IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

ASHWIN PRASAD

Appellant

CASE NO: HAA. 19 of 2019
[MC, Suva, Crim. Case No. 25 of 2010]

Vs.

STATE

Respondent

Counsel : Ms. R. Lal and Ms. K. Lal for the Appellant
Ms. J. Prasad for the Respondent

AND

STATE

Appellant

Vs.

ASHWIN PRASAD

Respondent

Counsel : Ms. J. Prasad for the Appellant
Ms. R. Lal and Ms. K. Lal for the Respondent

Hearing on : 19 November 2019

Judgment on: 07 February 2020

JUDGMENT

Introduction

1. This appeal essentially deals with the offence of money laundering and the application of the provisions of section 70(2) of the Criminal Procedure Act 2009 ("CPA") in framing of charges.

2. The appellant, Ashwin Prasad was charged before the Magistrate Court at Suva for two counts of corrupt practices under the Penal Code and two counts of money laundering under the Proceeds of Crime Act 1997. The charges reads thus;

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.

3. After trial the Learned Magistrate convicted Appellant Prasad as charged and on 27/06/19 sentenced him to 05 months imprisonment for counts one and two and for 03 years imprisonment for counts three and four. The sentences were ordered to be served concurrent to each other. The Learned Magistrate declined to fix a non-parole period.

4. There are two appeals before this court emanating from the above case. Appellant Prasad has appealed against his conviction and sentence, and the State has also appealed against the sentence. The two appeals are dealt with together. For convenience, throughout this judgment Appellant Prasad will be referred to as the 'appellant' and State, the 'respondent'.

5. The grounds of appeals raised by the appellant are as follows;

Appeal against conviction

i. ***THAT*** *the Learned Magistrate erred in Law and in fact when convicting the Accused/Applicant of two (2) counts of Corrupt Practices Contrary to Section 376(a) of the Penal Code, Cap 17, as the phrasing of the words Overseas Suppliers in the Particulars of the offence, were not sufficient, or too ambiguous for Counsel for the Accused/Applicant to mount a credible, sufficient or tangible defense to this.*

ii. ***THAT*** *the Learned Magistrate erred in Law and in fact when convicting the Accused/Applicant of two (2) counts of Corrupt Practices Contrary to Section 376 (a) of the Penal Code, Cap 17, as this charge became statutorily limited by time and thus barred by Statute under s187 of the Criminal Procedure Act 2009. As a result, this charge was out of time from 27th October, 2015, when the Accused/Applicant was charged with them.*

iii. ***THAT*** *the Learned Magistrate erred in Law and in fact when convicting the Accused/Applicant of two (2) counts of Money Laundering Contrary to Section 69 (3) of the Proceeds of Crime Act 1997, as the charges were defective, having failed to meet the criteria s70(2) of the Criminal Procedure Act 2009 for a Gross sum, as this charge was neither a theft, fraud, corruption, or abuse of office and the evidence pointed to many separate acts, the charges should not have been rolled up as per Arora v State SC 2017 Criminal Petition CAV0033 of 2016.*

iv. ***THAT*** *the Learned Magistrate erred in Law and in fact when sentencing the Accused/Applicant by applying/utilizing the "objective seriousness" of the offending as establish in Koroivuki v State [2013] FJCA 15; AAU0018 of 2010, amounting to a double counting of the aggravating factors in this matter.*

v. ***THAT*** *the Learned Magistrate erred in Law and in fact when convicting the Accused/Applicant of two (2) counts of Corrupt Practices Contrary to Section 376(a) of the Penal Code, Cap 17 and two (2) counts of Money Laundering Contrary to Section 69 (3) of the Proceeds of Crime Act 1997 by failing to consider the decision of Arora v State SC 2017 Criminal Petition CAV0033 of 2016.*

vi. ***THAT*** *the Learned Magistrate erred in Law and in fact when convicting the Accused/Applicant by failing to adequately examine the issues of the length of delay in bringing the charges against the Accused/Applicant, the time that had lapsed since the alleged offence, the reason for the delay in bringing the charges and the undue prejudice that this had on the accused as a result. In total the delay between the offending and conviction was 17 years.*

Appeal against sentence

i. ***THAT*** *the Learned Magistrate erred in Law and in fact when sentencing the Accused/Applicant by failing to examine the issues of the length of delay in bringing the charges against him, the time that had lapsed since the alleged offence, the reason for the delay in bringing the charges and the undue prejudice that this had on the accused as a result. In total the delay between the offending and conviction was 17 years.*

ii. ***THAT*** *the Learned Magistrate erred in Law and in fact when sentencing the Accused/Applicant by applying/utilizing the "objective seriousness" of the offending as establish in Koroivuki v State [2013] FJCA 15; AAU0018 of 2010, amounting to a double counting of the aggravating factors in this matter.*

iii. ***THAT*** *the Learned Magistrate erred in Law and in fact when sentencing the Accused/Applicant of two (2) counts of Corrupt Practices Contrary to Section 376(a) of the Penal Code, Cap 17 and two (2) counts of Money Laundering Contrary to Section 69(3) of the Proceeds of Crime Act 1997 by failing to consider the decision of Arora v State SC 2017 Criminal Petition CAV0033 of 2016.*

iv. ***THAT*** *the Learned Magistrate erred in Law and in fact by failing to review similar tariff cases adequately in respect to Count 1 and Count 2 when determining the starting point for the Accused/Applicant's sentence.*

v. ***THAT*** *the sentence is manifestly harsh an excessive in the circumstances.*

6. The grounds of appeal advanced by the respondent assailing the sentence are as follows;

   (a) That the Learned Chief Magistrate erred in fact and in law when he imposed a sentence which was made manifestly lenient.

   (b) That the Learned Chief Magistrate erred in fact and in law when he failed to impose a non-parole period.

The factual matrix

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.

Discussion

Appeal by Appellant Prasad

Ground one

> ***THAT*** *the Learned Magistrate erred in Law and in fact when convicting the Accused/Applicant of two (2) counts of Corrupt Practices Contrary to Section 376(a) of the Penal Code, Cap 17, as the phrasing of the words Overseas Suppliers in the Particulars of the offence, were not sufficient, or too ambiguous for Counsel for the Accused/Applicant to mount a credible, sufficient or tangible defense to this.*

8. On this ground, the appellant argues that the first and the second counts are defective for want of particulars. Counsel for the appellant acknowledged that the appellant was represented by a lawyer during the proceedings before the magistrate court and this issue was never raised in the magistrate court.

9. As pointed out in the case of ***Ali v State*** [2019] FJHC 724; HAA003.2019 (12 July 2019) and ***Prasad v State*** [2018] FJHC 617; HAA15.2018 (20 July 2018), in terms of section 279 of the Criminal Procedure Act the High Court cannot entertain a ground of appeal in relation to a defect in a charge of substance or form or for any variance between the charge and the evidence where the appellant was represented by a lawyer before the magistrate court unless that objection was raised before the Learned Magistrate and the Learned Magistrate had refused adjourn the hearing on that account.

10. When this was pointed out during the hearing, ground one was withdrawn.

Ground Two

Accused/Applicant of two (2) counts of Corrupt Practices Contrary to Section 376 (a) of the Penal Code, Cap 17, as this charge became statutorily limited by time and thus barred by Statute under s187 of the Criminal Procedure Act 2009. As a result, this charge was out of time from 27th October, 2015, when the Accused/Applicant was charged with them.

11. The appellant argues that the first two charges are time-barred in light of the provisions of section 187 of the Criminal Procedure Act.

12. Section 187 of the Criminal Procedure Act provides thus;

187(1) This section applies to all offences the maximum punishment for which does not exceed imprisonment for 12 months or a fine of 10 penalty units unless a longer time is allowed by any law for the laying of any charge for an offence under that law.

(2) No offence shall be triable by a Magistrates Court, unless the charge or

complaint relating to it is laid within 12 months from the time when the matter of the charge or complaint arose.

(3) The court shall order the dismissal of any proceedings which are in breach of this section.

13. The appellant points out that the penalty for the offence he was charged with on the first two counts (offence of corrupt practices under section 376 of the Penal Code) is an imprisonment term of two years or a fine of six hundred dollars. Ten (10) penalty units as at today amounts to a fine of FJD1000. The appellant's argument is that, since the fine provided under section 376 of the Penal Code is six hundred dollars, in view of section 187 of the Criminal Procedure Act, a charge under the said section 376 cannot be laid after the expiry of 12 months from the time when the matter of the charge arose.

14. It is clear that the purpose of section 187 of the Criminal Procedure Act is to limit a person from being prosecuted for a minor offence after the lapse of one year from the date the alleged offence was committed.

15. It is a fact that the value of money decreases over time. The Penal Code came into force in 1945 and the difference in the value of six hundred dollars then and now is quite significant. Therefore, it is my considered view that, it is not pragmatic to base determine whether a particular offence under the Penal Code is time-barred in view of the provisions of section 187 of CPA based on the fine. It is my considered view that, priority should be given to the imprisonment term prescribed for the offence over the amount of the fine when applying the provisions of section 187 of CPA in relation to an offence under the Penal Code, if the relevant penalty includes both an imprisonment term and a fine.

16. Ground two should therefore fail.

Ground three

> ***THAT** the Learned Magistrate erred in Law and in fact when convicting the Accused/Applicant of two (2) counts of Money Laundering Contrary to Section 69 (3) of the Proceeds of Crime Act 1997, as the charges were defective, having failed to meet the criteria s70(2) of the Criminal Procedure Act 2009 for a Gross sum, as this charge was neither a theft, fraud, corruption, or abuse of office and the evidence pointed to many separate acts, the charges should not have been rolled up as per Arora v State SC 2017 Criminal Petition CAV0033 of 2016.*

17. Again, the appellant alleges that the charges are defective, and this time the third and fourth charges. At the outset I wish to state that, for the same reasons I have pointed out in relation to ground one, that is, based on the provisions of section 279 of the Criminal Procedure Act, this ground of appeal as it is formed, cannot be entertained by this court.

18. However, since the issue raised in this ground is premised upon the provisions of section 70(2) of the Criminal Procedure Act and a case authority, I was inclined to deal with the said issue.

19. Section 70 of the Criminal Procedure Act reads thus;

> *Gross sum may be specified in certain case of stealing and sexual offences*
>
> *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.*
>
> *(3) When a person is charged with any offence of a sexual nature and the evidence points to more than one separate acts of sexual misconduct, it shall be sufficient to specify the dates between which the acts occurred in one count and the prosecution must prove that between the specified dates at least one act of a sexual nature occurred.*
>
> *In such a case the charge must specify in the statement of offence that the count is a representative count.*

20. Section 70(1) above applies to any offence involving theft or misappropriation of property. Theft or misappropriation of property, for example in instances where the offence is committed by an employee against the employer, may most likely be committed over a period of time. The accused will be the same, the victim will be the same, and the modus operandi will be the same. In such a case though there may be multiple dates on which the money or the property was appropriated, the accused in fact commits one offence. Therefore it is logical to specify the gross amount that was appropriated and the dates between which the offence was alleged to have been committed.

21. Section 70(2) of CPA applies to any offence involving theft, fraud, corruption, or abuse of office. The spectrum in this section is wider. But in my view, the situation is more or less the same. Though the accused is the same, the victim is the same, and modus operandi is the same; but when there are separate acts involving money, property or other advantage where it would be clear that the accused had committed one offence, but over a period of time, it is sufficient in terms of section 70(2) of CPA to specify the gross amount that was appropriated and the dates between which the offence was alleged to have been committed. It should be noted that in instances where an offence is rolled up, the evidence in relation to the elements of the offence would be essentially the same, but since the offence was committed over a period of time, there will be several transactions taken place on different dates within that period.

22. Further, as correctly pointed out by the counsel for the respondent, by the use of the words "any offence <u>involving</u>" it is clear that it is not necessary for the relevant offence to be one of the offences listed in the section for the provisions of the section to be applicable. The section does not limit the rolling-up to the offences specified in the section. It clearly reads that "any offence" can be rolled-up provided that, that offence involves, theft, fraud, corruption or abuse of office. For example, section 70(2) above should not be read to understand that only in a theft charge or in an abuse of office charge, the gross amount and the time period can be specified.

23. The above position is further strengthened by the inclusion of the words 'fraud' and 'corruption' in the said section. As the counsel for the respondent pointed out, there is no offence with the title 'fraud' in Fiji. There is also no offence titled 'corruption'. If the legislature intended to limit the application of section 70(2) of CPA to specific offences under the law, why did the legislature then include fraud and corruption which are not distinct offences in that section?

24. Therefore, it is clear that where the offence of theft, the offence of abuse of office, fraud or corruption forms a necessary or an integral part of a particular offence, such offence qualifies to be rolled up in terms of the provisions of section 70(2) of the CPA. For example, section 70(2) of CPA can be clearly applied where the offence is one of obtaining property by deception, general dishonesty and conspiracy to defraud as these offences involve fraud (fraudulent conduct).

25. It is pertinent to note that the offence of money laundering involves dealing with proceeds of crime. Proceeds of crime according to the Proceeds of Crime Act, in simple terms, means the proceeds of a serious offence (includes a foreign serious offence). Accordingly, it is manifestly clear that, if the serious offence relevant to a particular offence of money laundering involves theft, fraud, corruption or abuse of office, that offence (money laundering) can clearly be rolled-up in terms of the provisions of section 70(2) of CPA. Therefore, in my judgment, the provisions of section 70(2) of CPA are not contravened by the manner in which the third and the fourth charges are framed, that is, by the fact that the gross amount is specified and the period during which the alleged transactions took place is stated.

26. However, in deciding whether to have a roll-up charge, the prosecution should not overlook the fact that section 70(2) of CPA uses the term "any offence" and not "offences". Multiple offences cannot be rolled-up pursuant to section 70(2) of CPA. In my judgment, in instances where the same crime is committed against multiple victims by the same accused, that accused cannot be considered as having committed one offence. It is because, most likely, given the fact there are different victims, the modus operandi of the offence committed against each accused will

not be the same. In such a situation, the accused in fact commits separate offences against each victim and therefore those separate offences cannot be rolled-up pursuant to the provisions of section 70(2) of CPA.

27. Moreover, the rolling up of an offence though usually welcomed by the bench as it saves time and effort to an extent when recording the plea and when preparing the judgment or the summing up, that approach is more challenging to the prosecution as there is a high likelihood of overlooking certain transactions involved when leading the evidence and thereby failing to establish the gross amount which is cited in the charge.

28. On this third ground of appeal the appellant also submits that the third and fourth charges should not have been rolled-up given the decision in the case of ***Arora v State*** [2017] FJSC 24; CAV0033.2016 (6 October 2017).

29. In ***Arora*** (supra) Calanchini P had said thus;

> [36] Although not raised by Counsel, the procedure adopted by the prosecution in the information laying the charge against the petitioner is of some concern. It was alleged by the prosecution that there were some 36 transactions over a period from 9 December 2005 to 11 May 2007. Ordinarily where there are multiple transactions that allegedly constitute separate offences, the prosecution should proceed by laying a separate count in respect of each transaction. That would appear to be the effect of section 59 of the Criminal Procedure Act 2009 which states:
>
> *"(1) Any offence may be charged together in the same charge or information if the offences charged are:*
> *(a) founded on the same facts or form; or*
> *(b) are part of a series of offences of the same or a similar nature.*
> *(2) Where more than one offence is charged in a charge or information, a description of each offence shall be set out in a separate paragraph of the charge or information and each paragraph shall be called a count."*
>
> Section 61(7) provides that:
>
> *"Where a charge or information contains more than one count, the counts shall be numbered consecutively."*

> [37] However, under section 70(2) of the Criminal Procedure Act 2009 the use of a "*rolled up*" charge is permitted:
>
> > *"70(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."*
>
> [38] 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 within 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.
> [39] 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.

30. As correctly pointed out by the counsel for the respondent, the above paragraphs do not form part of the *ratio decidendi* of the judgment in ***Arora*** (supra) for two reasons. First, the issue dealt with in the above paragraphs was not one that was raised before the court either through a ground of appeal or during the hearing by any party to the case. No arguments were heard on that issue. Secondly, the said proposition was not relevant in the determination of any issue raised before the court and accordingly, in the final determination of the appeal. Of course the said observation which is *obiter*, though not binding on the lower courts, is strongly persuasive.

31. On the other hand the facts in ***Arora*** (supra) were different from the facts in this case. Especially the predicate offence or the serious offence which is relevant to the money laundering charges in the instant case is different from the predicate offence relevant to the money laundering charge in ***Arora*** (supra) and therefore, the instant case can be clearly distinguished from ***Arora*** (supra).

32. Upon perusal of the charge sheet in the case at hand, it is clear that the third charge stems from the first charge (corrupt practices) and the fourth charge from the second charge (corrupt practices).

33. For the reason that the third charge (offence) and the fourth charge (offence) stem from offences involving corruption, the rolling up of the offence in the third count and the fourth count does not contravene the provisions of section 70(2) of CPA. The offence relevant to the third charge and the offence relevant to the fourth charge clearly involves corruption.

34. Therefore the third ground should fail.

Ground Four

> ***THAT*** *the Learned Magistrate erred in Law and in fact when sentencing the Accused/Applicant by applying/utilizing the "objective seriousness" of the offending as establish in Koroivuki v State [2013] FJCA 15; AAU0018 of 2010, amounting to a double counting of the aggravating factors in this matter.*

35. This ground does not raise any issue against the conviction. Hence it was withdrawn during the hearing as a ground of appeal against conviction.

Ground Five

> ***THAT*** *the Learned Magistrate erred in Law and in fact when convicting the Accused/Applicant of two (2) counts of Corrupt Practices Contrary to Section 376(a) of the Penal Code, Cap 17 and two (2) counts of Money Laundering Contrary to Section 69 (3) of the Proceeds of Crime Act 1997 by failing to consider the decision of Arora v State SC 2017 Criminal Petition CAV0033 of 2016.*

36. Fifth ground of appeal is similar to the third ground of appeal, in that, the crux of the issue raised is that the conviction on the third and the fourth counts are bad in law given the decision in ***Arora*** (supra). I have clearly answered this issue.

37. Therefore, fifth ground should fail.

Ground Six

> ***THAT** the Learned Magistrate erred in Law and in fact when convicting the Accused/Applicant by failing to adequately examine the issues of the length of delay in bringing the charges against the Accused/Applicant, the time that had lapsed since the alleged offence, the reason for the delay in bringing the charges and the undue prejudice that this had on the accused as a result. In total the delay between the offending and conviction was 17 years.*

38. The allegation is that the appellant was prejudiced due to the length of delay between the offending and the conviction which is 17 years. This is clearly not a valid ground to raise against a conviction. Nevertheless, the appellant has not demonstrated how he was prejudiced due to the said delay.

39. Therefore, the sixth ground should fail.

The convictions on the third and fourth counts

40. Having closely examined the third and the fourth counts when dealing with the issue raised under the third ground of appeal, I was compelled to examine whether the Learned Magistrate had erred in law by convicting the appellant on the third and the fourth counts not owing to any defects in the charges as alleged by the appellant, but due to the apparent error in the reasons given by the Learned Magistrate in convicting the appellant on those charges.

41. The Learned Magistrate in his judgment had stated the following as his reasons for finding the appellant guilty of the third and fourth counts;

> *The evidence established that these suppliers for Carpenter's Hardware regularly paid monies into the Accused's account between January 2002 to December 31st 2003. The said monies were proceeds of unlawfully solicited commissions which the Accused has obtained to the detriment of his employer. The accused was aware that these commissions were realized from his unlawful activity.*

42. In relation to the case at hand, the relevant elements of the offence would be;

    a) The accused;

b) engaged directly or indirectly in a transaction;
c) that involves money;
d) that money is proceeds of crime;
e) he knew, or ought reasonably to know, that the money is derived or realised, directly or indirectly, from some form of unlawful activity.

43. It appears that the Learned Magistrate had considered soliciting commissions to be the predicate (serious) offence and therefore the commissions were the proceeds of crime [element (d) above]. Further, it appears that from the fact that the suppliers 'paid moneys into the [appellant's] account', it was deemed that the appellant obtained that money and this was considered as evidence of 'engaging in a transaction' [element (b) above].

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. If the money in question is not derived from a serious offence, it does not become proceeds of crime. Therefore the aforementioned reasoning of the Learned Magistrate is erroneous and does not support a conviction for the offence of money laundering. However, I do note that this line of thinking of the Learned Magistrate is not in line with the prosecution case theory.

45. The question now is, despite the Learned Magistrate's error explained above, was there evidence to establish the offence of money laundering beyond reasonable doubt?

46. According to the facts of the case the appellant had received money to his personal account from the overseas suppliers of his company whom he was dealing with in his capacity as an employee of the company. The fact that the appellant received the commissions is not disputed and the appellant had in fact admitted that during cross-examination. The issue is whether the money which was received into the

appellant's bank account could be considered as proceeds of crime and if it could, then, whether the appellant had engaged in a transaction which involves that proceeds of crime.

47. When I inquired from the counsel for the respondent the evidence the prosecution was relying on to establish the money laundering charges, the response was that the corruption charges end when the 'money hits the bank account' and that withdrawing the money amounts to money laundering.

48. This withdrawal the counsel was referring to should be the three withdrawals made by the appellant on 06/11/2003 where the total sum was FJD 105,000 as per the evidence of the third prosecution witness ("PW3"). These are the only withdrawals highlighted when PW3 had given evidence. The appellant also had admitted withdrawing this amount on the said date during cross-examination. Then again, if this is the case, the third charge should fail. Because the time of offence of the third charge is from 01st January 2002 to 31st January 2002 and the aforementioned withdrawal was made on 06/11/2003. I went a step further to examine the statements of the appellant's account tendered by the prosecution before the magistrate court. That is, P62 and P64. The account details for 2002 is found only in P62 and the total withdrawals made amounts to $2,810. However, the third charge reads that the appellant engaged in a transaction that involved money to the total of $13,078.18.

49. Even in relation to the fourth charge, the aforementioned submission of the counsel for the respondent is not consistent with the particulars of offence as the property specified in the fourth count is "money to the total value of $58,443.05" and the time of offence is not on or about 06/11/2003 but from 01st January 2003 to 31st January 2003. On the other hand, having calculated the total amount withdrawn in 2003 according to P62 and P64, the amount I arrived at is $106,900 which is different from the amount stated in the charge. Moreover, whereas the prosecution claim that the accused had a total of $13,078.18 in his account in 2002, and whereas the

accused had withdrawn only $2810 in 2002 according to the evidence adduced by the prosecution, did the balance of the $13,078.18 vanish into thin air or it seized to be proceeds of crime by 01/01/2003? Shouldn't the prosecution be expected to take into account such technicalities and deal with them given the technical nature of the argument they advance in order to bring home the money laundering charges in the instant case?

50. The bottom line is, the amount stated in the fourth count does not correspond to the total amount the appellant appear to have withdrawn in 2003 or to the total amount of proceeds of crime that was supposed to be in the appellant's account in 2003. This cannot be considered as a mere variance between the particulars in the charge and the evidence, as the said amount is crucial in identifying and determining an element of the offence.

51. All in all, there is an ambiguity with regard to the evidence the prosecution had relied upon to establish the 'transaction' the appellant was alleged to have engaged in, which is a disputed element in relation to the third count and the fourth count.

52. Given the provisions that defines the offence of money laundering and the other relevant provisions, I am not saying that there is no merit in the hairsplitting argument of the counsel for the respondent that the corruption offence ends when the relevant funds reach the appellant's bank account and the money laundering offence commences from thereon. However, if this argument is to be applied across the board, every person who commits theft where the property is appropriated using the offender's hands, and every person who commits burglary and robbery, invariably commits the offence of money laundering. The moment such offender lays his/her hand on the property whether it is money or something else, at least the offence of theft is completed which is a serious offence according to the Proceeds of Crimes Act. From there on, the offender is in possession of proceeds of crime and thus commits the offence of money laundering! Whether the offender simply remains at the scene with that property in his hand, whether he walks or runs away with the property, whether he goes to a nightclub and buy drinks or

simply buys groceries from a store using the property; all such actions technically amounts to money laundering.

53. It should be noted that, every person who commits an offence involving theft or other offence involving misappropriation of property, commits that offence with the intention of using the property so misappropriated. Every such offender in the process of committing the offence, invariably acquires the possession of the misappropriated property. Having the possession of the property, using of the property and engaging in transactions involving the misappropriated property forms part of the initial objective or intention in committing such offence. Therefore, again, based on the same rationale behind the aforementioned argument of the counsel for the respondent, every person who attempts to commit theft or any other offence involving misappropriation of property also attempts to commit the offence of money laundering?

54. The question is, is this the outcome expected from the Proceeds of Crime Act of Fiji?

55. On the other hand, given the aforementioned argument of the counsel for the respondent, an offender who commits theft by using a bank account to receive the money (property) is highly likely to be charged for money laundering which carries a penalty of 20 years imprisonment and a $120,000 fine, even though the amount appropriated may be, let's say $200; whereas an offender who commits theft using his physical body where the property is appropriated with the use of his hands, irrespective of the value of the property so appropriated, is highly unlikely to be charged with the offence of money laundering. Needless to say, there appear to be an element of discrimination and lack of fairness in this approach.

56. I am mindful of the fact that it is not within my jurisdiction in this case to review the prosecution policy of the Office of the Director of Public Prosecutions and I do not intend to do that. Suffice it to say, the prosecutorial discretion should always be exercised in a fair and equitable manner. '[T]he prosecutor must also apply the law,

but the application of her prosecutorial discretion should be exercised under the auspices of fair balance and wisdom'[1].

What is money laundering?

57. According to UNODC (United Nations Office on Drugs and Crime) literature, money laundering is a cycle that involves three stages. The money laundering cycle has been explained in the UNODC website[2] as follows;

> *Money-laundering is the process that disguises illegal profits without compromising the criminals who wish to benefit from the proceeds. There are two reasons why criminals - whether drug traffickers, corporate embezzlers or corrupt public officials - have to launder money: the money trail is evidence of their crime and the money itself is vulnerable to seizure and has to be protected. Regardless of who uses the apparatus of money-laundering, the operational principles are essentially the same. Money-laundering is a dynamic three-stage process that requires:*
>
> - *placement, moving the funds from direct association with the crime;*
> - *layering, disguising the trail to foil pursuit; and,*
> - *integration, making the money available to the criminal, once again, with its occupational and geographic origins hidden from view.*
>
> *These three stages are usually referred to as placement, layering and integration.*

58. According to the above excerpt, in simple terms, money laundering is about disguising the proceeds of a crime; it is about hiding the identity of the dirty money by laundering it so that it may appear as clean money.

59. The offence of money laundering in Fiji is created under section 69 of the Proceeds of Crimes Act. Section 69(3) of the said Act reads thus;

> *3) 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 proceeds of crime, or*
> *(b) the person receives, possesses, conceals, uses, disposes of or brings into Fiji any money or other property, that is proceeds of crime; or*

[1] Introducing a Fairness-Based Theory of Prosecutorial Legitimacy before the International Criminal Court; *European Journal of International Law*, Volume 27, Issue 3, August 2016, Pages 769–788 at 787

[2] https://www.unodc.org/unodc/en/money-laundering/laundrycycle.html

(c) the person converts or transfers money or other property derived directly or indirectly from a serious offence or a foreign serious offence, with the aim of concealing or disguising the illicit origin of that money or other property, or of aiding any person involved in the commission of the offence to evade the legal consequences thereof; or

(d) the person conceals or disguises the true nature, origin, location, disposition, movement or ownership of the money or other property derived directly or indirectly from a serious offence or a foreign serious offence; or

(e) the person renders assistance to a person falling within paragraph (a), (b), (c) or (d),

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

60. The term 'proceeds of crime' is defined in section 4(1A) of the Proceeds of Crime Act as follows;

""proceeds of crime" means property or benefit that is –

(a) Wholly or partially derived or realised directly or indirectly by any person from the commission of a serious offence or a foreign serious offence;

(b) Wholly or partly derived or realised from a disposal or other dealing with proceeds of a serious offence or a foreign serious offence; or

(c) Wholly or partly acquired proceeds of a serious offence or a foreign serious offence,

and includes, on a proportional basis, property into which any property derived or realised directly from the serious offence or foreign serious offence is later converted, transformed or intermingled, and any income, capital or other economic gains derived or realised from the property at any time after the offence."

61. It is pertinent to note that limbs (a) and (b) of section 69(3) above, in fact would cover almost all aspects of dealing with proceeds of crime. The words used in the two limbs that is; engaging in a transaction, receives, possesses, conceals, uses, disposes, brings into Fiji, are definitely wide enough to cover the two situations covered under limb (c) and limb (d). Then the question is, what is the application of the limbs (c) and (d)?

62. It is pertinent to note that, the term '*proceeds of crime*' is found in limbs (a) and (b) but not in (c) and (d). The limbs (c) and (d) refers to "*money or other property derived directly or indirectly from a serious offence or a foreign serious offence*".

63. This difference in the terms used cannot be accidental. Moreover, limbs (c) and (d) also refers to 'concealing' and 'disguising'. While limb (c) deals with converting or transferring money or other property with the aim of concealing or disguising the illicit origin, limb (d) deals with concealing and disguising the money or other property.

64. Having considered the entire provisions of section 69(3) of the Proceeds of Crime Act above carefully, I have formed the view 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 that charge to be under either limb (c) or limb (d). Given the words used in these two limbs especially the fact that the term 'proceeds of crime' is not used, and also the fact that these two limbs requires the proof of either concealing or disguising the money/ property or doing an act with the aim of concealing or disguising the money/ property, it appears that these two limbs were clearly provided to deal with situations of self-laundering.

65. In my view, 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. These would be situations where the process of concealing or disguising of the illicit origins of the money or property (placement, layering and integration) has already commenced and the offender's conduct is in relation to such proceeds of crime.

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.

67. As I have pointed out above, as any offender who commits an offence involving misappropriation of property, the appellant in this case should have intended to use the money he would corruptly obtain as commission from the relevant

suppliers. It is obvious that the withdrawing of the entire amount or part of the amount from the bank account for his use was anticipated by him at the time he planned and committed offence of corrupt practices.

68. What exactly did the appellant intend to do by making the withdrawals? What did he want to accomplish? Did he want to engage in a transaction involving proceeds of crime knowing that the said proceeds were derived from an illegal activity? Or, did he simply want to use the money that was derived from committing the serious offence (corrupt practices)? In my view, the evidence does not establish any motive or an intention on the part of the appellant that is different from what he initially had when he committed the crime of corrupt practices which he is convicted of. His actual objective was not about money laundering, it was more about using the money he obtained from committing the offence of corrupt practices.

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.

70. In the light of the preceding discussion, I have concluded that the convictions against the appellant for the third count and the fourth count should not be allowed to stand.

Appeal against the sentence

71. Both the appellant and the respondent have appealed against the sentence. In both appeals it is the sentence imposed on the third and fourth counts that is challenged.

72. The appellant submits that the sentence for the third and fourth counts which is an imprisonment term of 3 years is manifestly excessive and the respondent submits that the said sentence is manifestly lenient. The respondent also assails the decision

of the Learned Magistrate not to impose a non-parole period.

73. However, given my decision to quash the convictions entered for the third count and the fourth count, it is no longer necessary to consider the grounds of appeal against the sentence advanced by both the appellant and the respondent. Since the 5 months imprisonment term imposed for the first and the second counts was not challenged by either party, I will not interfere with the said sentence.

Orders of the Court;

i.) Appeal by the appellant against conviction is partially allowed;

ii.) Both appeals against the sentence are dismissed;

iii.) Convictions entered in Suva Magistrate Court Criminal Case No. 25 of 2010 for the first count and the second count, and the relevant sentence of 5 months are affirmed; and

iv.) Convictions entered in Suva Magistrate Court Criminal Case No. 25 of 2010 for the third count and the fourth count, and the relevant sentence are quashed; and

v.) Since the appellant has now served his sentence in relation to counts one and two, he shall be released forthwith.

Vinsent S. Perera
<u>JUDGE</u>

<u>Solicitors;</u>

Lal Patel Bale Lawyers, Suva for the Appellant/Respondent
Office of the Director of Public Prosecutions for the State