IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO. CAV0018 OF 2014
(On an appeal from the Court of Appeal Criminal Appeal No. AAU 0010 of 2014)

BETWEEN:

MAHENDRA PAL CHAUDHRY
Petitioner

AND:

THE STATE
Respondent

Coram: The Hon. Justice Saleem Marsoof, Judge of the Supreme Court
The Hon. Justice Almeida Guneratne, Judge of Supreme Court
The Hon. Justice A.L.Brito Mutunayagam, Judge of Supreme Court

Counsel: Mr. A. K. Singh for the Petitioner
Mr. C. Grossman QC, Ms E. Yang with Mr. M. Korovou for the Respondent

Date of Hearing: Thursday, 30th October, 2014

Date of Judgment: Friday, 14th November, 2014

JUDGMENT

Justice Saleem Marsoof

01. The Petitioner seeks leave to appeal from a judgment dated 14th August 2014 of the Fiji Court of Appeal (Chandra JA., Temo JA., and Kotigalage JA.,), which affirmed his conviction by the High Court of Suva (Madigan J.) for the alleged violation of Sections 3, 4 and 26(1) of the Exchange Control Act (Cap. 211) with a variation of the sentence.

02. Before considering the grounds urged by the Petitioner in support of his application for leave to appeal, it may be useful to give some brief background to the case and the

material facts on the basis of which the High Court found the Petitioner guilty of the aforesaid violations of the Exchange Control Act of Fiji.

The Background

03. The Petitioner, who was first elected to Parliament at the general election held in 1987 and appointed as the Minister of Finance and Economic Planning in a coalition government which lasted barely a month, has been in active politics and in the leadership of the Labour Party since then. Having suffered defeat at the subsequent general election held in 1994, the Petitioner was once again elected to Parliament at the elections held in 1999 and became Fiji's first Indo-Fijian Prime Minister on 19th May 1999.

04. Exactly a year later, on 19 May 2000, the Petitioner and most of his Cabinet were taken hostage in a *coup d'etat*, and was sacked by the then President Ratu Sir Kamisese Mara on 27th May 2000, on the ground that he was unable to exercise the duties of his office. No sooner than the Petitioner was released after 56 days in captivity, he went to Australia for medical treatment, and from there, proceeded to India.

05. While in India, the Petitioner came by certain funds which constitute the subject matter of these proceedings, alleged to be donations received from the government of India and other sources, ostensibly to assist the Petitioner and his family to settle down in Australia. These funds were invested by the Petitioner in Australia and New Zealand, but the Petitioner did not choose to acquire permanent residency in Australia.

06. The Petitioner returned to Fiji in October 2000, in time to contest the general election held in 2001, whence even though his party was defeated, he was able to retain his seat in Parliament. Thereafter, although the Labour Party led by the Petitioner won several by-elections conducted in 2004, and did considerably better at the general election held in 2006, the Petitioner continued to remain in the opposition. Following the *coup* that took place in December 2006, the Petitioner accepted the post of Minister of Finance in an interim government on 7th January 2007, but resigned from

this portfolio on 23rd August 2008 along with two other Ministers from the Labour Party, who had been part of the interim government.

Material Facts

07. It is significant that certain crucial facts that were material to the charges on which the Petitioner was later convicted were admitted by the Petitioner at the trial. It is evident from the Agreed Facts marked P1 filed on 2nd April 2014 that the Petitioner received the sums totalling over Australian Dollars 1,500,000.00 (AUD $1.5 million) in the form of donations from people in India to assist the Petitioner and his family to leave Fiji following the political upheaval in Fiji in May 2000 and to establish residence in Australia.

08. Admittedly, the said sum of AUD $1.5 million was made up of AUD $503,000 deposited on 1st November 2000, AUD $486,890 deposited on 22nd February 2001 and AUD $514,148.50 deposited on 15th April 2002 into a Cash Management Call Account bearing No. 06-2245-10088252 opened in the name of the Petitioner with the New South Wales branch of the Commonwealth Bank of Australia.

09. It is common ground that the said sums aggregating AUD $1.5 million were deposited into the Petitioner's aforesaid bank account in the Commonwealth Bank of Australia with the knowledge and approval of the Petitioner as well as the Indian Government, and in particular, that the aforesaid sum of AUD $514,148.50 was deposited directly into the Petitioners aforesaid Cash Management Call Account bearing No. 06-2245-10088252 in the aforesaid Bank on 15th April 2002 by the Office of the Consul-General of Government of India.

10. There is no dispute that, at all material times, that is from 1st November 2000, when the first of the several deposits was made in the Commonwealth Bank of Australia, until 23 July 2010, on which date the Director of Public Prosecution filed charges against the Petitioner, the total sum of AUD $1.5 million, initially deposited in the Petitioner's Cash Management Call Account at the aforesaid Bank, were held by the Petitioner in his own name.

11. It is also admitted that the aggregate sum of AUD $1.5 million initially deposited in the Petitioner's aforesaid Cash Management Call Account at the Commonwealth Bank of Australia did not remain in the said account throughout the material times, and were partly or wholly moved into other accounts of the same Bank or invested or re-invested from time to time in certain other financial institutions in Australia as shown in Agreed Facts 16 to 26 and 31, except for a sum of New Zealand $150,000 which was deposited on or about 26th March 2001 into the Petitioner's Term Deposit Account No. 981000000116059 with ANZ National Bank Limited, New Zealand. The said funds derived from the initial deposits amounting to AUD $1.5 million, continued up to 23rd July 2010 to remain invested in Australia and New Zealand.

12. It is common ground that all foreign currency including Australian dollars and New Zealand dollars are "specified currency" for the purposes of inter-alia Sections 3, 4, and 26 of the Exchange Control Act of Fiji, and that neither the Petitioner nor the Commonwealth Bank of Australia or any of the other financial institutions in which the aforesaid sum of AUD $1.5 million had been invested or re-invested during material times, were "authorised dealers" as defined in Section 2(1) of the said Act. Admittedly, the aforesaid fund totalling AUD $ 1.5 million or any part thereof, which consisted of "specified currency" within the meaning of Section 4 of the said Act, had never been brought into Fiji or converted to Fiji currency.

13. There is no dispute that the Petitioner had, after being questioned by the Fiji Island Reserve and Custom Authority (FIRCA), disclosed the source of the aforesaid funds and paid all taxes due under Fiji law with respect to the income derived by the Petitioner from the aforesaid investments in Australia and New Zealand. Since all the 31 Agreed Facts filed and adopted by Court on 2nd April 2014 have been reproduced in full at paragraph [30] of the impugned judgment of the Court of Appeal, I do not consider it necessary to repeat them in this judgment.

The Charges, the Conviction and the Sentence

14. The case against the Petitioner went to trial on the following charges contained in the amended information dated 3rd October 2013:

FIRST COUNT

Statement of Offence

FAILURE TO SURRENDER FOREIGN CURRENCY: Contrary to Section 4 of the Exchange Control Act, Cap 211 and section 1 of Part II of the Fifth Schedule of the Exchange Control Act, Cap 211.

Particulars of Offence

MAHENDRA PAL CHAUDHRY in between the 1st day of November 2000 and the 23rd day of July 2010, at Suva in the Central Division being a resident in Fiji entitled to sell foreign currency but not being an authorised dealer, however being required by law to offer it for sale to an authorized dealer, retained the sum of $1,500,000.00 ($1.5 million) Australian Dollars for his own use and benefit, without the consent of the Governor of the Reserve Bank of Fiji.

SECOND COUNT

Statement of Offence

DEALING IN FOREIGN CURRENCY OTHERWISE THAN WITH AN AUTHORISED DEALER WITHOUT PERMISSION: Contrary to Section 3 of the Exchange Control Act, Cap 211 and section 1 of Part II of the Fifth Schedule of the Exchange Control Act, Cap 211.

Particulars of Offence

MAHENDRA PAL CHAUDHRY in between the 1st day of November 2000 and the 23rd day of July 2010, at Suva in the Central Division being a resident in Fiji but not being an authorised dealer, did lend the sum of $1,500,000.00 ($1.5 million) Australian Dollars to persons otherwise than an authorized dealer, namely the Financial Institutions in Australia and New Zealand as listed in Annexure marked "A", without the permission of the Governor of the Reserve Bank of Fiji.

THIRD COUNT

Statement of Offence

FAILURE TO COLLECT DEBTS: Contrary to Section 26(1)(a) of the Exchange Control Act, Cap 211 and section 1 of Part II of the Fifth Schedule of the Exchange Control Act, Cap 211.

Particulars of Offence

MAHENDRA PAL CHAUDHRY in between the 1st day of November 2000 and the 23rd day of July 2010, at Suva in the Central Division being a resident in Fiji having the right to receive a sum of $1,500,000.00 ($1.5 million) Australian Dollars from the Financial Institutions in Australia and New Zealand as listed in Annexure marked "A", caused the delay of

payment of the said sum, in whole or in part, to himself by authorizing the continual re-investment of the said sum together with interest acquired back into the said Financial Institutions without the consent of the Governor of the Reserve Bank of Fiji."

15. The case against the Petitioner was taken up for trial in the High Court of Suva on 1st April 2014, on which date certain documents were exchanged between the prosecution and the defence and the four assessors were sworn in. Since the learned Counsel wished to have more time to decide on the Agreed Facts, the trial was adjourned to the next day.

16. On 2nd April 2014, a list containing 31 Agreed Facts which were agreed between the prosecution and the defence in terms of Section 135 of the Criminal Procedure Code and signed by the learned Counsel for the defence and the prosecution, was filed in Court and accepted by the trial Judge. These Agreed Facts marked P1 have been reproduced in full at paragraph [30] of the judgment of the Court of Appeal dated 14th August 2014 and have been summarised by me in paragraphs 7 to 13 of this judgment.

17. After the usual formalities including the Petitioner pleading not guilty to the charges, the briefing of the assessors by the trial Judge and the opening addresses by learned Counsel, on 2nd April 2014 the evidence of Sabrina Hanif, Board Secretary of the Reserve Bank of Fiji was led by the prosecution. The witness was cross-examined briefly by learned Counsel for the defence, and there were no questions in re-examination. Thereafter the leaned Counsel for the defence took up the position that there is no case to answer in terms of Section 231(1) of the Criminal Procedure Decree of 2009, and both learned Counsel then addressed Court in that regard. The trial Judge adjourned Court to make his ruling as to whether there was a case for the defence to answer for the next day.

18. On 3rd April 2014, the trial Judge made a ruling calling upon the defence to commence its case and explained to the Petitioner his rights as accused. Learned Counsel for the defence informed Court that the Petitioner does not intend to give evidence or make any unsworn statement, and that there will be no other witnesses. After the closing addresses of learned Counsel, the trial Judge commenced his summing up, that was continued on the next day.

19. On 4th April 2014, after the trial Judge concluded his summing up, the assessors took time to deliberate, and returned a unanimous verdict finding the Petitioner guilty of all charges. On the same day at 3 pm, the trial Judge pronounced his judgment concurring with the opinion of the assessors.

20. In his aforesaid judgment dated 4th April 2014, the trial Judge stated that the offences with which the Petitioner had been charged with "are offences of strict liability and the elements of each offence are before the Court as agreed facts." The trial Judge also noted that there has been no defence evidence that would explain or contradict those inculpatory facts. Addressing the Petitioner, the trial Judge observed as follows:-

> "There is no question that you at all relevant times were resident in Fiji; there is no question that you were in control of approximately AUD $1.5 million in Australia and New Zealand. Having been aware at least as early as October 2009 of the probability of breach of provisions of the Exchange Control Act, you have done nothing to repatriate the funds to an authorised dealer in Fiji."

21. The trial Judge accordingly found the Petitioner guilty of each count in the information, and convicted him for the violation of Sections 4, 3 and 26 of the Exchange Control Act. Pending sentence, the Petitioner was also ordered not to access any of the funds held abroad until sentence is passed. The case was adjourned for 1st May 2014 at 9.30 am for consideration of sentence.

22. On 1st May 2014 after examining medical reports as to the Petitioner's condition of health, his previous convictions and hearing three witnesses as to character, Ratu Epeli Ganilau, Taufa Vakatale and Kevin Bar, all called by the defence, the trial Judge by his sentence judgment dated 2nd May 2014 ordered as follows:-

> "1. I order that the convictions remain recorded against the accused's name.
>
> 2. I order that he pay a fine of 20,000 penalty units (equivalent to FJD$2 million).
>
> 3. I order that the fine be paid into Court by 30 June 2014 failing which he is to serve a term of imprisonment of 15 months in default.

4. If MPC (which is an abbreviation of the full name of the Petitioner) is to serve a term of imprisonment pursuant to Order No.3 hereof, he is to serve a minimum term of 12 months before being eligible for parole.

5. MPC is to comply with the terms of the E.C.A. (Exchange Control Act) and offer all of his foreign funds held abroad to an authorised dealer, such repatriation to be effected by 31 July 2014. Failure to do so will make him liable to prosecution for continuing breach of the E.C.A.

6. I order that the prohibition to access his funds be lifted as of today.

7. I order that the accused continue to be barred from travel out of Fiji until he has complied with Orders 2, 3 and 4. Once the fine is paid or the sentence is served he will then be free of restrictions save as to the need to comply with Order 5."

23. The Petitioner appealed to the Court of Appeal against his conviction and sentence, and the Court of Appeal by its impugned judgment dated 14th August 2014 affirmed the conviction but varied the sentence. Chandra JA, in his judgment with which Temo JA., and Kotigalage JA., concurred, expressed the view that in all the circumstances of the case, the quantum of the fine imposed by the trial Judge was "excessive and that it should be reduced", and acting in terms of Section 23 of the Court of Appeal Act, brought down the fine imposed by the High Court by half, that is from FJD $2 million to FJD $1 million. The Court of Appeal affirmed the conviction and the sentence subject to the aforesaid reduction of the fine.

The Application for Special Leave to Appeal

24. The Petitioner in this application seeks special leave to appeal against the said judgment of the Court of Appeal dated 14th August 2014. The principal grounds, upon which his petition dated 18th August 2014 is premised, as set out in paragraph 2 of the said petition, are that the Court of Appeal erred in fact and law in upholding the conviction of the Petitioner in the High Court wherein the learned trial Judge had-

(a) prejudiced the subject matter of the trial in a pre-trial ruling (HAM 236/239 of 2013);

(b) made findings of 'fact' without giving the Petitioner a right to reply to such adverse findings, in his sentencing ruling, when there was no tested evidence to support such findings;

(c) misdirected the assessors that the Petitioner needed permission from the Reserve Bank of Fiji to hold monies in his overseas bank account;

(d) misdirected the assessors that P3 was evidence of the refusal by the Reserve Bank of Fiji for the Petitioner to hold funds abroad when P3 made no such representation;

(e) failed to provide any direction to the assessors that a "right to receive specified currency" was an element of the offence under Section 26(1) of the Exchange Control Act and which element the Respondent had to prove beyond reasonable doubt in the absence of any agreed facts;

(f) held that that the Petitioner was required to repatriate all monies held in his overseas bank account;

(g) failed to provide any direction to the assessors that "an entitlement to sell foreign currency" was an element of the offence under section 3(1) of the Exchange Control Act and which the Respondent had to prove beyond reasonable doubt in the absence of any agreed facts;

(h) failed to provide any direction to the assessors that "an entitlement to sell foreign currency" was an element of the offence under Section 4(1) of the Exchange Control Act and which element the Respondent had to prove beyond reasonable doubt in the absence of any agreed facts;

(i) failed to provide any direction to the assessors that "cause to offer for sale any foreign currency" was an element of the offence under Section 4(1) of the Exchange Control Act and which element the Respondent had to prove beyond reasonable doubt in the absence of any agreed facts;

(j) failed to provide any direction to the assessors that the Petitioner had become "bound to offer for sale any foreign currency" under Section 4(1) of the Exchange Control Act and which element the Respondent had to prove beyond reasonable doubt in the absence of any agreed facts;

(k) failed to direct the assessors on the conjunctive and constituent elements of the element of foreign currency as it related to section 3(1) and 4(1) of the Exchange Control Act;

(l) failed to properly direct the assessors on the objects and application of the Exchange Control Act;

(m) misdirected the assessors that the Petitioner had lent monies to an overseas financial institution by having monies deposited into such account by staff of the Indian Consul General and further misdirected the assessors on the law of

banking by failing to consider the definition of banking business as defined in the Banking Act.

(n) misdirected the assessors on directions that the service or knowledge of Ministerial / Reserve Bank of Fiji directions were a pre-requisite to a finding of guilt of an offence as per section 39(3) of the Exchange Control Act;

(o) misdirected himself on the delegation of powers under section 39(4) of the Exchange Control Act as it related to the correct legal entity (as per delegation of powers vide Legal Notice 98 of 1981) whose permission was required for matters relating to foreign currency under the Exchange Control Act;

(p) misdirected himself and the assessors beyond what was in the Agreed Facts and what was said and exhibited in evidence; and

(q) exceeded the jurisdiction of the Exchange Control Act in considering and applying aggravating factors when arriving at sentence.

25. In paragraph 3 of the said petition, the Petitioner has submitted that in arriving at its judgment, the Court of Appeal failed to or misapplied and/or failed to correctly apply the following:

(a) the Interpretation of Sections 26(1) and 4(1) of the Exchange Control Act as enunciated by the Supreme Court in *Governor of Reserve Bank of Fiji v Reddy's Enterprise Ltd* [1996] FJSC 6; CBV0001.1993 (10 October 1996);

(b) the ratio of *First Mortgage Ltd v Romanella Pty Ltd &* Others [1992] FJHC 80; [1992] 38 FLR 71 (22 April 1992) as it relates to the application of the Exchange Control Act;

(c) the definition of "foreign currency" in the Exchange Control Act;

(d) the definition of "currency" in the Exchange Control Act;

(e) the applicable legal principles and precedent enunciated in *Ram v State* [2012] FJSC; CAV 0001.2011 (9 May 2012), where the Supreme Court held that all the constituent elements of an offence must be put to the assessors for determination and which the learned trial Judge had failed to do;

(f) the applicable legal principles and precedent *in State v Li Jun* [2008] FJSC 18; CAV 0017.2007S(13 October 2008), where the Supreme Court held that all elements of the charge/s against the Petitioner had to be proved beyond reasonable doubt;

(g) the purpose and application of the Exchange Control Act and its non applicability to a gratuitous gift ; and

(h) the mandatory conjunctive statutory requirements of failing to give information and books for aggravating factors, as prescribed in Part II of the Fifth Schedule at Section 4 (b) of the Exchange Control Act.

26. Accordingly, the petitioner has further submitted in paragraph 4 of his petition that the impugned judgment of the Court of Appeal dated 14th August 2014 –

(a) contains serious errors of fact and law on matters of fundamental public importance and interest and has the propensity to affect all residents of Fiji who have private overseas bank accounts and whether such accounts come within the purview of the Exchange Control Act;

(b) was legally incorrect in holding that the-

(i) pre-judgment regarding the applicability of the Exchange Control Act,

(ii) misdirection on elements of offence,

(iii) errors of law in the definition of lending, failing to put to the assessors the direction that in the absence of agreement the prosecution had to prove each and every element of the offence; and

(iv) sentencing errors by Madigan J in the High Court.

did not prejudice the Petitioner in dismissing the appeal and the invocation of the provisions pursuant to section 23(1) of the Court of Appeal Act when such a finding is contrary to the principles of administration of criminal justice and contrary to section 15(1) of the 2013 Constitution;

(c) if allowed to stand substantial and grave injustice would occur to the Petitioner; and

(d) denied the Petitioner's right to a fair trial and was in breach of his fundamental rights in contravention of the Constitution of Fiji 2013.

27. Before considering in detail the aforesaid grounds and submissions presented by the Petitioner for seeking special leave to appeal, it is important to note that while Section 98(3)(b) of the Constitution of the Republic of Fiji confers on the Supreme Court the exclusive jurisdiction, "subject to such requirements as prescribed by law", to hear and determine appeals from all final judgments of the Court of Appeal, Section 7(2) of the

Supreme Court Act No. 14 of 1998, sets out stringent criteria for the grant of special leave to appeal in the following manner:-

> "In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless –
>
> (a) a question of general legal importance is involved;
>
> (b) a substantial question of principle affecting the administration of criminal justice is involved; or
>
> (c) substantial and grave injustice could otherwise occur."

28. It is manifest from the language used in the above quoted provision of the Supreme Court Act that special leave should not be granted as a matter of course. It is noteworthy that, as this Court was constrained to observe in *Aminiasi Katonivualiku v. The State* [2003] FJSC 17; CAV0001.1999 (17 April 2003) at page 3, -

> ".....the Supreme Court is not a Count of criminal appeal or general review nor is there an appeal to the Court as a matter of right and, whilst we accept that in an application for special leave some elaboration on the grounds of appeal may have to be entertained, the Court is necessarily confined within the legal parameters set out above, to an appeal against the judgment of the Court of Appeal which in this instance, was an order for a new trial."

29. The above passage has been cited with approval in subsequent decisions of this Court such as *Raura v The State* [2006] FJSC 4; CAV0010U.2005S (4 May 2006) and *Chand v The State* [2012]FJSC 6; CAV14/2010 (9th May 2012). The parameters of Section 7(2) of the Supreme Court are demarcated by the concepts of "general legal importance", "substantial question of principle" and "substantial and grave injustice", which were amply illustrated in the following *dictum* of Lord Sumner in *Ibrahim v Rex* [1914] A.C. 599 at page 614:-

> "Leave to appeal is not granted 'except where some clear departure from the requirements of justice' exists: *Riel v. Reg* (1885) 10 App. Case. 675; nor unless by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done': In *re Abraham Mallory Dittet* (1887) 12 App. Case. 459. It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing

> of criminal appeals as being upon the same footing: *Riel's* case *supra; ex parte Deeming* [1982] A.C. 422. The Board cannot give special leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice: *Ex parte Macrea* [1893] A.C. 346. There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future: *Reg. v. Bertrand* (1867) L.R. 1 P.C. 520."

30. The *dictum* of Lord Sumner was adopted as the *locus classicus* on the matter when dealing with applications for leave to appeal to the Judicial Committee of the Privy Council from decisions of the Supreme Courts of Sri Lanka, India and Mauritius in criminal cases, respectively in *Seneviratne v. The King* [1936] 3 All ER 36, AIR [1936] P.C. 289, *Pritam Singh v. The State* AIR [1950] SC 169 and *Badry v The Director of Public Prosecutions* [1982] UKPC 1. The same principles have been incorporated into Section 7(2) of the Supreme Court Act.

31. In the light of these judicial decisions, it is necessary to examine whether any of the grounds urged, and submissions made, by the Petitioner in his petition seeking special leave to appeal from the impugned decision of the Court of Appeal, are of sufficient substance to cross the stringent threshold laid down in Section 7(2) of the Supreme Court Act.

32. For convenience, the grounds set out in paragraph 2 of the petition may conveniently be divided into four main issues, namely, the questions of (i) pre-judgment by trial Judge in pre-trial rulings (paragraph 2(a)); (ii) misdirections of the trial Judge in his summing up and his judgment (paragraph 2 (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n),(o) and (p)); (iii) findings of facts being made without giving right of reply to the Petitioner with respect to the sentencing ruling (paragraph 2 (b)) and (iv) excess of jurisdiction under the Exchange Control Act regarding aggravating factors relevant for sentencing (paragraph 2 (q) of the petition).

33. I propose to examine these questions in turn in the light of the submissions contained in paragraph 3 and 4 of the petition, the written submissions filed on behalf of the

parties to this application and the submissions made by the learned Counsel at the hearing before this Court, noting also that these were more or less the same grounds on which the present Petitioner had based his appeal to the Court of Appeal as it becomes clear from paragraph 39 of its impugned judgment of that Court dated 14th August 2014 .

(i) The Question of Pre-judgment

34. On the ground of pre-judgment as set out in paragraph 2(a) of the petition, the learned Counsel for the Petitioner simply relies on the following observations of the trial Judge in paragraphs 27 and 28 of his Ruling dated 6th March 2014 on two interlocutory applications, namely, HAM 236 and 239 of 2013, and submitted that these paragraphs demonstrate that the trial Judge had made premature findings of fact and law, prior to the commencement of the trial, to the effect that the petitioner has funds in Australia the origin of which are of no consequence before the trial commenced, and thereby prejudiced the trial.

35. Paragraphs 27 and 28 of the aforesaid ruling were to the following effect:-

> 1. No matter how the applicant may regard his funds in Australia and no matter what their provenance, the fact is that they represent foreign exchange held by a Fijian resident and as such they are caught by the terms of the Act.
>
> 2. Mr. Reynold's submissions are well researched, novel and ingenious but unfortunately they are misconceived. The funds being abroad, the legislation creates the *"nexus"*, and this limb of the applicant's argument has no merit.

36. Learned Counsel for the Petitioner has in this context referred to the well known statement of Lord Chief Justice Hewart in *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, [1923] All ER 233 that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly seen to be done."

37. It is significant that learned Counsel for the Petitioner had made the identical submission before the Court of Appeal, which responded in paragraph 64 of the

impugned judgment by pointing out that the learned Counsel has taken paragraphs 27 and 28 out of context, and that when considered in the light of what the learned trial Judge had observed in the preceding paragraphs commencing from paragraph 22, it would be clear that there was no pre-judgment.

38. While it is unnecessary to reproduce paragraphs 22 to 26 of the trial Judge's ruling dated 6th March 2014 in full, it would suffice to state that those paragraphs were premised on the argument put forward on behalf of the Petitioner that Sections 3, 4 and 26 of the Exchange Control Act, on the basis of which the Petitioner had been charged, "cannot apply to the facts as relied upon by the Prosecution and they are therefore bad law and should be quashed." (vide paragraph 22 of the Ruling dated 6th March 2014)

39. There could, in any event, be no pre-judgment on the facts as the material facts had been admitted in the several affidavits filed by the Petitioner himself in the course of the several interlocutory applications filed by him. The point was well made by the trial judge himself when dealing with the Petitioner's application in HAM 216 of 2013 seeking the recusal of the trial judge from the trial, in his ruling dated 31st March 2014, wherein he observed as follows:-

> 6. In all the interlocutory applications made in these proceedings and there have been many, there has never been ever a suggestion that there were no funds in Australia or that the applicant is not a resident in Fiji. Every application has been predicated on the fact that he holds monies abroad in Australia and New Zealand and the applications have been whether those funds come within the purview of the Exchange Control Act *("ECA")* or not. In the latest application (HAM 239/13), the applicant's counsel Mr. Reynolds Q.C. adopted as the main thrust of his argument that those funds had no nexus with Fiji or with Fijian currency and that therefore the ECA provisions are inapplicable to him and his circumstances.
>
> 7. In submissions made to the Court dated 1st November 2013 signed by the solicitor for the applicant, Mr. Anand Singh, paragraphs 13 & 14 provide background facts to an application to quash the information filed against the applicant. Those paragraphs read:

"13. Those funds were collected between 2000 and 2002 in New Delhi and other parts of India, including non resident Indians (sic) to assist the applicant and his family members to establish residence in another country following the political upheaval in Fiji in May 2000.

14. The donated funds, totalling approximately AUD 1.5 million were deposited by the Indian Consul General in Sydney into the personal bank account held by the applicant in Australia. The Applicant retained the funds in Australia. In 2004 he disclosed the income generated from interest on the funds, amending his tax returns and paid outstanding taxes to the Fiji Islands Revenue and Customs Authority".

8. Furthermore, the applicant himself swore an affidavit on 10 February 2011 in support of a stay application. In that affidavit he repeated the factual background referred to in paragraph 6 hereof and from paragraph 27 to 33 of his affidavit, the applicant personally deposed to the fact that he received those funds and kept them in Australia.

40. It is significant to note that at the trial against the Petitioner the very facts which the Petitioner contends that the trial Judge had prejudged were admitted by the Petitioner in the Admitted Facts filed on 2nd April 2014. In the Court of Appeal, learned Counsel for the Petitioner went to the extent of contending that the Agreed Facts were filed subsequent to the impugned ruling dated 6th March 2014 on the interlocutory applications bearing reference HAM 236 and 239 of 2013, but as the Court of Appeal rightly observed at paragraph 71 of its impugned judgment, then "the question can be asked as to why they were filed as Agreed Facts if the agreed facts were supportive of that position stated by the learned trial Judge at paragraphs 27 and 28."

41. In all these circumstances, there was, in my view, no pre-judgment in regard to the facts, which of course is subject to the question as to whether the trial judge as well as the Court of Appeal were right in holding that the Exchange Control Act would apply to those admitted facts and all the elements of the charges against the Petitioner have been made out, which are matters that have to be considered later in this judgment. In my opinion, the Petitioner has not crossed the threshold for grant of special leave on the question of pre-judgment of material facts.

(ii) The Question of the Misdirections

42. The next matter for consideration is whether the alleged misdirections of the trial Judge in his summing up and / or his judgment referred to in paragraph 2 (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n),(o) and (p) are sufficiently substantial for the grant of special leave to appeal to this Court. It may be noted at the outset that all these grounds have been examined by the Court of Appeal in paragraphs 73 to 140 of the impugned judgment.

43. All alleged misdirections referred to in the aforesaid sub-paragraphs of paragraph 2 of the petition relate to the existence or otherwise of the various ingredients of the offences for which the Petitioner was convicted in the High Court. As would appear from the charges, the offences were respectively violations of Section 4 (first count), Section 3 (second count) and Section 26(1)(a) read with Section 1 of Part II of the Fifth Schedule of the Exchange Control Act.

44. For the purpose of appreciating the submissions of learned Counsel in regard to these alleged misdirections, it is desirable to examine the objects and structure of the Exchange Control Act (Cap. 211). The Act, which was enacted in 1950, and has been amended several times, was intended as stated in its preamble, "to confer powers and impose duties and restrictions in relation to gold, currency, payments, securities, debts and the import, export, transfer and settlement of property, and for purposes connected with the matters aforesaid." As this Court observed in the course of its judgment in *The Governor of Reserve Bank of Fiji v Reddy's Enterprises Ltd* [1996] FJSC 6; CBV0001.1993 (10 October 1996)-

> "It is a comprehensive statute aimed at the protection of Fiji's reserves of gold and foreign currency and is modelled on the United Kingdom Exchange Control Act of 1947 which was repealed in 1987. It prohibits a wide range of transactions involving dealings *by Fijian residents in gold, foreign currency and securities* without the permission of the Minister." (*Emphasis added*)

45. It is also significant to note that the Exchange Control Act is divided into several parts, and Sections 3 and 4 of the Act on which the first two counts are based, fall within Part

II of the Act entitled "Gold and Foreign Currency". This part is also divided into several sub-parts, and Section 3 is found under the sub-head entitled "Dealings in gold and foreign currency" while Section 4 is found under sub-head entitled "Surrender of gold and foreign currency". However, Section 26(1)(a) on which the third count is based, falls within Parts VI of the Act headed "Miscellaneous" and the sub-head "Duty to collect certain debts." Following the structure of the Exchange Control Act, I would prefer to deal first with count two, which is based on Section 3, and then proceed to a consideration of Sections 4 and 26 of the Act.

Alleged Violation of Section 3 of ECA

46. The main grounds on which the Petitioner seeks to challenge the conviction imposed by the High Court and affirmed by the Court of Appeal under count two for the violation of Section 3 of the Exchange Control Act are set out in paragraph 2(c), 2(d), 2(g), 2(j), 2 (k), 2(l), 2(m), 2(n), (o) and 2(p) of the petition.

47. Learned Counsel for the Petitioner contends that the Court of Appeal erred in fact and law in upholding the conviction despite the fact that the trial Judge had misdirected the assessors that the Petitioner needed permission from the Reserve Bank of Fiji to hold monies in his overseas bank account, and that P3 was evidence of the refusal by the Reserve Bank of Fiji for the Petitioner to hold funds abroad when P3 made no such representation. He also contends that the trial Judge failed to provide any direction to the assessors that "an entitlement to sell foreign currency" was an element of the offence under section 3(1) of the Exchange Control Act.

48. Section 3(1) of the Exchange Control Act provides that-

> 3.-(1) *Except with the permission of the Minister,* no person other than an authorised dealer, shall, in Fiji, and *no person resident in Fiji other than an authorised dealer*, shall, outside Fiji, buy, or borrow any gold or foreign currency from, or sell or *lend any gold or foreign currency* to, any person other than an authorised dealer. (*Emphasis added*)

49. As already noted, the Petitioner was charged with the violation of Section 3 of the Act on the basis that he did between 1st November 2000 and the 23rd July 2010, being a

resident in Fiji but not being an authorised dealer, did *lend* the sum of $1,500,000.00 ($1.5 million) Australian Dollars to persons otherwise than an authorized dealer, namely several financial institutions in Australia and New Zealand as listed in Annexure marked "A", without the permission of the Governor of the Reserve Bank of Fiji. The said Annexure listed 5 financial institutions, namely the Perpetual Investments Management Limited, Australia, the Australia and New Zealand National Bank Limited, New Zealand, the Commonwealth Management Investments Limited, Australia, the Commonwealth Bank of Australia, and the Colonial First State Managed Investment Limited, Australia, in all of which the Petitioner had invested during the material times.

50. It is noteworthy that the powers and functions of the Minister of Finance under the Exchange Control Act had been delegated by Legal Notice No. 98 dated 30th September 1981 and published in the Fiji Royal Gazette Supplement No. 36 of 9th October 1981 to the Central Monetary Authority of Fiji, which is the predecessor to the Reserve Bank of Fiji in terms of the Reserve Bank of Fiji Act No. 14 of 1983. The only witness to testify at the brief trial, Sabrina Hanif, the Board Secretary to the Reserve Bank of Fiji, has stated in evidence that any Fijian resident who wishes to open a bank account overseas, should write to the Reserve Bank of Fiji to obtain the approval of the Bank for that purpose. In those circumstances, the first submission of learned Counsel for the Petitioner based on paragraph 2(c) of the petition that the trial Judge had misdirected the assessors that the Petitioner needed permission from the Reserve Bank of Fiji to hold monies in his overseas bank account, is altogether unfounded.

51. Turning now to the submission of learned Counsel for the Petitioner based on paragraph 2(d) of the petition that the trial Judge had misdirected the assessors that P3 was evidence of the refusal by the Reserve Bank of Fiji for the Petitioner to hold funds abroad when P3 made no such representation, I note that the trial Judge had directed the assessors in his summing up, as follows:-

> "12.....there is no evidence before you that the accused had permission to hold the funds. On the contrary, there is evidence in P3, a letter of the Reserve Bank that the accused had no authority to hold the funds.

13. There is no legal requirement for the accused to be *"directed"* or given notice of his impending breach. You might think that it was unfair not to be given full details of his breach before he was charged and you might think that it was discourteous of the Reserve Bank not to reply to Mr.Chaudhry's letter of 18 November 2009 but those matters are not elements of the offence and should not play a part in your deliberations."

52. It is clear that what the trial Judge was referring in paragraph 12 of his summing up as P3 was the letter dated 23rd October 2009 (P2) that was addressed to the Petitioner by Messrs. Siwatibau & Sloan, for and on behalf of the Reserve Bank of Fiji, as set out Admitted Facts items 29 and 30, from which it also becomes clear that the Petitioner responded to P2 by his letter dated 18th November 2009 (P3) addressed to the Reserve Bank of Fiji. This is the letter mentioned in paragraph 13 of the summing up.

53. In this connection, it is important to take note of the following observation of the Court of Appeal in paragraphs 89 and 90 of the impugned judgment:-

"[89] A doubt arises as regards the admissibility of the document P3. A perusal of the record and the evidence does not show how that letter referred to as P3 was admitted. A perusal of P3 shows that it was a letter issued by the Reserve Bank of Fiji regarding a search warrant dated 6 July 2010 stating that the Reserve Bank of Fiji did not provide approval to the Appellant for opening the accounts listed therein which were all overseas Banks and Institutions.

[90] Therefore the statement of the learned Judge that this letter P3 was evidence that the Appellant had no authority to hold the funds is incorrect....."

54. Unfortunately, having said that there was doubt as to whether the letter dated 23rd October 2009 (P2), which the trial Judge and the Court of Appeal have erroneously described as P3, the Court of Appeal fell into further error by considering the contents of the said letter in paragraph 83 of its impugned judgment. In paragraph 90 of its judgment, the Court of Appeal went on to hold that although the trial Judge's comment regarding P3 would amount to a misdirection, it would not take away the effect of the evidence that was available before the assessors and the Court, and applied the proviso to Section 23(1) of the Court of Appeal Act to hold that there was sufficient evidence to convict the Petitioner.

55. It is also unfortunate that neither the trial Judge nor the Court of Appeal made any mention of the *uncontradicted* testimony of Sabrina Hanif, Board Secretary of the Reserve Bank of Fiji, wherein she has stated that the Petitioner did not at any time ask for permission to hold funds in any of the aforesaid foreign financial institutions. Her testimony, recorded on 2nd April 2014 (Supplementary Record of the High Court pages 10 to 11), was as follows:-

> "Q: If Fijian resident wants to open an account overseas?
> A: Need to write to the Bank to seek approval.
> Q: Did Mahendra Pal Chaudhry ask for permission?
> A: No. Didn't write."

56. In the preceding paragraph, I used the term "uncontradicted" in relation to the testimony of witness Hanif advisedly, as not only was the witness not subjected to any cross-examination on this point, but the Petitioner also refrained from giving evidence or calling any other witness to establish that he had obtained the permission or approval of the Reserve Bank of Fiji as required by Sections 3(1), 4(1) and 26(1) of the Exchange Control Act. In these circumstances, in my view, there was no prejudice caused to the Petitioner based on the misdirection regarding P3 as there is other evidence to justify the finding that the Petitioner had neither sought nor obtained permission or approval at the material times to hold any specified currency in any financial institution overseas.

57. Learned Counsel for the Petitioner grounded his next submission on paragraph 2(g) of the petition which was to the effect that the trial Judge "failed to provide any direction to the assessors that *an entitlement to sell foreign currency* was an element of the offence under section 3(1) of the Exchange Control Act and which the Respondent had to prove beyond reasonable doubt in the absence of any agreed facts". Realising that it was Section 4(1) and not Section 3(1) that embodied the element of "entitlement to sell", learned Counsel submitted at the hearing of this appeal that the misdirection that the Petitioner was complaining of was that the trial Judge failed to provide any direction to the assessors that *selling or lending any gold or foreign currency* was an element of the offence under Section 3(1) of the Exchange Control

Act and which the Respondent had to prove beyond reasonable doubt in the absence of any agreed facts.

58. The latter submission of the learned Counsel for the Petitioner is also misconceived to the extent that the learned trial judge did refer to the requirement of proving that the Petitioner had lent AUD $1.5 million to unauthorised dealers in his summing up, which as far as it relates to the offence under Section 3 is quoted below:-

> "14. In looking then at the second count; an offence under section 3 of the Exchange Control Act. The matters that the State must prove to you so that you are sure for you to find the accused guilty of this offence are:
>
> 1. That the accused was resident in Fiji between November 2000 and July 2010.
> 2. *That he lent AUD $1.5 million to unauthorised dealers.*
> 3. That he did not have the permission of the Reserve Bank.
>
> Again, Ladies and Gentlemen, the prosecution would say to you that the first element is proved by fact 2; there is no evidence before you that the accused had permission from the Governor of the Reserve Bank to lend the money. *I direct you as a matter of law that investing funds and by placing funds in banking institutions are loans to those banks which the banks must repay on demand, so the accused's admissions in paragraph 3 of the Agreed Facts would satisfy the second element.*
>
> 15.The accused says again that the monies are a gift from India with no reference to the Inland Revenue of Fiji but that is not relevant to the charges in the ECA. He also says that he did not receive proper notice from the authorities to warn him of his alleged breach.
>
> 16.Once more as is the case with Count 1, Ladies and Gentlemen, there is no legal obligation on the authorities, be it the Reserve Bank, or its solicitors or any *"competent authority"* to so warn a person thought to be in breach, so in law this defence is not available to the accused." (*Emphasis added*)

59. Learned Counsel for the Petitioner has contended with great force that the direction of the trial judge in paragraph 14 of his summing up that placing funds in banking institutions "are loans to those banks which the banks must repay on demand" was a misdirection. Learned Counsel has pointed out that Exchange Control Act does not define the words "buy", "borrow", "sell" or "lend", and that receiving deposits from

his Indian benefactors cannot constitute lending, as firstly there were no agreed facts that evinced lending and secondly there was no other evidence to suggest lending. He has submitted that there was no agreed facts or evidence that the Petitioner had come by any "certificates of deposits", which he conceded is defined in Section 2 of the Act to include "the right to receive the stated amount".

60. As against this, learned Counsel for the Respondent relies, as the trial Judge and the Court of Appeal did, on Agreed Facts item 3 which is as follows:-

> 3. At the relevant times the Accused had the following overseas accounts ("the Overseas Accounts") in the following financial institutions in Australia and New Zealand ("the Financial Institutions"):-
>
> (a) Cash Management Call Account No. 06-2245-10088252 with the Commonwealth Bank of Australia;
> (b) Commonwealth Balance Fund Account No. 39920061 with the Commonwealth Managed Investments Limited, Australia;
> (c) Term Deposit Account No. 9800000016059 with the ANZ National Bank Limited, New Zealand;
> (d) Account No. 2006 8875 with the Perpetual Investments Management Limited, Australia;
> (e) Colonial First State Income Fund Account No. 0900-0670-5669 with the Colonial First State Investments Limited, Australia;
> (f) First Choice Investments Account No. 0700-0673-5908 with the Colonial First State Investments Limited, Australia;
> (g) First Choice Investments Account No. 070-011 3363221 with the Colonial First State Investments Limited, Australia;

61. It is also significant that the Petitioner had agreed with the Respondent on the following Agreed Facts (P1) in regard to the movement of funds in the Petitioner's overseas accounts:-

> 17. On 26 February 2001, AU$400,000 was deposited into the Accused's Commonwealth Balanced Fund account numbered 39920061 with Commonwealth Managed Investments Limited, Australia.
> 18. Since at least about 26 March 2001, about NZ$150,000 was deposited with the Accused's Term Deposit account numbered 981000000116059 with ANZ National Bank Limited, New Zealand.
> 19. On 17 September 2002, AU$500,000 was invested into the Accused's account numbered 20068875 with Perpetual Investment Management Limited, Australia.
> 20. On 17 September 2002, AU$500,000 was invested into the Accused's First State Income Fund account numbered 0900-0670-5669 with Colonial First State Investments Limited.

21. On 19 September 2002, the Accused closed the Accused's Commonwealth Balanced Fund Account with Commonwealth Managed Investments Limited, Australia and the balance of AU$378,979.18 was paid out. On the same day, the same amount was deposited into the Accused's Cash Management Call Account.
22. On 23 September 2002, AU$380,000 was withdrawn from the Accused's Cash Management Call Account. On 24 September 2002, AU$380,000 was invested in the Accused's First Choice Investments Account numbered 0700-0673-5908 with the Colonial First State Investments Limited.
23. On 4 August 2005, the Accused closed his account with Perpetual Investment Management Limited, Australia and the balance of AU$488,231.02 was paid out. On 5 August 2005, the same amount was deposited into the Accused's Cash Management Call Account.
24. On about 30 January 2006, the Accused closed his First State Income Fund account with Colonial First State Investments Limited and the balance of AU$472,722.56 was paid out.
25. On about 6 February 2006, about AU$450,000 was invested with the Accused's First Choice Investments account numbered 070-0113366221 with the Colonial First State Investments Limited.

62. Learned Counsel for the Respondent has submitted that the relationship between the customer and banker is one of creditor and debtor as explained in the celebrated decision in *Foley v. Hill* [1848] 2 HLC 28. Briefly stated, the facts of this case were that the appellant opened a bank account with the respondent bankers and deposited money in the said account. A few years later, the appellant brought proceedings against the respondent bankers seeking recovery of both the principal and interest. The counsel for the appellant argued that it was the duty of the respondent bankers to keep all the accounts up to date as the relationship between the appellant and the respondent was not merely one of debtor and creditor but one based on trusteeship. Lord Chancellor Cottenham rejected this contention of the respondent, and observed in his oft quoted judgment at pages 36-37 that-

> Money, when paid into a bank, ceases altogether to be the money of the principal (see *Parker v. Marchant*, 1 Phillips 360); it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it.....The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach, of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal; but he is of course answerable for the

amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands.

That has been the subject of discussion in various cases, and.....*that being established to be the relative situations of banker and customer, the banker is not an agent or factor, but he is a debtor.* Then the analogy between that case and those that have been referred to entirely fails; and the ground upon which those cases have, by analogy to the doctrine of trusteeship, been held to be the subject of the jurisdiction of a Court of Equity, has no application here, as it appears to me."(*Emphasis added*)

63. This analysis of Lord Chancellor Cottenham has been followed in a large number of decisions to this day, including the decision in *Arab Bank v Barclays Bank* [1954] 2 All ER 226, [1954] AC 495 which has been cited by both Counsel, in which it was stated by Court that-

> "The contract between a banker and a customer on current account is fundamentally a contract for the loan of money, but for a loan on which are engrafted special terms."

64. The multifarious complexion of the relationship that could arise between the banker and customer due to the engrafting of special terms into the contract was adverted to by Steyn J. in the course of his judgment in *Barclays Bank plc v Quincecare Ltd and another*, [1992] 4 All ER 363 at 375, in the following manner:-

> "Primarily, the relationship between a banker and customer is that of debtor and creditor. But *quoad* the drawing and payment of the customer's cheques as against the money of the customer's in the banker's hands the relationship is that of principal and agent: see *Westminister Bank Ltd v Hilton* (1926) 43 TLR 124 at 126 per Lord Atkinson".

65. Learned Counsel for the Petitioner sought to overcome the difficulty by submitting that Section 2(1) of the Banking Act, (Cap 212) has defined "banking" so as to include "the business of accepting deposits of money from the public or members thereof", and the provisions of this Act would override the common law position enunciated by the House of Lords in *Foley v Hill, supra.* However, I find nothing in the Banking Act that would assist the Petitioner, and on the contrary, I find that in India where the provisions of the English Exchange Control Act have been greatly followed in drafting the Foreign Exchange Regulation Act,1947, and the provisions of the Banking Act are quite similar to our Banking Act, Venkatarama Aiyar J., of the Supreme Court of India

has stated in *Shanti Prasad Jain v The Director of Enforcement* AIR 1962 (SC) 1764 at paragraph 35 that-

> "Now the law is well settled that when moneys are deposited in a Bank, the relationship that is constituted between the banker and the customer is one of debtor and creditor and not trustee and beneficiary. The banker is entitled to use the monies without being called upon to account for such user, his only liability being to return the amount in accordance with the terms agreed between him and the customer. And it makes no difference in the jural relationship whether the deposits were made by the customer himself, or by some other persons, provided the customer accepted them. There might be special arrangement under which a Banker might be constituted a trustee, but apart from such an arrangement, his position qua Banker is that of a debtor, and not trustee. The law was stated in those terms in the old and well-known decision of the House of Lords in *Foley v. Hill* [1848] 11 H.L.C. 28-9 E.R. 1002, and that has never been questioned."

66. The decision in *Shanti Prasad Jain v The Director of Enforcement, supra* is interesting as it dealt with the corresponding provision in Section 4(1) of the Foreign Exchange Regulation Act of 1947, which was, like Section 3(1) of our Act, inspired by the language of Section 1(1) of the English Exchange Control Act of 1947. On the peculiar facts of this case, the Indian Supreme Court came to the conclusion that since the appellant had only a contingent right to the deposits made to its credit in an overseas Bank account under a special arrangement and not in the course of normal banking business, there was no lending of those amounts by the appellant to the Bank within the meaning of Section 4(1) of the Indian Act.

67. In this respect, the *Shanti Prasad Jain* decision is distinguishable from the instant application before this Court in which there is absolutely no suggestion by the Petitioner of any special arrangement, but it is relevant to note that in the course of his judgment in this case, Venkatarama Aiyar J., went on to make the following pertinent observation:-

> "The intention of the Legislature was plainly to prohibit all transactions in foreign exchange by persons who are residents of India whether such transactions take place during their actual residence in India or during their sojourn in foreign parts. To hold that the prohibition under the Act does not extend to acts done outside India by residents of India must inevitably lead to large-scale evasion of the Act resulting in its object being defeated. A

construction which leads to such a result must be avoided. The expression "resident in India" is clearly used in the sense "resident of India"."

68. The other submission of the learned Counsel for the Petitioner was that the learned trial Judge also misdirected the assessors that the fact that the monies deposited and invested overseas originated from a "gift from India" was not relevant for the charges under the Exchange Control Act. I find no merit in this submission, which has been dealt with by the Court of Appeal adequately in paragraphs 51 and 52 of its judgment, quoted below:-

> [51] .....The charge does not speak of a situation as contemplated by Mr. Singh in his argument relating to the right to receive which he bases on the gratuitous donation that the Appellant had received from India.
>
> [52] The charge does not speak of the Appellant's *right to receive any monies before the deposit of the monies in the Australian and New Zealand Financial Institutions*. The charge relates to the position *after the monies had been deposited* in the Appellant's Accounts which catches up with the provisions in section 26.

69. For these reasons, I hold that the Petitioner has failed to demonstrate any misdirection with respect to his conviction for the violation of Section 3 read with Section I of Part II of the Fifth Schedule of the Exchange Control Act or to raise any question of general legal importance or substantial question of principle affecting the administration of criminal justice or occasioned any substantial and grave injustice to justify the grant of special leave to appeal on this count.

Alleged Violation of Section 4 of ECA

70. The main grounds on which the Petitioner seeks to challenge the conviction imposed by the High Court and affirmed by the Court of Appeal under count one for the violation of Section 4 of the Exchange Control Act are set out in paragraphs 2(h), 2(i), 2(j), 2 (k), 2(l), 2(m), 2(n), 2(o) and 2(p) of the petition.

71. Learned Counsel for the Petitioner contends that the Court of Appeal erred in fact and in law in upholding the convictions despite the fact that the trial Judge had failed to provide any direction to the assessors that the Petitioner, having been "entitled to sell

foreign currency", was "bound to" or "cause to" offer for sale such currency under Section 4(1) of the Exchange Control Act, which elements the Respondent had to prove beyond reasonable doubt in the absence of any agreed facts.

72. Section 4(1) of the Exchange Control Act, which falls within Part II of the Act dealing with "Gold and Foreign Currency " and under the sub-part entitled "Dealings in gold and foreign currency", provides as follows:-

> "4.-(1) Every person in or resident in Fiji who is *entitled to sell*, or to procure the sale of, any gold, or any foreign currency to which this section applies, and is not an authorised dealer, *shall offer it, or cause it to be offered, for sale* to an authorised dealer, unless the Minister consents to his retention and use thereof or he disposes thereof to any other person with the permission of the Minister." (*Emphasis added*)

73. It is noteworthy that the Petitioner was charged on count one with the violation of Section 4 of the Act on the basis that he did between 1st November 2000 and the 23rd day of July 2010, being a resident in Fiji *entitled to sell foreign currency* but not being an authorised dealer, however *being required by law to offer it for sale to an authorized dealer*, retained the sum of $1,500,000.00 ($1.5 million) Australian Dollars for his own use and benefit, without the consent of the Governor of the Reserve Bank of Fiji.

74. The learned trial Judge directed the assessors in paragraphs 11 and 12 of his summing up in the following manner:-

> "11. The first charge that the accused faces is a charge alleging that he is in breach of section 4 of the Act. That section in the simplest of terms says that any person resident in Fiji who has money overseas in foreign currency and he is not a person authorised to have it, then he must offer that money to a person who is authorised to hold it, unless he has permission from the Minister to keep that money or permission to give it to somebody else. Persons authorised are called *"authorised dealers"* and for the purposes of the Act are only in Fiji, usually banks. So what the State must prove to you so that you are sure is this:
>
> (1) That at the material time, that is from November 2000 to July 2010, the accused was a resident of Fiji.
> (2) That he had foreign currency overseas.
> (3) That he was not an authorised person to hold foreign currency.

(4) That he did not have the Minister's permission to have the Funds.
(5) That he did not bring the funds into Fiji.

12. So where do you find the evidence for these elements of the offence? The agreed facts which you must accept say this:

(1) That the accused was at the relevant times *"resident"* (Fact 2).
(2) That he had foreign currency in 7 different accounts. (Fact 3).
(3) He was not an *"authorised dealer"* (or authorised person) to hold it (Fact 7.)
(4) The funds were never offered to an authorised dealer in Fiji. (Fact 31)

and, in addition, there is no evidence before you that the accused had permission to hold the funds. On the contrary, there is evidence in P3, a letter of the Reserve Bank that the accused had no authority to hold the funds."

75. In paragraphs 76 to 102 and 112 to 119 of the impugned judgment of the Court of Appeal, the points raised before that Court by the Petitioner have been carefully examined. The grounds set out in paragraphs 2(h), 2(i), 2(j), 2 (k), 2(l), 2(m) and 2(p) of the petition, on the basis of which special leave to appeal has been sought against the judgment of the Court of Appeal are the same as those raised before the Court of Appeal. Except for the blemish concerning P3, which has already been dealt with in paragraphs 51 to 55 of this judgment, the Court of Appeal found that the directions to the assessors contained in the trial Judge's summing up were impeccable, and I have no reason to disagree with the Court of Appeal.

76. Learned Counsel for the Petitioner has submitted before this Court that the summing up and judgment of the trial Judge in this case as well as the judgment of the Court of Appeal which affirmed the conviction of the Petitioner, varying only the sentence, were inconsistent with the law as settled in the decision of this Court in *The Governor of the Reserve Bank of Fiji v. Reddy's Enterprises Ltd* [1996] FJSC 6; CBV0001.1993 (10 October 1996).

77. That was a decision that turned on Section 26(1)(a) of the Exchange Control Act, but in the course of the judgment in that case, the Supreme Court responding to a submission by Counsel for the respondent that subsection 26 could not have been intended to penalise a Fijian creditor who does nothing to delay or forego payment of his debt due in Fijian dollars, observed that:-

> "If he elects instead to receive it in a *specified currency* it must be offered for sale under Section 4 to an authorised dealer, thereby achieving the Act's intended protection of the country's foreign currency reserves. (*Emphasis added)*

78. Since the Petitioner has failed to demonstrate that any question of general legal importance or substantial question of principle affecting the administration of criminal justice arises in this case, and in the absence of any indication that any substantial or grave injustice has occurred, I do not see any basis for justifying the grant of special leave to appeal to the Petitioner with respect to his conviction and sentence for the violation of Section 4 read with Section 1 of Part II of Fifth Schedule of the Exchange Control Act.

Alleged Violation of Section 26 of ECA

79. The main grounds on which the Petitioner seeks to challenge the conviction imposed by the High Court and affirmed by the Court of Appeal under count one for the violation of Section 4 of the Exchange Control Act are set out in paragraphs 2(e), 2(f), 2(j), 2 (k), 2(l), 2(m), 2(n), 2(o) and 2(p) of the petition.

80. Learned Counsel for the Petitioner contends that the Court of Appeal erred in fact and in law in upholding the conviction of the Petitioner despite the trial Judge failing to direct the assessors that a "right to receive specified currency" was an element of the offence under Section 26(1) of the Exchange Control Act, which element the Respondent had to prove beyond reasonable doubt in the absence of any agreed facts, and arriving at the conclusion that the Petitioner was required to repatriate all monies held in his overseas bank account.

81. Section 26(1) of the Exchange Control Act, which falls within Part VI of the said Act entitled "Miscellaneous", under the sub-head "Duty to collect certain debts", provides that-

> "26.-(1) Except with the permission of the Minister, no person resident in Fiji who has *a right (whether present or future and whether vested or contingent) to receive any specified currency,* or to receive from a person

resident outside Fiji a payment in Fiji currency, shall do, or refrain from doing, any act with intent to secure or shall do any act which involves, is in association with or is preparatory to any transactions securing –

(a) that the receipt by him of the whole or part of that currency or, as the case may be, of that payment in Fiji currency, is *delayed*; or
(b) that the currency or payment *ceases*, in whole or in part, to be receivable by him:

Provided that nothing in this subsection -

(j) shall, unless the Minister otherwise directs, impose on any person any obligation, in relation to any debt arising in the carrying on of any trade or business, to procure the payment thereof at an earlier time than is customary in the course of that trade or business; or

(ii) shall, unless the Minister otherwise directs, prohibit any transfer to a person resident in Fiji and not elsewhere of any right to receive any specified currency or payment in Fiji currency."(*Emphasis added*)

82. As already noted, the Petitioner was charged on the third count with the violation of Section 26(1)(a) read with Section 1 of Part II of the Fifth Schedule of the said Exchange Control Act, on the basis that in between 1st of November 2000 and 23rd of July 2010, the Petitioner being a resident in Fiji having *the right to receive a sum* of $1,500,000.00 ($1.5 million) Australian Dollars from the Financial Institutions in Australia and New Zealand as listed in Annexure marked "A", *caused the delay of payment* of the said sum, in whole or in part, to himself by authorizing the continual re-investment of the said sum together with interest acquired back into the said Financial Institutions without the consent of the Governor of the Reserve Bank of Fiji.

83. At the hearing of this application, learned Counsel for the Petitioner submitted that the trial Judge failed to direct the assessors that a "right to receive specified currency" was an element of the offence under Section 26(1) of the Exchange Control Act, which element the Respondent had to prove beyond reasonable doubt in the absence of any agreed facts, and arriving at the conclusion that the Petitioner was required to repatriate all monies held in his overseas bank account.

84. The trial Judge's summing up in regard to the third count was as follows:-

17.The third count the accused faces is called a *failure to collect debts*. It simply means that being a holder of foreign exchange abroad, and being resident in Fiji, *he delayed bringing those funds back into the Fijian banking system and kept them for himself by continuing to reinvest them*. To prove to you so that you are sure before you can find the accused guilty the State must establish the following elements of the offence:

1. That the accused was resident in Fiji between November 2000 and July 2010.
2. *That he had AUD $1.5 million in various financial institutions.*
3. That he delayed bringing the funds back into Fiji, and
4. That he did not have the consent of the Governor of the Reserve Bank.

18. Now, Ladies and Gentlemen, the State would say the first element is proved by Fact 2, the second element by Fact 3, the third element is proved by Fact 31 and that there is no evidence before you to prove that he had consent of the Governor.

19. Mr. Bodor spent quite some time going through the Siwatibau & Sloan letter with you telling you that it was an inadequate instruction to Mr.Chaudhry to bring back his money to Fiji. You of course will consider what Mr.Bodor says and gave it the weight you think fit.

20. However I direct you in law that for the first two counts there is no requirement for a warning "direction" so the letter is unnecessary for your deliberations on those 2 counts. For the third count, s.26 of the Act says that the authorities *may* give a direction to an account holder to repatriate his funds but it is not compulsory. If you think that the solicitor's letter is giving a direction you may then wish to consider what Mr.Bodor says about it.

21.At the end of the prosecution case you heard me tell the accused what his rights are in defence. He could remain silent or give evidence. In either case he could call witnesses. He chose to remain silent and call no witnesses. The accused is perfectly entitled to do that because he has nothing to prove. It is the State that must prove their case so that so that you are sure of it. You are not to make any adverse finding against the accused just because he gave no evidence. You must judge the case on the strength of the prosecution evidence and nothing else."

85. Learned Counsel for the Petitioner contends that in his summing up, the trial Judge did not specifically refer to the "*right to receive specified currency*" as a distinct element of the offence under Section 26(1)(a) of the Exchange Control Act, and the said omission has seriously prejudiced the Petitioner. This submission is altogether untenable given that admittedly the Petitioner had control over an aggregate sum exceeding AUD $1.5 million lying in various financial institutions in Australia and

New Zealand, and the trial Judge has explained to the assessors in his summing up that the essence of the charge was that the Petitioner, being a resident of Fiji, had failed *to collect his debts*, by which is meant that being a holder of foreign exchange abroad who was free to repatriate the funds to Fiji, he *delayed bringing those funds back into the Fijian banking system and kept them for himself by continuing to reinvest them in various overseas financial institutions.*

86. Though not explicitly stated in the summing up, it would have been clear to the assessors who heard the trial Judge's summing up that a right to receive specified currency was an important element of the offence, and that all ingredients of the offence were made out by the evidence in the case, most of which was simply Agreed Facts. Furthermore, as the Court of Appeal observed in paragraph 52 of its judgment, the charge on count three does not speak of the Appellant's right to receive any monies *before* their deposit in the Australian and New Zealand financial institutions, but is concerned only with the position arising *after* the deposit of the monies had been deposited into the Petitioner's accounts with the said financial institutions. This, in fact, rendered the gratuitous nature of the Petitioner's initial receipt of the funds from India, altogether irrelevant to the charges.

87. The other submission of the learned Counsel for the Petitioner is that the prosecution has failed to prove that the Petitioner had acquired a right to payment in Fijian currency, which according to him, was indispensable to sustain the charge. He has placed reliance on the following passage from the decision of this Court in *The Governor of the Reserve Bank of Fiji v. Reddy's Enterprises Ltd, supra:*

> As stated above, we are satisfied that the Company acquired a present vested right *to payment in Fijian currency* on settlement of the policy claim, and logically under the terms of s 26 (1) it could not have acquired at the same time a contingent right to sterling in the same transaction. (*Emphasis added*)

88. For appreciating the fallacy of the submission of learned Counsel for the Petitioner, it will be useful to briefly go into the facts of *Reddy's* case. The respondent in that case, Reddy's Enterprises Limited, owned the Tanoa Hotel near Lautoka, which was destroyed by fire on 17 December 1988. It had been insured in London, but in terms of

the policy, the settlement of any claim was to be in Fiji currency. However, the parties reached a settlement of the claim at FJD $5.1 million of which 10% was paid in Fiji, and the balance of 1,865,853 pounds sterling (the then equivalent of FJD $4.59 million being 90% of the settlement) was paid in June and July 1989 to a broker, Sedgwick London, for the respondent and placed on a term deposit with Westpac Bank in London in August. Pending a decision about appropriate plans for the re-instatement of the hotel, the respondent wished to invest this money abroad for up to 2 years at higher interest rates than those currently available in Fiji.

89. The respondent's request for consent to this course under the Exchange Control Act was declined by the Governor of the Reserve Bank of Fiji on 20th June 1989 and further representations to the Minister of Finance were also unsuccessful. The respondent applied to the High Court for judicial review by way of *certiorari* seeking to quash the Governor's decision, which relief was refused by Byrne J in a judgment delivered on 29 November 1990. The Court of Appeal allowed the respondent's appeal and set aside the High Court order, and on an appeal to this Court by the Governor of the Reserve Bank, the decision of the Court of Appeal was reversed and the decision of the High Court to the effect that there has been a breach of Section 26(1) by the respondent, was restored.

90. Before the Supreme Court, the appellant advanced two main arguments, namely (1) that on its proper interpretation, Section 26 (1) required that receipt of payment on the policy be in Fiji, so the respondent was in breach by receiving payment in London; and (2) that the respondent's right was to receive payment only in Fiji dollars, and that by agreeing to take sterling it had delayed receipt of that currency, thereby infringing Section 26(1)(a) of the Exchange Control Act. This Court rejected the first argument but accepted the second, and observed as follows:-

> "In agreement with the Court of Appeal we would reject the appellant's submission that Section 26(1) must be read as requiring payment in Fiji. In the High Court Byrne J reached that conclusion after an extensive survey of authorities dealing with statutory interpretation. He felt it necessary to imply such a term to give effect to the intention of the Act. However, among other more specific provisions *the protection of Fiji's foreign exchange reserves is secured by the requirement in Section 4 to offer specified foreign currency to an authorised dealer; and by the default provisions in Section*

26 (2) giving the Minister the power of obtaining or expediting receipt or payment. The place of Section 26 among the general body of miscellaneous provisions at the end of the Act, followed by a similar requirement in Section 27 not to delay the sale or importation of goods, tends to confirm what its language so clearly indicates – namely, that *Section 26 is directed only at conduct by Fiji residents seeking to delay or evade the receipt of payments due to them in the particular currency stipulated.*" (*Emphasis added*)

91. The decision in *Reddy's* case, though not on all fours with the present case, is a useful decision which has examined the application of Sections 4 and 26 of the Exchange Control Act particularly in relation to the elements of an offence under Section 26(1)(a) of the Act, and there is nothing in that decision that supports the submissions made by learned Counsel for the Petitioner.

92. The Petitioner has clearly failed to show that there were any misdirections with respect to his conviction for the violation of Section 26(1)(a) read with Section I of Part II of the Fifth Schedule of the Exchange Control Act which would raise any question of general legal importance or substantial question of principle affecting the administration of criminal justice or occasion any substantial and grave injustice to justify the grant of special leave to appeal on this count.

(iii) The Question of the Right of Reply before Sentencing

93. The ground which has been set out in paragraph 2(b) of the petition is that the trial Judge made findings of 'fact' without giving the Petitioner a right to reply to such adverse findings, in his sentencing ruling, when there was no tested evidence to support such findings. Apart from this bold assertion in the petition, no submissions were addressed to Court by learned Counsel for the Petitioner to even clarify what adverse findings of fact are alleged by the Petitioner to have been made by the trial Judge in his sentencing judgment, and learned Counsel for the Respondent has submitted that this point had never been raised in the Court of Appeal.

94. In these circumstances, I am of the view that there is no material for this Court to consider the grant of special leave to appeal on the basis of the ground set out in paragraph 2(b) of the petition.

(iv) The Question of Exceeding the Jurisdiction of Court in regard to Sentencing

95. In paragraph 2(q) of the petition, the Petitioner has sought special leave to appeal from this Court on the basis that the Court of Appeal erred in fact and in law in upholding the conviction of the Petitioner in the High Court wherein the learned trial judge had "exceeded the jurisdiction of the Exchange Control Act in considering and applying aggravating factors when arriving at sentence." I understand from this that the Petitioner's complaint is that the High Court had exceeded the jurisdiction conferred on it by the Exchange Control Act in sentencing the Petitioner.

96. Since the submissions of learned Counsel focused on Section 1(4) of Part II of the Fifth Schedule of the Exchange Control Act, falling within the heading "General Provisions as to Offences", which is admittedly the relevant provision for sentencing, I quote below Section 1(4) in its entirety:

> "(4) Except in the case of a body corporate convicted on indictment, the maximum fine which may be imposed for an offence punishable under this Part shall be -
>
> *(a)* on summary conviction $1,000: and
> *(b)* on conviction on indictment $2,000;
>
> so, however, that (in either case), where the offence is concerned with any currency, any security, any payment, any gold, any goods or any other property, *and does not consist only of a failure to give information or produce books, accounts or other documents with respect thereto when required so to do under Part 1*, a larger fine may be imposed not exceeding 3 times the amount or value of the currency, security, payment, gold, goods or property." (*Emphasis added*)

97. Learned Counsel for the Petitioner submitted that in terms of the above quoted provision, the maximum fine that can be imposed by Court is FJD $2,000 for each offence, and no more. He has further submitted that for the purpose of applying the "*three times multiplier*", by which is meant *the power to impose a fine not exceeding 3 times the amount or value of the currency, security, payment, gold, goods or property*, it was mandatory for the prosecution to show that the Petitioner had failed to give information and books and that the offence concerned any currency etc. He further

submitted that these conjunctive limbs must exist in any case for the three times multiplier to be applied, and that was not the case as far as the Petitioner was concerned. He stresses that there was no agreement or evidence that the Petitioner had filed to give information and books and that the offence concerned any currency any security, any payment, any gold, any goods or any other property to justify the application of the three times multiplier.

98. In support of his submission, learned Counsel for the Petitioner has invited our attention to Halsbury's *Laws of England* (4th Edition) Volume 44 (1983) p. 560 at paragraph 910 wherein it is stated thus:

> "It is a general rule that penal enactments are to be construed strictly and not extended beyond their clear meaning. This general rule means no more than that if, after the ordinary rules of construction have first been applied, as they must be, the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt."

99. Learned Counsel has also submitted that the Petitioner had been charged with the failure to repatriate foreign currency, and not "currency" as defined in Section 2(1) of the Exchange Control Act, and further that there cannot in law be any order for repatriation of any monies as a penalty as the said Act prescribes only for forfeiture of currency and *not foreign currency* as was the case in the current instance.

100. In response to these submissions of learned Counsel for the Petitioner, learned Counsel for the Respondent submitted that the Petitioner has wrongly understood the import of the words "failure to give information or produce books, accounts or other documents" in the above quoted provision as an aggravating factor. He submitted that on the contrary, it is clear from a plain reading of the provision that where the offence committed *only* consists of such a failure, then the larger fine not exceeding triple the value would not be warranted. He also submitted that there is no ambiguity in the language used in Section 1(4) of Part II of the Fifth Schedule of the Exchange Control Act.

101. I am of the opinion that the submissions made on behalf of the Petitioner are unjustified by the plain and unambiguous language used in Section 1(4) of Part II of

the Fifth Schedule of the Exchange Control Act. It is crystal clear from the said provision that where the offence is concerned with any currency, any security, any payment, any gold, any goods or any other property, *and does not consist only of a failure to give information or produce books, accounts or other documents with respect thereto when required so to do under Part 1*, a larger fine may be imposed not exceeding 3 times the amount or value of the currency, security, payment, gold, goods or property.

102. It is obvious from the words italicised by me that only where the offence consists of a mere failure to give information or produce books, accounts or other documents with respect to currency when required so to do under Part 1, that the fines of FJD $1000 or FJD $2000, depending on whether it is a summary conviction or a conviction upon indictment, become mandated.

103. The case against the Petitioner involved *foreign* currency, which is as much currency as Fiji currency. The Petitioner's argument that the present convictions do not constitute offences concerned with any currency is both contrived and artificial, and must be viewed with circumspection.

104. It is impossible to infer from the definition of "currency" that it is intended to mean that an offence is less serious and therefore immune from the provisions of the Exchange Control Act simply because the monies were securely deposited in foreign bank accounts. The definition of "currency" in Section 2(1) of the Exchange Control Act is an inclusive definition, and there is nothing therein that would exclude money deposited in a foreign bank. To hold otherwise would defeat the objectives of the Exchange Control Act.

105. For these reasons, I am of the opinion that the Petitioner has failed to demonstrate any excess of jurisdiction which could give rise to any questions of general legal importance or substantial questions of principle affecting the administration of criminal justice or occasion any substantial and grave injustice to justify the grant of special leave to appeal to this Court.

Conclusions

106. Accordingly, I hold that the application for special leave to appeal filed by the Petitioner is devoid of merit and should be dismissed.

Hon. Justice Saleem Marsoof
Justice of the Supreme Court

I agree.

Hon. Justice Almeida Guneratne
Justice of the Supreme Court

I agree.

Hon. Justice A.L.Brito Mutunayagam
Justice of the Supreme Court

Solicitors:

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