IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 30 OF 2019

BETWEEN:
STATE
APPELLANT

A N D:
HANNAN WANG
RESPONDENT

Counsel: Mr. A. Jack for the Appellant
Mr. N. Shivam for Respondent

Date of Hearing: 20th October 2020

Date of Judgment: 19th February 2021

J U D G M E N T

Introduction

1. The Respondent (The First Accused in the Magistrate's Court Proceedings) together with another (The Second Accused in the Magistrate's Court Proceedings) had been charged in the Magistrate's Court in Suva, with two counts of Money Laundering, contrary to Section 69 (2) (a) and 3 (b) of the Proceeds of Crimes Act. In addition to the said two counts, another Accused (The Third Accused in the Magistrate's Court Proceedings) was

alone charged with one count of Money Laundering, contrary to Section 69 (2) (a) and 3 (b) of the Proceeds of Crimes Act. The particulars of the offences are that:

FIRST COUNT

Statement of Offence (a)

MONEY LAUNDERING: *Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act 1997 as amended by Proceeds of Crime (Amendment Act) Act 7 of 2005 and Proceeds of Crimes (Amendment) Decree 61 of 2012.*

Particulars of Offence (b)

HANNAN WANG AND GUANGWU WANG *between the 9th day of June 2015 to the 24th day of June 2015 at Suva, in the Central Division, engaged directly or indirectly in transactions involving ANZ Bank Account No. 12339449 to the total sum of $675, 774.98 that are the proceeds of crime, knowing or ought reasonably to know that the money is derived directly or indirectly from some form of unlawful activity.*

SECOND COUNT

Statement of Offence (a)

MONEY LAUNDERING: *Contrary to Section 69 (2) (a) (3) (a) of the Proceeds of Crime Act 1997 as amended by Proceeds of Crime (Amendment Act) Act 7 of 2005 and Proceeds of Crimes (Amendment) Decree 61 of 2012.*

Particulars of Offence (b)

HANNAN WANG AND GUANGWU WANG *between the 17th day of June 2015 to 19th day of June 2015 at Suva, in the Central Division, engaged directly or indirectly in transactions involving ANZ Bank*

Account No. 12346956 to the total sum of $11, 334.16 that are the proceeds of crime, knowing or ought reasonably to know that the money is derived directly or indirectly from some form of unlawful activity.

THIRD COUNT

Statement of Offence (a)

MONEY LAUNDERING: *Contrary to Section 69 (2) (a) (3) (a) of the Proceeds of Crime Act 1997 as amended by Proceeds of Crime (Amendment Act) Act 7 of 2005 and Proceeds of Crimes (Amendment) Decree 61 of 2012.*

Particulars of Offence (b)

XUHUAN YANG *between the 18th June 2015 at Suva, in the Central Division, engaged directly or indirectly in transactions involving ANZ Bank Account No. 12339449 and 12346956 to the total sum of $8, 500.00 that are the proceeds of crime, knowing or ought reasonably to know that the money is derived directly or indirectly from some form of unlawful activity.*

2. The trial in the Magistrate's Court had commenced on 2nd of October 2017 and concluded on the 24th of November 2017. The Appellant had adduced the evidence of eleven Prosecution witnesses and tendered exhibits numbering PE 1 to PE 15b. The Defence had presented the evidence of three witnesses, including the Respondent. Subsequent to the hearing, the Learned Magistrate had delivered her Judgment, on the 22nd of February 2019, finding the Appellant and the two co-accused not guilty of the charges as charged. Aggrieved with the said Judgment, the Appellant filed this Petition of Appeal on the following two grounds:

(a) That the learned Magistrate erred in law in failing to direct herself on the principles of joint enterprise:

(b) That the learned Magistrate erred in law by failing to correctly consider the mental element "that the Respondent knew or ought to have reasonably known that the monies were from unlawful activity" by stating that "Mr. Wang Hannan, Mr. Guangwu Wang and Mr. Xuhuan Yang knew or ought reasonably to have known that the monies in the ANZ Bank Accounts had not been derived from a legitimate source."

3. This appeal was first listed before me on the 1st of October 2019, where the parties were directed to file their respective written submissions. However, the written submissions filed by the learned Counsel for the Appellant was insufficient as it had no clarity in outlining the grounds of appeals. The lackluster approach of the learned Counsel for the Appellant, in presenting his appeal with clarity and completeness delayed this proceedings. The Court had to order the parties to file further written submissions on four separate occasions. Having carefully considered the respective written submissions filed by the parties and the record of the Magistrate's Court proceedings, I now proceed to pronounce the Judgment as follows.

Factual Background

4. For proper comprehension of the factual background of this case, I will now briefly summarise the case presented in the Magistrate's Court. According to the evidence presented by the Prosecution and the Defence in the Magistrate's Court, Chunxiao Tour Company (CTC) and Jintong Trading Company (JTC) was incorporated by the Company Registrar of Fiji on the 22nd of May 2015. As stated in the company registration, the business address of CTC and JTC was Shop 1, Sabrina Building, Victoria Parade, Suva. Subsequent to the incorporation, CTC and JTC had opened two bank accounts with the ANZ Banking Corporation. The Bank Account Number of CTC was 12339449 and the Bank Account Number of JTC was 12346956. Upon the request of CTC and JTC, the

ANZ Bank had installed two EFTPOS machines at the office of CTC and JTC at 160 Waimanu Road, Suva. Later, it was found that CTC/JTC had skimmed foreign credit cards using the two EFTPOS machines. The money derived from the above credit card skimming had gone into the two ANZ bank accounts of CTC/JTC. Having found this illegal credit card skimming, ANZ Bank had reported it to the Police and found CTC/JTC had abandoned their offices at 160 Waimanu Road with the two EPTOPS machines.

5. On the 18th of June 2015, the Second Accused had cashed a cheque drawn from CTC's bank account in the sum of $21,800.00. The Third Accused had cashed another cheque drawn from CTC's bank account in the sum of $8,500.00 on the same day. Four days later, the Respondent had cashed two more cheques drawn from the same CTC account in the sum of $5000.00 each. The Respondent and the two Accused admitted that they had cashed those four cheques. The three Accused are directors of Yiwu International (YI), which is a wholesale trading company. YI usually imports various items from China. Ms. Lijun Liu is the other director of Yiwu International. She was the girlfriend of the Respondent. The Defence claimed that Mr. Ling had bought a load of shoes and bags worth $40,300.00 from YI and paid for the same by the four cash cheques drawn from CTC.

6. The Prosecution had further presented evidence to establish that the business address used by CTC and JTC in incorporating their respective companies was the same address where YI had previously operated its business. YI had vacated the said address on the 1st of April 2015 and moved to No. 134 of Waimanu Road, Suva. Furthermore, Mr. Eremasi Tikoduadua, a bank officer of ANZ had seen the Second Accused at the CTC office at No 160 Waimanu Road with another Chinese person when he had gone there to install the EFTPOS machines. He had trained the Second Accused and another person on how to use the EFTPOS machine. Ms. Aradhana Singh, who was the clerk at Hari Investment, the company which owns the two offices where CTC and JTC were based, gave evidence stating that the Respondent visited her office three times. On the first two occasions, he was accompanied by Anny Gu. Anny Gu came to make arrangement to rent the two offices at No 160 of Waimanu Road for CTC and JTC. She had introduced the

Respondent as a representative of CTC and JTC. The Respondent made his last visit on the 23rd of June 2015 to pay the rent of the two offices. The Defence had called Anny Gu as a witness of the Defence. In her evidence, Anny Gu had stated that neither the Respondent nor the two other Accused were involved in the incorporation of CTC and JTC or opening of the two bank accounts. They had not been involved in renting the two offices at 160 Waimanu Road. She was present when Mr. Tikoduadua trained the two Chinese persons on how to operate the EFTPOS machines. It was not the Second Accused, but some other Chinese national who was present with Mr. Ling. She further stated that she went to Hari Investment several times regarding the renting of the two offices, but the Respondent never accompanied her in those visits.

Written Submissions of the Parties,

7. The learned Counsel for the Appellant submitted that the Learned Magistrate had not considered the principle of the joint enterprise as stipulated under Section 46 of the Crimes Act. Having postulated it, the learned Counsel argued that the Prosecution had presented sufficient evidence in the Magistrate's Court to establish that the three Accused had formed a common intention to transfer money without authority from several foreign credit cards into CTC's bank account. In prosecuting the above common purpose, the three Accused had committed the offence of money laundering, by withdrawing certain amounts as stated in those four cheques.

8. The submissions of the learned Counsel for the Appellant has certain perplexities, which the Court requested him to explain with clarity in his further written submissions. There is no clarity whether the Prosecution presented their case in the Magistrate's Court based on joint enterprise (under Section 46 of the Crimes Act) as submitted by the Appellant's Counsel. According to the charge in the Magistrate's Court, the Respondent together with the second Accused had been charged with two counts of money laundering, while the third Accused, alone, was charged separately for a single count of money laundering. Accordingly, the third Accused was charged on the basis of single responsibility. In view of the first two counts, it appears that the Respondent and the second Accused had been

charged as two principle offenders and not as one of them being the principle and one of them being the secondary party to the crime. The particulars of offence pertaining to the three counts have not stated that the three accused were charged under Section 46 of the Crime Act.

9. The first count alleges that the Respondent and the second Accused had engaged in transactions involving CTC's ANZ bank account. As per the evidence, the alleged transactions are the cashing of three cheques, (two cheques by the Respondent on the 22nd of June 2015 and one cheque by the second Accused on the 18th of June 2018). The second count is based on the allegation that Respondent and the second Accused had engaged in transactions involving ANZ bank account belonging to JTC. However, there is no evidence to establish the alleged transactions involving the bank account of JTC. The third count focus on the alleged cashing of the cheque drawn from CTC by the third Accused on the 18th of June 2015. Consequently, it appears that the three counts are founded on the four separate incidents of cashing of the four cheques drawn from CTC's Bank account.

10. Accordingly, it is clear that the allegation against the three Accused is based upon the contention that they have cashed the four cheques drawn from the account of CTC. When cashing those cheques, they knew or ought reasonably to have known that the money had been derived or realised, directly or indirectly, from the alleged crime of credit card skimming.

11. Accordingly, there is an ambiguity regarding the basis of the first ground of appeal. Albeit, I will focus on the contention of the Appellant that the Learned Magistrate has erroneously failed to take proper consideration of the circumstantial evidence presented by the Prosecution to establish that the Respondent knew or ought reasonably to have known that the money that he had cashed had been derived from an unlawful activity.

Section 69 of the Proceeds of Crimes Act

12. Section 69 (2) (a) and 3 (a) of the Proceeds of Crimes Act states that:

> *A person who after the commencement of this Act, engages in money laundering commits an offence and is liable on conviction, to*
>
> *a) if the offender is a natural person, a fine not exceeding $120,000 or imprisonment for a term not exceeding 20 years, or both; or*
>
> *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*
> *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.*

13. Accordingly, the main elements of the offence of Money Laundering as charged are:

i) The accused,
ii) Engaged directly or indirectly in a transaction involving money or property,
iii) The money or the property were proceeds of crime,
iv) The accused either knew or ought reasonably to have known that the money or the property had been derived or realised, directly or indirectly, from some form of unlawful activity.

14. The Prosecution is not required to prove the commission of the predicate offence. It is only required to prove the existence of the predicate offence and the money or the property had been derived from that predicate offence. In respect of the knowledge of the accused, it is not necessary to prove that the accused knew or ought reasonably to have known the exact nature of the predicate offence. It is sufficient to establish that the accused knew or ought reasonably to have known that the money or property had been derived from some form of unlawful activities.

15. The Fiji Court of Appeal in **Stephen v State [2016] FJCA 70; AAU53.2012 (27 May 2016)** has outlined the definition of "knows or ought reasonably to have known", where Gamlath JA found that:

> *"There is some authority for the view that in the criminal law "knowledge" includes wilfully shutting one's eyes to the truth.* ***Warner v. Metropolitan Police*** *(1969) 2 AC 256 at 279 HC*
>
> *The most important matter in determining whether a person had the requisite knowledge is to carefully examine the relevant evidence and to draw an inference based on that exercise.*
>
> *The dictum of Lord Bridge in Westminster City Council v. Carayal Grange Ltd. 83 Cr. App. R. 155 at 164 it was held that*
>
> > *"... it is always open to the tribunal of fact ... to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not wish to have his suspicions confirmed."*
>
> ***R v. Sherif, Ali (Siraj);*** *etal – The Times, February 11, 2009 CA; "Jury are entitled to conclude, if satisfied that the defendant deliberately closed his eyes to the obvious because he did not wish to be told the truth, that*

that fault was capable of being evidence in support of a conclusion that the defendant did indeed either know or believe the matter in question – Archbold 2012 paragraph 17-49, page 1817.

*In **Tracey v. DPP**, Lord Diplock had said that:*

"Knowledge or belief"are words of ordinary usage and in many cases no elaboration at all was needed."

The other component in the Act is that in the case of Money Laundering it is sufficient even if the prosecution can prove that the accused ought reasonably to know that the money or other property is derived or realised, directly or indirectly, from some form of unlawful actions. See section 69(3).

In here, it is my opinion that the meaning of the phrase 'ought reasonably to know', as against having actual knowledge, should be understood to mean, either constructive knowledge or with having reference to all the attendant circumstances a person ought to have known the existence of the unlawfulness involved."

Judgment of the Learned Magistrate

16. The Learned Magistrate, in her Judgment, had correctly identified the elements of the offence of money laundering under Section 69 of the Proceeds of Crimes Act, including both the physical and fault elements. The Learned Magistrate found that the money in the account of CTC, when the three Accused had cashed the four cheques, were proceeds of crime within the meaning of section 3 and section 4 (1A) of the Proceeds of Crime Act. Hence, she had been satisfied that the Prosecution had successfully established the physical elements of the first and the third counts.

17. Nonetheless, the Learned Magistrate had found that the Prosecution had failed to establish that the Respondent and the two Accused knew or ought reasonably to have known that the money they were withdrawing had been derived or realised, directly or indirectly, from some form of unlawful activities (*vide; para 106 of the Judgment*). The Learned Magistrate states that:

> *"Taken together, the evidence the state relies on is insufficient to prove beyond reasonable doubt that the defendants knew or ought reasonably to have known that the monies they had withdrawn came from or had intermingled with money derived from unlawful activity" (vide paragraph 107 of the Judgment).*

18. In order to reach the above conclusion, the Learned Magistrate had relied on the evidence of the Respondent and Ms. Lijun, the co-director of YI. They had stated that the four cheques were for the payment of the purchase of shoes and bags, made by a representation of CTC, on the 18th and 22nd of June 2015. She further found the Respondent's explanation for making a rent payment for the office of CTC at No 160 Waimanu Road was reasonable and believable.

19. The Learned Magistrate had accepted that Mr. Eremasi Tikoduadua had seen the second Accused during his visit to install the EFTPOS machines at the office of CTC. However, she had not accepted the evidence of Mr. Tikoduadua, where he stated that the Second Accused introduced himself as the owner of CTC. The Learned Magistrate found that Mr. Tikoduadua might have been mistaken in hearing that the Second Accused telling him that he was the owner of CTC as the English level of the Second Accused was deficient. Hence, she found Mr. Tikoduadua as an honest but mistaken witness.

20. The Learned Magistrate took judicial notice that the minority expatriate Chinese community in Fiji often bond together and worked to help make their lives easier for themselves and each other. Hence, the mere presence of the Respondent and the Second

Accused at the office of CTC at No 160 Waimanu Road does not make them culpable of committing these offences (vide Para 114 of the Judgment).

Ground One and Two

21. Having briefly outlined the Judgment of the Learned Magistrate, I now turn to determine whether the Learned Magistrate had correctly and adequately considered the evidence presented by the parties in reaching her above conclusion in the Judgment.

22. In an appeal like this, the Court is very reluctant to intervene in the judgment delivered by the lower court. The Appellate Court must recognise and indeed must keep in mind the advantage that the Learned Magistrate had in seeing and hearing the witnesses and all the material exhibits presented before her. This Court had no such advantage of seeing the witnesses and observing their demeanour in giving evidence. Hence, this Court must not lightly intervene unless it has scrutinised the impugned Judgment of the Learned Magistrate in order to determine whether she had erred in fact and law in concluding that the Respondent and two Accused were not guilty. In doing that, the Appellate Court must not substitute its own view about the evidence presented in the trial.

23. Section 142 (1) of the Criminal Procedure Act states that every judgment delivered by a Judge or a Magistrate must contain the point or points required to determine and the decision and the reasons for such decision. The Supreme Court of Fiji in **Pal v Reginam [1974] FJLawRp 1; [1974] 20 FLR 1 (17 January 1974)** has given a descriptive and precise guideline in formulating the judgments in the Magistrates' Court, which I find it as a great assistance. Grant CJ in **Pal v Reginam (supra)** had outlined that:

> *"I would take the opportunity, as the judgment of the lower court in this case is a clear example, of drawing attention to what appears to be a trend on the part of some Magistrates to set out in a judgment a summary of the evidence of the witnesses in the order in which they were called regardless of the fact that this bears no relationship to the sequence of*

events which is the subject matter of the trial; and a tendency to omit reasons for the decision reached.

Witnesses very often give evidence out of order, but one does not expect a Magistrate to simply restate same seriatim in his judgment. In order to arrive at a proper conclusion the Magistrate must have considered the matter in its logical progression, and have formulated reasons for his ultimate conclusion, and the judgment should be expressed accordingly.

As a general rule, the judgment should commence with a description of the charge, followed by the relevant events and the material evidence set out in correct sequence in narrative form, the identifying number of each pertinent witness being incorporated at the appropriate places, after which the Magistrate should state what witnesses he believes and whose evidence he accepts or rejects, and should proceed to make his findings of fact, apply the appropriate law to those facts, and give his reasoned decision; bearing in mind throughout the provisions of Section 154 (1) of the Criminal Procedure Code.

If these considerations are kept in view, not only will it make the task of an appellate court easier, it might well lead to fewer decisions being upset."

24. In view of the guideline as expounded in **Pal v Reginam (supra),** the Magistrate must state what witnesses he believes and what evidence he accepts or rejects. In doing that, he should give reasons for believing the witness and accepting or rejecting the evidence. To do that, the Learned Magistrate must properly evaluate the evidence and the witnesses presented in the hearing. Determination of the reliability and credibility of the evidence is one of the main factors in this process. It would help the Court finally determine which evidence to accept or what part of the evidence to refuse.

25. If the accused adduced evidence for the Defence, the Learned Magistrate must consider those evidence when determining the issues of the case. Lord Reading C.J. in **Abramovitch (1914) 84 L.J.K.B. 397)** held that:

> *"if an explanation has been given by the accused, then it is for the jury to say whether on the whole of the evidence they are satisfied that the accused is guilty. If the jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitle to be acquitted, inasmuch as the crown would then have failed to discharge the burden impose upon it by our law of satisfying the jury beyond reasonable doubt of the guilt of the accused. The onus of proof is never shifted in these cases; it always remains on the prosecution".*

Circumstantial Evidence and Evidence of Corroboration

26. I find it prudent to discuss two important evidential principles before I proceed to determine whether the Learned Magistrate had properly evaluated the evidence, giving reasons for that. The first important evidential principle is "circumstantial evidence". The second principle is the "evidence of corroboration".

27. The offence of this nature, involving financial frauds, more often takes place in an abstract form. Hence, it is impossible to prove such crimes by the direct and positive testimonies of the eye-witnesses or conclusive documentary evidence. The Prosecution has to put much reliance on the circumstantial evidence in proving such crimes. A circumstantial case is one which depends on its cogency on the unlikelihood of coincidence. The Prosecution presents evidence to prove separate events and circumstances. If they are taken together, that can only explain the guilt of the accused. Those circumstances can include opportunities, proximity to the critical events, communications between participants, scientific evidence, and motive etc. (*vide page 35 of The Crown Court Bench Book of UK*)

28. Drawing of inference from circumstantial evidence is a process by which you find from evidence which you regard as reliable, that you are driven to a further conclusion of fact. The inference must be the only and certain rational inference of the guilt of the accused. Suppose, the evidence which the Court has accepted as reliable, suggests some other probable inferences or conclusions, showing the accused's innocence or creating doubt about the guilt of the accused. In that case, the Court must not draw any inference of guilt of the accused person based on the accepted circumstantial evidence.

29. Evidence of Corroboration is the evidence that could confirm or establish another evidence presented in the trial. Lord Hailsham LC in **Reg v Kilbourne (1973) AC 729 at 741** had held that:

> *"The word "corroboration" by itself means no more than evidence tending to confirm other evidence. In my opinion, evidence which is (a) admissible and (b) relevant to the evidence to corroboration, and, if believed, confirming it in the required particulars, is capable of being corroboration of that evidence and, when believed, is in fact such corroboration".*

Analysis

30. In this case, there is no evidence to establish that either the Respondent or the two Accused were involved in incorporating CTC and JTC. Moreover, there is no evidence that they were involved in opening the two bank accounts of CTC and JTC with the ANZ bank. Additionally, there is no dispute that the money in the two bank accounts of CTC and JTC was derived from the alleged illegal credit card transactions. Hence, the main dispute that the Learned Magistrate had to determine was whether the Respondent and the two Accused knew or ought reasonably to have known that the money, they had cashed from the four cheques, had been derived from directly or indirectly from unlawful activity.

Business Address of the CTC and JTC

31. According to Anny Gu, she was instructed by Mr. Ling to facilitate the incorporation of the two companies, CTC and JTC. Mr. Ling further requested her to assist him in opening the two bank accounts, for which she had rendered her service. As stated in the business registration, the business address of the CTC and JTC is shop one of Sabrina Building, Victoria Parade Suva. YI had done its business at the same address till 1st of April 2015, a month or so before CTC and JTC had used the same address for their business incorporation and opening of the bank accounts. According to Anny Gu, Mr. Ling had told her to put the address of shop one, Sabrina Building as the business address of CTC and JTC. Mr. Ling had told Anny Gu that address belongs to one of his Chinese friends's shop. (*vide; Page 328 of the transcript of the evidence*). The Learned Magistrate had not considered this evidence in her Judgment.

32. Soon after incorporating CTC and JTC and opening their two respective bank accounts, both the companies had rented an office space at No 160 Waimanu Road, on the 27th of May 2015, which is a few meters away from YI's present location at No 134 Waimanu Road. The Learned Magistrate has not taken this evidence into consideration in her Judgment as well.

Evidence of the Respondent's Mobile Phone Number

33. The next important evidence that the Learned Magistrate had failed to consider in her Judgment is the Respondent's mobile phone. In his caution interview, he had admitted that 8021999 is his mobile phone number, which he reaffirmed in his evidence (*vide; page 296 of the transcript of the evidence*). In her evidence, Anny Gu stated that she communicated with Mr. Ling on 8021999 and 8782270. Ms. Lijun, in her evidence, said that Mr. Ling sometimes borrowed their phones. However, when he was given an opportunity to comment about his mobile phone number, the Respondent did not state that Mr. Ling had borrowed his mobile phone at any time material to this case. Ms. Lijun

did not elaborate that Mr. Ling had borrowed the mobile phone of the Respondent. In his submissions, the learned Counsel for the Respondent argued that it is the onus of the Prosecution to ask the accused to explain whether he had given the phone to Mr. Ling. Apparently, it was the Defence, who presented the evidence through Anny Gu that she had communicated with Mr. Ling on the mobile phone number 8021999. The evidence of the Respondent and Anny Gu are direct and positive testimony to establish that the Respondent's mobile phone number is 8021999 and Mr. Ling used the same number to communicate with Anny Gu. These two direct evidence could lead to a further positive inference that whenever Mr. Ling communicated with Anny Gu using 8021999 or vice versa that either the Respondent was present with Mr. Ling for him to use the Respondent's mobile phone or it was the Respondent who had actually communicated with Anny Gu, giving her instructions about CTC and JTC.

34. The above inferences could be further corroborated and confirmed by the following evidence adduced by the Prosecution. The evidence that CTC and JTC had used the address of Shop One, Sabrina Building, Victoria Parade, Suva to incorporate the two companies and the bank accounts' opening. Soon after the opening of the bank account and the incorporation of the companies, CTC and JTC moved to No 160 Waimanu Road, which is few meters away from YI's present business location at 134, Waimanu Road. Moreover, the Respondent had reaffirmed in his evidence that he had admitted in his caution interview that he knew Mr. Ling was renting an office beside his shop (*vide; page 298 of the transcript of the evidence*). Besides that, Ms. Aradana Singh identified the Accused as one of the two male persons accompanied by Anny Gu when she visited her office regarding the renting of the two office space at No 160 Waimanu Road. According to Anny Gu, Mr Ling was one of the two men who accompanied her to Ms. Singh's office.

The evidence of Aradana Singh

35. The Learned Magistrate had completely ignored and/or overlooked the evidence of Aradhana Singh. She was a clerk at Hari Investment, the owners of the office space at No

160 Waimanu Road. According to her evidence, the Respondent came to her office twice with Anny Gu in order to rent the office space for CTC and JTC. On one of the occasions, the Respondent paid the deposit for the lease agreement. His last visit was on the 23rd of June 2015, when he came to pay the monthly rent of the two offices. Ms. Singh had called Anny Gu on the 22nd of June 2015 to inform her that the monthly rent was due. Anny Gu in her evidence confirmed that she received a call from Ms. Singh, informing her that one month of rent had not been paid on the due date. Anny Gu had informed Mr. Ling about it. On the following day, the Respondent had come and paid the rent. Ms. Singh had seen the Respondent many times at YI store, situated at 134 of Waimanu Road, which was close to her office. The Respondent and Ms. Lijun in their respective evidence confirmed the address of YI and stated that they usually stay there, conducting their business. Ms. Singh had seen that the office space of CTC and JTC had always been closed and no customers were present.

36. There are certain inconsistencies and contradictions in the evidence of Ms. Singh. She had not stated about the Respondent in her statement given to the Police. Moreover, Ms. Singh was shown certain photographs by the Police to identify the person who accompanied Anny Gu to her office. She had accordingly identified the Respondent. On the contrary, in his evidence, Sgt. Satish had stated that Ms. Singh had shown him the photograph of the Respondent, identifying him as the person who accompanied Anny Gu to her office. In addition to that, Anny Gu, in her evidence, had stated that the Respondent never accompanied her to Ms. Singh office when she made those visits regarding the office at 160 Waimanu Road. It is essential to determine whether the above-discussed inconsistencies and contradictions and the evidence of Anny Gu have discredited the evidence of Ms. Singh, thus making her evidence unreliable and untrue.

37. The Trial Magistrate has to consider the credibility of the evidence and the witnesses when two or more witnesses are presenting competing versions of the event regarding an issue or an incident. The evaluation of the credibility of the evidence focuses on many issues, such as whether the witness lies or presented inaccurate facts that are intentional and motivated attempts to deceive or had any improper motive in giving false evidence.

38. Ackner LJ in **R v Beck (1982) All ER 807 at 813** had discussed the scope of the warning of corroboration when the witness is tainted with an improper motive, where Ackner LJ found that:

> *"While we in no way wish to detract from the obligation on a judge to advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be gained by an improper motive, and the strength of that advice must very according to the facts of the case, we cannot accept that there is any obligation to give the accomplice warning with all that entails, when it is common ground that there is no basis for suggesting that the witness is a participant or in any way involved in the crime the subject matter of the trial".*

39. The above dictum of Ackner LJ in **R v Beck (supra)** has suggested that the Court must proceed with caution when it considers the evidence of a witness if there is a basis to suggest that the witness is a participant or involved in the crime charged. (**R v Spencer (1987) A.C.128**).

40. Anny Gu had forwarded the application form to incorporate CTC and JTC with copies of fake passports of the owners. According to Anny Gu, she is an experienced business consultant who helped Chinese people set up their business. Hence, it is not probable that she had tendered these applications without knowing the copies of these two fake passports. Moreover, she had not properly checked whether the two owners of CTC and JTC were physically present in Fiji when they have signed the application forms. Neither, had she checked whether CTC and JTC actually occupied Shop one, Sabrina Building, Victoria Parade. Anny Gu stated in her evidence that she did not want to tarnish her name as a business consultant, suggesting that the purpose of giving evidence is to clear her name (*vide; page 341 of the transcript of the evidence*). She was also the proposed surety for the Respondent in his bail application (*vide; page 340 of the transcript of the evidence*). These evidence and materials provide a basis to suggest that Anny Gu was

either a participant or involved in this crime either unintentionally or ignorantly. Hence, the Court must proceed with caution in evaluating her evidence.

41. The evidence that Mr. Ling had used the mobile number of the Respondent to communicate with Anny Gu, the business address of CTC and JTC was the same address that the Respondent's company previously rented, and the Respondent knew that Mr. Ling's office was beside his shop, does not corroborate the evidence of Anny Gu in relation to the Respondent's visits to Ms. Singh's office. Hence, the Court can safely conclude that the evidence of Anny Gu is not credible in respect of the Respondent's visit to Ms. Singh's office. Accordingly, the Court finds the evidence of Ms. Singh in relation to Respondent's visits to her office is credible, reliable and truthful evidence.

Evidence of Mr. Tikoduadua

42. The Learned Magistrate had accepted that Mr. Tikoduadua had seen the Second Accused at the office of CTC at No 160, Waimanu Road when he went to install EFTPOS machines. However, she had not accepted that the Second Accused had introduced himself as the owner of CTC. The Learned Magistrate found that Mr. Tikoduadua may have been mistaken with his recollection of his memory of the event that took place on that day. The evidential value of Mr. Tikoduadua's identification of the Second Accused as one of the two Chinese males present at 160 Waimanu Road, does not depend on the basis of the alleged self-identification by the Second Accused as the owner of CTC. The evidence of Mr. Tikoduadua's identification of the Second Accused confirms that the Second accused was present and trained by Mr. Tikoduadua on how to use EFTPOS machines at CTC's office. It leads to a further inference that the Second Accused knew or ought reasonably to have known about the purpose of installing EFTPOS at the CTC office.

Judicial Notice

43. The Learned Magistrate, in paragraph 114 of the Judgment, had concluded that there is an innocent explanation for the Second Accused's presence at CTC's office and also the payment of rent by the Respondent. The Learned Magistrate then found that:

> *"Minority communities will often band together and work to help make life a little easier for themselves and each other. Minority expatriate or migrant communities will predominantly be focused in integrating and succeeding in a forgone land. There will be sense of common striving. Networking must be an invaluable part of that journey. But at the end of the day, a sprit of general cooperation and goodwill does not mean that the expatriate Chinese community, or indeed any community in Fiji, runs as a pack."*

44. It appears that the Learned Magistrate had taken judicial notice about the community behaviours of the minority expatriate communities in Fiji. The Court of Appeal in England in **Mullen v Hackney London Borough Council (1 W.L.R. 1103, at 1105)** has discussed the scope of the judicial notice, where it was held that:

> *"It is well established that courts may take judicial notice of various matters when they are so notorious, or clearly established, or susceptible of demonstration by reference to a readily obtainable and authoritative source, that evidence of their existence is unnecessary: see Phipson on Evidence, 14th ed. (1990), ch. 2/06.*
>
> *Generally, matters directed by statute, or which have been so notified by the well established practice or precedents of the court, must be recognized by the judges; but beyond this, they have a wide discretion and may notice much which they cannot be required to notice. The matters noticeable may include facts which are in issue or relevant to the issue;*

and the notice is in some cases conclusive and in others merely prima facie and rebuttable: Phipson on Evidence, ch. 2/07.

Moreover, a judge may rely on his own local knowledge where he does so "properly and within reasonable limits". This judicial function appears to be acceptable where "the type of knowledge is of a quite general character and is not liable to be varied by specific individual characteristics of the individual case," This test allows a judge to use what might be called "special (or local) general knowledge." See Phipson on Evidence, ch. 2/09. County courts fall within the scope of the rule relating to courts which have been held to be local courts, and thus courts whose members are not merely permitted to use local knowledge, but who are regarded as fulfilling a constitutional function if they do so: see Phipson on Evidence, ch. 2/09."

45. The New Zealand Court of Appeal in **R v Wood** [1988] 2 NZLR 233 at 235 found that:

"A Judicial notice is the cognisance taken by the Court of certain matters which are so notorious, or clearly established, that evidence of their existence is deemed unnecessary - Phipson on Evidence (12th ed, 1976) paras. 10, 46. Judicial notice is available to both Judges and juries, Phipson, para 47. There are at least two reasons for the taking of it. First, it expedites the hearing of many cases by dispensing with the proof of matters which, if they had to be the subject of evidence, might be costly to prove. Secondly, it tends to produce uniformity of decision on matters of fact where a diversity of findings might otherwise result. But this very matter requires that before judicial notice is taken of any fact it must be so well-known as to give rise to the presumption that all persons are aware of it - Cross, p 160; Holland v Jones [1917] HCA 26; (1917) 23 CLR 149, 153; Auckland City Council v Hapimana [1976] 1 NZLR 731. Before a Court Anotices @ a fact it must be fully satisfied of its existence

and it must be cautious to see that there is no reasonable doubt as to its existence - Holland v Jones at 153, per Issacs J. The fact in question must be so notorious that it cannot be the subject of serious dispute."

46. The judicial notice taken by the Learned Magistrate regarding the expatriate minority community does not fall within the category of "notorious or clearly established, or susceptible of the demonstration by reference to a readily obtainable and authoritative source" as stipulated in **Mullen (supra)**. Neither does it fall within the "Magistrate's own local knowledge that is quite general in character and is not liable to vary by specific individual characteristics of the individual case" as outlined by **Mullen (supra)**. Thus, I find the Learned Magistrate's finding that the presence of the Second Accused at CTC's office and the payment of the rent by the Respondent were due to the innocent networking in the Chinese expatriate community in Fiji is founded on a wrong principle of judicial notice.

47. On account of the above-discussed reasons, I find that the Learned Magistrate has failed to consider the following evidence, that:

i) CTC and JTC have used Shop One Sabrina Building, Victoria Parade, Suva as their business address, which is the same address previously used by YI.

ii) Mr. Ling had told Anny Gu to put the address of Shop one, Sabrina Building, Victoria Parade as the business address of CTC and JTC as the said address belongs to one of Mr. Ling's Chinese Friends.

iii) Soon after the incorporation and opening of the two bank accounts, CTC and JTC had moved to No 160, Waimanu Road, which is a few meters away from the shop of YI at No 134, Waimanu Road,

iv) The Respondent had accompanied Anny Gu to Hari Investment's office to rent the office at 160 Waimanu Road and that he had paid the deposit for the lease and later paid the office's monthly rent on the 23rd of June 2015.

v) The evidence of the Respondent confirming 8021999 is his mobile phone number,

vi) The evidence of Anny Gu that she corresponded with Mr. Ling on the mobile number 8021999,

vii) The Second Accused was present at CTC's office when Mr. Tikoduadua came to install EFTPOS machines. Mr. Tikoduadua had trained the Second Accused on how to use EFTPOS machines,

viii) The Respondent knew the office of Mr. Ling was beside their shop,

ix) The Respondent and the Second accused were directors of YI and did business together at YI shop at No 134, Waimanu Road,

x) Ms. Singh's evidence that the office spaces of CTC and JTC had always been closed and no customers were present.

48. If the above incidents, events, the proximity of the events, and communication between parties are taken together, they cannot be explained as coincidence, but the rational conclusion is that the Respondent and the Second accused knew or ought reasonably to have known the matters and the transactions of CTC and JTC. This conclusion will lead to a further inference that the Respondent and the Second accused knew or ought reasonably to have known that the money in CTC's bank account had been derived or realised from the credit card skimming or any unlawful activities involving the EFTPOS machines.

The alleged purchase of shoes and bags by CTC from YI.

49. The money laundering process generally consists of three main stages. (https://www.unodc.org/unodc/en/money-laundering/overview.html). They are that:

i) Placement,

ii) Layering,

iii) Integration,

50. The first stage is the placement. At this stage, the money derived from the commissioning of the predicate offence is placed into the financial system through various methods.

51. Once the placement of the money into a financial system is successful, it can proceed to the layering stage. This stage aims to make it more difficult to detect and uncover laundering activities, making the trailing of illegal proceeds difficult for law enforcement agencies. At this stage of the process, the money can be converted into monetary instruments or changed into another form of asset. Sometimes, the money or the proceeds can be split into small portions and dispersed to local or foreign locations.

52. The final stage is the integration of the money into the formal and legitimate financial market. At the integration stage, money appears to be normal business earnings and difficult to trail back to its criminal or illegal origin.

53. In this matter, CTC and JTC had skimmed the credit card, and the proceeds of that crimes had deposited into the two bank accounts. The Prosecution established that one Mr. Zu Haiming had withdrawn a significant amount from CTC's bank account. The Defence's exhibit number one establishes that the actual name of Mr. Ling is Mr. Zu Haiming. According to the Defence evidence, Mr. Ling had purchased bags and shoes amounting to $40300. The payment was made in four cash cheques drawn from CTC bank account. Accordingly, it appears that Mr. Ling or Mr. Haiming had started placing the proceeds of the crime in the financial market by withdrawing and/or making purchases from the said money.

54. Therefore, it is not relevant for the Learned Magistrate to determine whether this purchase of bags and shoes had actually taken place. Either way, if the purchase actually took place or it was a false purchase, this does not change the criminal liability of the Respondent and the Second Accused, if they knew or ought reasonably to have known that the money they had withdrawn from CTC's bank account had been derived from fraudulent credit card skimming. The above discussed circumstantial evidence has led to an indisputable and conclusive inference that the Respondent and the Second Accused

were involved in and knew the activities of CTC and JTC. That inference further led to another indisputable inference that the Respondent and the Second Accused knew or ought reasonably to have known that the money in CTC's bank account had been derived from the said fraudulent credit card skimming. There is no need, pursuant to section 69 of the Proceeds of Crime Act, to establish that the Respondent or the Second Accused intended to place the proceeds of crimes into the financial market.

55. Accordingly, the Prosecution had successfully proven beyond reasonable doubt that the Respondent and the Second Accused had cashed $31800 from the bank account of CTC bearing the account number 12339449 on three separate occasions using three cheques drawn from the said bank account on the 18th and 22nd of June 2015. Furthermore, the Prosecution had successfully proven beyond reasonable doubt that the said amount of $31800 were proceeds of crimes as defined under section 3 and 4(1A) of the Proceeds of Crimes Act. In addition to that, the Prosecution had successfully proven beyond reasonable doubt that the Respondent and the Second Accused knew or ought reasonably to have known that the money they had withdrawn had been derived, directly or indirectly, from some form of unlawful activities, thus proving beyond reasonable doubt that the Respondent and the Second Accused are guilty of the first count of money laundering.

56. I am mindful of the fact that the particulars of the offence of the first count states that the Respondent and the Second Accused had been involved in transactions to a total of $675,774.98. However, the Prosecution has established that they had actually been involved in transactions worth $31800. The change of the figures does not exonerate the Respondent, and the Second Accused from their above stated criminal liability in committing the offence of money laundering.

57. The Prosecution had not provided any evidence to establish that the Respondent and the Second Accused had been involved in any transaction pertaining to the bank account of JTC. Hence, the Learned Magistrate conclusion of not guilty in respect of the second count is correct.

58. In view of the reasons discussed above, I find that the Learned Magistrate had erroneously failed to consider the above-discussed evidence with the applicable legal principles and the concepts regarding the count one as charged in the Magistrate's Court. The acquittal on the basis of the finding of not guilty for the first count is therefore contrary to the evidence presented in the Magistrate's Court. It constitutes an error of law and of fact. It must be quashed and substituted with a finding of guilt and a conviction. It is in that context; I find there is a reason for me to intervene in the Judgment of the Learned Magistrate pursuant to Section 256 (2) of the Criminal Procedure Act. I do not find this is an appropriate case to have a re-trial before another Magistrate. I accordingly make the following orders that:

i) The Appeal is allowed,

ii) The order of the acquittal of the Respondent in respect of the first count, based on the finding of not guilty is quashed,

iii) The above-stated order of acquittal of the Respondent is replaced with a conviction on the basis of the finding of guilt for the first count of Money Laundering, contrary to Section 69 (2) (a) and 3 (a) of the Proceeds of Crime Act.

iv) Accordingly, the Respondent is convicted for the first count of Money Laundering, contrary to Section 69 (2) (a) and 3 (a) of the Proceeds of Crime Act.

v) The case is remitted to the same Learned Magistrate to hear sentencing submissions and mitigation and then proceed to sentence.

vi) The Respondent is remanded in custody and ordered to be produced before the Learned Magistrate as ordered by this Court,

59. Thirty (30) days to appeal to the Court of Appeal.

…….
Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva
19th February 2021

Solicitors
Office of the Director of Public Prosecutions for the Appellant.
Neel Shivam Lawyers for the Appellant.