in a High Court trial at this stage is well established. In Talala v State [2019] FJCA 50: AAU155.2015 (7 March 2019) the Fiji Court of Appeal observed;

"It is well settled that, the test at this stage of the trial is whether there is some relevant and admissible evidence, direct or circumstantial, touching on all elements of the charge and not an assessment of the weight and credibility of such evidence, unless the evidence is inherently vague or improbable."

29. In State v Nikolic [2019] FJHC 91; HAC115.2018 (18 February 2019) the High Court stated;

"The test for a no case to answer application in the High Court is settled. The test is whether there is some incriminating evidence, direct or circumstantial, on all the essential ingredients of the charged offence or offences (Sisa Kalisoqo v R Criminal Appeal No. 52 of 1984, State v Mosese Tuisawau Cr. App. 14/90, State v Woo Chin Chae [2000] HAC 023/99S)"

30. This Court therefore is required at this stage to determine whether Prosecution presented some relevant and admissible incriminating evidence, direct or circumstantial, on all the essential elements of the offence as charged.

31. The Prosecution called 7 witnesses and tendered 14 documents. Most of the documents were tendered by consent.

32. In relation to the first count of Theft, the accused has not made an application for no case to answer. The application only relates to the second and third counts. Nevertheless I have analised the evidence relating to the first count as well so far as Section 231(1) of the Criminal Procedure Act is concerned.

First Count- Theft

33. In relation to the first count, the following elements are required to be proved by the Prosecution pursuant to Section 291 of the Crimes Act:

(a) The accused;
(b) Dishonestly appropriates property;
(c) Belonging to another;
(d) With the intention of permanently depriving the other of the said property.

34. Identity of the accused is not in dispute in this case. It is agreed that the accused was employed by Art & Soul Limited during the period December 2008 through May 2012 (agreed facts paragraph 1).

35. The State presented PE1 (Bank statement of Art and Soul Limited) and PE3 (Bank Statement of the accused) to prove that there were internet money transfers and deposits done by the accused. As a result of which between 1st January 2012 and 31st May 2012 the accused received a sum of $15,362.78 from Art & Soul into her bank account. There is evidence on the element of 'appropriation".

36. PW1 testified in court that the accused was only entitled to an annual salary of $12,000 and that she ought to have received only a sum of $424.61 as her fortnightly salary. He said that anything in excess of this amount was not authorised. With reference to the bank statements, PW1 identified the sums allegedly appropriated by the accused without his knowledge or authorisation. Evidence was lead that the accused by misrepresentation of facts obtained the signature of PW 2 to a blank cheque and the same was subsequently deposited into accused's bank account. There is evidence on dishonesty.

37. PW1 testified that the money belonged to Art & Soul Limited and that the alleged transfers were made from the Art and Soul Bank account. There is evidence that the property belonged to another.

38. Evidence was also lead about a confession allegedly made by the accused to PW 1 and PW 3 with regard to the alleged theft and about her subsequent conduct of restitution of $ 10,000.00.

39. By analysing the evidence lead by the Prosecution as to accused's conduct, it is open for the assessors to infer that the accused intended to permanently deprive Art & Soul Limited of the said sums.

40. There is evidence on the first count.

Second Count- Obtaining Property by Deception

41. The elements of the second count Obtaining Property by Deception are as follows:

(a) The accused;
(b) By a deception;
(c) Dishonestly obtained property;
(d) Belonging to another;
(e) With the intention of permanently depriving the other of the said property.

42. The Defence claims that the State had failed to prove the element 'deception'.

43. The following definition is provided for the term 'deception' under section 316 of the Crimes Decree;

> "deception" means an intentional or reckless deception, whether by words or other conduct, and whether as to fact or as to law, and includes:
>
> (a) a deception as to the intentions of the person using the deception or any other person; and
>
> (b) conduct by a person that causes a computer, a machine or an electronic device to make a response that the person is not authorised to cause it to do.

44. In Chute v. State [HAA 15 of 2016], Perera J stated at paragraph 35:

> "It is necessary for the prosecution to prove that the deception operated in the mind of the person who is alleged to have been deceived"

45. Perera J in his endeavour to find a clearer definition for "deception" has referred to Blackstone's Criminal Practice 2007 at page 402 which states:

> "The best known judicial definition of deception is that of Buckley J in Re London and Globe Finance Corporation Ltd [1903] 1 Ch 728 at p.732:
>
> "To deceive is ....to induce a man to believe that a thing is true which is false. This was quoted with approval in DPP v Ray [1974] AC 370 and is consistent with the normal dictionary meaning of the term, …"

46. In this case, the accused admits that she lodged PE10 (Form S – FRCA Return for Salary and Wages Earners) and the attached document PE11 (Pay as you earn (PAYE) Employer Certificate [agreed facts number 8] with FRCA. PW1 testified that the accused was on a

$10,000 annual salary scale and was not liable to pay taxes in 2011 and therefore not enti-entitled to a refund. He denied signing PE11 and stated that the company stamp was always in possession of the accused. If this evidence is believed, it is open for the assessors to find that the documents she lodged with FRCA (PE10 and PE11) were misleading and incorrect.

47. PW5 of FRCA testified that FRCA had assessed and processed the payment of tax refund on the strength of PE10 and PE11. The State relies on evidence of PE5 to show that FRCA, when it made the refund to the accused, accepted PE10 and PE11 as genuine documents containing correct information. If the assessors believe that the tax refund was induced by the tendering of false and fraudulent documents, it is open for them to infer that FRCA was deceived and, as a result of this deception, a tax refund was made to the accused.

48. The Defence Counsel on the basis of a dictum in Chute (supra) argues that the claim for the refund was a claim relating to the future and therefore does not constitute deception under Section 318 of the Crimes Act. He relies on Perera J's dictum in Chute (supra) which states at paragraph 35:

> "It is necessary for the prosecution to prove that the deception operated in the mind of the person who is alleged to have been deceived. I am of the view that deception under section 318 of the Crimes Decree should be a deception as to existing facts or law and not a deception as to the future. With regard to deception as to the future, Blackstone's Criminal Practice 2007 states thus;
>
> "For a deception to be an offence under the Theft Acts 1968 or 1978, it must be a deception as to existing facts, or as to law. A representation that something will happen in the future will not suffice. It therefore, will not do to argue that, when one person issues a worthless cheque to another, he has deceived the other into thinking that it will be honoured. For similar reasons, if a person falsely promises to perform a service for someone in the future, it cannot be argued that the person to whom the promise was

made has been deceived into thinking that the service will be performed. There may indeed have been a criminal deception, but in either case, the deception must be expressed in terms of present fact."

49. It is argued that the accused had submitted her tax return for the period June to December 2011, and no evidence was lead about any returns for January to May 2011.

50. PW 5 said that although the tax return was for the period June to December 2011, the assessment was done by FRCA on the basis of the annual salary of the tax payer as indicated in P11 which is the employee certificate. The assessment had been done on the basis that the tax payer's existing annual gross income stood at $14,423.25. Therefore it cannot be said that the alleged deception did not relate to existing facts.

51. There is no dispute that the accused received into her bank account (PE3) a sum of $1772.10. If the assessors accept that the accused had lied or supplied wrong information to FRCA in PW10 to obtain the refund, it is open for them to find that the accused had been dishonest.

52. PW5 confirmed that the sum of $1772.10 was paid by FRCA and this sum belonged to FRCA. Therefore there is evidence that the property belonged to another.

53. If the assessors believe that the accused made a false claim to FRCA, it is open for the assessors to infer that the accused was aware that her actions would permanently deprive FRCA of the sum that is refunded.

54. It is open for the assessor to infer from her conduct that the intention of the accused was to permanently deprive FRCA the sum of $1772.10. There is evidence on each element of count 2.

Third Count- Money Laundering

55. The third count against the accused is as follows:

Statement of Offence

Money Laundering: Contrary to section 69(2)(a) and (3)(b) of the Proceeds of Crime Act 1997.

Particulars of Office

Nousheen Mezbeen Hussain also known as Nousheen Mezbeen Ali, between the 1st day of January, 2012 and the 31st day of May, 2012, at Suva, in the Central Division used a total of $17,134.88, that are the proceeds of crime, knowing or ought reasonably to have known that the $17,134.88 is derived or realized directly or indirectly from some form of unlawful activity.

56. Section 69 of the Proceeds od Crimes Act defines Money Laundering as follows:

"A person shall be taken to engage in money laundering if, and only if:

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

(b) the person uses, disposes of or brings into Fiji any money or other property, that is the proceeds of crime,

and the person knows, or ought reasonably to know, that the money or other property is derived or realized, directly or indirectly, from some form of unlawful activity.

57. The elements for the offence of Money Laundering in this case are that:

(a) The accused;
(b) Used property;
(c) That is proceeds of crime;
(d) The accused knew, or ought reasonably to know that the money or other property is derived or realised, directly or indirectly, from some form of unlawful activity.

58. The term 'uses' is not defined in the Proceeds of Crimes Act. The State runs its case on the basis that the accused received some money which is proceeds of crime into her 'salaries' account and she either withdrew or transferred part of that money to a 'hidden' savings account. The position of the Prosecution is that by making withdrawals and transfers the proceeds of crime was being 'used' by the accused.

59. It is clear that the word 'transaction' encompasses withdrawals and internet transfers from one bank account to another. However the State has chosen not to run its case on the basis that the accused was 'engaged in transactions' that involve money that is proceeds of crime. It has rather relied on the word 'uses' which, in the absence of any statutory definition could be interpreted broadly to mean anything.

60. According to this section, even a thief who had used the stolen money to buy cigarettes or drinks can be indicted for money laundering. The Parliament I believe would not have contemplated such acts to be dealt under money laundering. The courts, in my view, should interpret the word 'uses' in such a manner so that the notion of money laundering is not diluted. It is hoped that the Office of the Director of Prosecution will use its wisdom to limit

its prosecutorial power to ensure that only money laundering cases in their strict sense are filed under this limb.

61. The Supreme Court in Arora (supra) at [25] observed:

> "The prosecution was required to establish beyond reasonable doubt that the petitioner had disposed of the cash. **The purpose of disposal is to integrate the proceeds of crime into "clean money"** for the benefit of the petitioner and or others" (emphasis added)

62. The Supreme Court has emphasised the money laundering aspect of the disposal. Similarly, when it comes to 'using', the purpose of the 'use' should be to integrate the proceeds of crime into "clean money".

63. The Defence Counsel referred me to the Hansard of 3 December 1997 which has reported (at pages 1109-1110) the Parliamentary debate when the then Minister of Finance commended the Proceeds of Crimes Bill to the House. The then Attorney General stated:

> "Fiji is not the first country to enact this kind of legislation. It is, as I said, part of international movement worldwide that is an area which must be targeted to ensure that there is no incentive for international criminals to be involved in criminal activities internationally. ....
>
> Sir, the main target for this Bill is money laundering which arises as a result of drug related activities or white collar crimes. There are cases already in Fiji where proceeds from drug related activities and international fraud have found there ways to our shores and they are now invested in legitimate business or properties and they are present in Fiji....

Sir, this bill is also related to the next bill, we will be dealing with and I am pleased that they are coming together. The Bill that deals with international assistance in criminal matters"

64. The Defence Counsel argues that the intention of Parliament was that this Act was to be part of international response to drug trafficking and international fraud. Having agreed that the DPP is not restrained from laying money laundering charges for domestic criminal matter; he suggests that there should be careful consideration for the laying of money laundering charges especially when trying to establish culpability of multiple counts of similar offending with other offences like theft or obtaining property or other fraud like offences.

65. Having agreed on the learned Counsel's comment about the careful consideration that should be taken by the DPP in the laying of money laundering charges for domestic criminal matters, I do not believe that the intention of Parliament was to confine this legislation to deal only with the aspects of international money laundering. Although the Bill was introduced along with the Mutual Assistance in Criminal Matters Bill, the preamble provides for confiscation of the proceeds of crime to deprive persons of the proceeds, benefits and properties derived from the commission of serious offences and to assist law enforcement authorities in tracing the proceeds, benefits and properties and for related matters....

66. I am of the view that the alleged acts of the accused justify the laying of a money laundering charge given the alleged manipulation of the Fiji financial system to hide the true origin of proceeds of crime.

67. There is no dispute that the accused received a total sum of $ 17,134.88 from Art & Soul and FRCA into her bank account. Prosecution adduced evidence to show that the money was generated from two serious predicate offences, namely, Theft and Obtaining Property by Deception. The sums would become proceeds once the money is deposited in the bank account of the accused. An examination of the accused's bank statement (PE1) gives no

indication that the funds in the accused's account came from any source other than that from Art & Soul Limited.

68. There is evidence that the money deposited in to the bank account of the accused comprises proceeds of crime. Since there is evidence that the accused was involved in the commission of the predicate offences, it is open for the assessors to infer that the accused was aware that the money was derived from some form of illegal activity.

69. There is evidence that as soon as the monies hit accused's (salaries) bank account (PE3) the accused either withdrew or transferred part of that money to a 'hidden' savings account [PE3(A)]. Prosecution tendered the bank statements PE 3 and PE3 (A) to show as to how the transfers and withdrawals were done by the accused. According to those statements, from 13 February 2012 to 31 May 2012, a total sum of 20268.64 had been withdrawn.

70. The bank statement of Art & Soul (PE1) indicates that various misleading narration like 'PAYROLL', 'FEL-IB', 'BSPL POL', 'INTEREST' have been used in conducting the unauthorised transfers from the Art & Soul bank account to the accused's 'salaries' account.

71. The police investigator Nilesh (PW7) said that during the initial process of investigation and the record of interview, the accused mentioned that she had only one ANZ account. His further investigations with Reserve Bank and the Financial Intelligence Unit revealed that there was another 'hidden' account under accused's name. The money from the original account where she used to receive the salaries was again transferred to the 'hidden' savings account whereupon various purchases and payments were done. He further said that the only reason for this account was to hide the proceeds of crime and to make it look legitimate that it was coming from her account as savings.

72. The frequency at which the money from the 'hidden account' was withdrawn does not indicate that the account was opened for the stated purpose of savings. There is evidence to

suggest that the whole purpose of opening the second bank account was to integrate the pro-proceeds of crime into "clean money" (PW-7). The evidence on misleading narrations used to carry out the unauthorised transfers would further add to the circumstances from which a reasonable inference could be drawn that the money was being used for the laundering purpose.

73. An examination of bank records of the accused shows that before the money (which was the subject matter of the allegation) started coming from Art & Soul bank account into to the accused's bank account, the accused had a balance carried forward from 2011 suggesting that a portion of the funds withdrawn from the accused's bank account could possibly have come from a source other than the alleged unlawful activity.

74. The Defence has raised issue as to how to differentiate clean money from proceeds of crime deposited into the accused's bank account. The Defence Counsel submits that ….. *" if the accused already had a balance of $8,922.13 in this account prior to 1 January 2012 and she deposits a further $ 8354 .40 between 1 January 31 May 2012, it is evident that she would have a total of $17,267.53. Although, PW-7 confirmed that it would be difficult to differentiate between legitimate monies and tainted money, he said that all the moneys were trained.....this cannot be right in accounting terms let alone the legality of it all".*

75. The answer to this issue is provided in case authorities from the United States Court of Appeals, Seventh and Tenth Circuits. Although the statutory provisions under which those cases were decided are not entirely similar to those of the provisions of the Proceeds of Crimes Act, they nevertheless carry a great persuasive weight given that the money laundering jurisprudence was conceived and greatly developed in the United States.

76. In United States of America v L Johnson [1992] USCA 10842; 971 F.2d 562 9 (28 July 1992) United States Court of Appeals, Tenth Circuit held:

"The government had the burden of showing that the criminally derived property used in the monetary transactions was in fact derived from specified unlawful activity. This does not mean, however, that the government had to show that funds withdrawn from the defendant's account could not possibly have come from any source other than the unlawful activity. Once proceeds of unlawful activity have been deposited in a financial institution and have been credited to an account, those funds cannot be traced to any particular transaction and cannot be distinguished from any other funds deposited in the account. The "tainted" funds may be commingled with "untainted" funds, with the result being simply a net credit balance in favor of the depositor. The credit balance gives the depositor a claim against the bank and allows him to withdraw funds to the extent of the credit. In the context of a withdrawal, the portion of § 1957 requiring a showing that the proceeds were in fact "derived from specified unlawful activity" could not have been intended as a requirement that the government prove that no "untainted" funds were deposited along with the unlawful proceeds. *Cf. United States v. Jackson,* 935 F.2d 832, 840 (7th Cir. 1991). Such an interpretation would allow individuals to avoid prosecution simply by commingling legitimate funds with proceeds of crime. *Id.* This would defeat the very purpose of the money-laundering statutes"

77. The Court finds that there is some direct and circumstantial evidence on all three counts against the accused. There is a case for the accused to answer.

78. In result, the following orders are made:

i. The objection taken to the information is overruled.

ii. The application for no case to answer is dismissed.

79. The accused will now be put to her defence.

Aruna Aluthge

Judge

At Suva

25 November 2019

Solicitors: **Director of Public Prosecution for State**

Toganivalu Legal for Accused