IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO: AAU 103 OF 2017
(High Court No. HAC 146 of 2010)

BETWEEN	**:**	**ROBIN SURYA SUBHA SHYAM**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Chandra JA** **Basnayake JA** **Prematilaka JA**
Counsel	**:**	**Mr. P. Sharma for the Appellant** **Mr. A. Jack for the Respondent**
Date of Hearing	**:**	**18 September, 2019**
Date of Judgment	**:**	**3 October, 2019**

JUDGMENT

Chandra JA

[1] I have read in draft the judgment of Basnayake, JA and agree with the proposed orders.

Basnayake JA

[2] This is a renewed application for leave to appeal against the judgment dated 11 October 2013 (pgs. 86-87 of the Record of the High Court (RHC)) and the sentence dated 14 October 2013 (Pgs. 44-49 RHC).

[3] The accused appellant (appellant) was charged (pg. 137 RHC) in the High Court under section 69 (2) (a) and (3) (a) of the Proceeds of Crimes Act of 1997 for the offence of Money Laundering involving the sum of $349,870.63. After trial the appellant was convicted by the learned Judge agreeing with the unanimous opinion of the three assessors. He was sentenced to 12 years imprisonment with a non-parole period of 10 years. An appeal was filed on 8 November 2013 (pgs. 39 to 42) pursuant to Section 21 of the Court of Appeal Act and Rule 35 of the Court of Appeal Rules. On 15 January 2015 a Justice of Appeal refused leave against the conviction and the sentence (pgs. 34 to 38).

[4] The Court of Appeal Act gives a Justice of Appeal power to grant leave. In this case leave had been refused. In the event of such refusal, the appellant may have the application determined by the Full Court under Section 35 (3) of the Court of Appeal Act. The section is as follows;-

> 35 (1) *A Judge of the Court may exercise the following powers of the Court-*
> (a) ***to give leave to appeal to Court****;* (b to f and sub sections 2, 4 & 5 not reproduced).
>
> *(3)* ***If the judge refuses an application on the part of the appellant to exercise a power under sub section (1) in the appellant's favour, the appellant may have the application determined by the Court as duly constituted for the hearing and determining of appeals under this Act.***

[5] The appellant on 27 January 2015 (pgs. 31 to 32 RHC) filed a notice of appeal to have his appeal determined by the Full Court of the Court of Appeal. This could be construed as having filed an application pursuant to section 35 (3) of the Court of Appeal Act. The appellant states that on 20 June 2018 the Court of Appeal (Hon. President) granted leave

to the appellant to file amended grounds and an amended notice and grounds of appeal were filed on 3 July 2018 (pgs. 1-4 of the RHC).

[6] In the 1st Petition of Appeal dated 8 November 2013, the appellant had filed 11 (eleven) grounds. The first eight grounds were based on the summing-up and the other three on the sentence. The grounds of appeal filed originally are as follows:

Grounds of Appeal (filed on 8 November 2013):

5.1 ***THAT*** *the learned trial judge erred in law by not adequately addressing the law on accomplice evidence and the danger of conviction based solely on evidence of accomplice(s) which failure rendered demonstrably perverse or unsafe or unsatisfactory the opinion of the assessors and the judgment of the Court.*

5.2 ***THAT*** *the learned trial judge failed to adequately address to the Assessors the issues concerning immunity witnesses and the weight of evidence that they should afford or give to such witnesses which failure was detrimental to the fairness of the trial and the weight upon which the evidence ought to have been received by the Assessors and the Court which rendered the judgment unsafe and or unsatisfactory.*

5.3 ***THAT*** ***t****he learned trial judge gave undue weight and regard to circumstantial evidence of the witnesses capable of giving circumstantial evidence which weight and regard was not balanced in the summing up address as forming part of the work required from the Appellant to perform as part of his day to day activity and such undue preference drew irresistible inference of guilt from the Assessors which inference was unsafe and unsatisfactory.*

5.4 ***THAT*** *the learned trial judge misdirected and did not give adequate directions to the assessors on the elements required for the prosecution to prove each transaction relied upon by the prosecution had to be considered independently of the others and that each of them had to be proven beyond reasonable doubt.*

5.5 ***THAT*** *the learned judge failed to bring to the Assessors attention the details of the Appellant's caution interview which explains his position and such failure caused a miscarry and rendered the opinion of the assessors and the judgment of the court to be unsafe, unsatisfactory and or fatal to the overall justice of the case.*

5.6 ***THAT*** *in all the circumstances of the case, there has been a miscarriage of justice by reason of the failure of the trial judge to properly address the issue of immunity and accomplice evidence, particularly that of Abdul Jamal Aziz also known as Jimmy and such inadequacy in the Court's approach, summing up and direction caused justice to miscarry and such judgment of the court is unsafe in all the circumstances of the case.*

5.7 ***THAT*** *the learned trial judge erred in law and fact by declining to accept the evidence that in majority of the transactions, the accomplice Abdul Jamal Aziz was the recipient of the monies (and no such evidence was given other than that given by such witness that the Appellant was involved in any way other than the performance of his work as an assessor with the Fiji Island Revenue and Customs) and such evidence which absolved the Appellant was not considered in the summing up which renders the judgment fatal.*

5.8 ***THAT*** *the learned trial judge's summing up did not adequately address the evidence in its totality in favour of the Appellant and such inadequacy of the trial judge's summing up was prejudicial to the Appellant in the Court's judgment.*

5.9 ***THAT*** *the learned trial and sentencing judge erred in law and fact by finding that the Appellant's level of criminal responsibility was made more culpable by the absence of any trace in the monies allegedly laundered.*

5.10 ***THAT*** *the learned trial and sentencing judge failed to properly sentence the Appellant giving due regard to existing laws and precedents which departure caused a sentence which is harsh and excessive in all circumstances of the case.*

5.11 ***THAT*** *in all the circumstances, the sentence imposed upon the Appellant was manifestly excessive.*

[7] The learned Justice of Appeal having considered the grounds by the Ruling dated 15 January 2015 declared that the grounds are not arguable.

The Amended Grounds

[8] 5.1 *That the charge that the Appellant faced was procedurally incorrect and in breach of sections 59; 61 (7); and 70 (2) of Criminal Procedure Act 2009; and this led to a serious miscarriage of justice. That the Respondent had rolled up the various transactions into one count.*

5.2 That the charge that the Appellant faced was procedurally incorrect and in breach of section 62 of the Criminal Procedure Act 2009; and this led to a serious miscarriage of justice. That the Respondent included alternatives in the charge rather than as separate counts.

*5.3 That the learned Trial Judge erred in law when in his summing-up he misdirected on the law concerning the offence of "Money Laundering" as per the dicta in **Johnny Albert Stephen v State** [Court of Appeal Criminal appeal No AAU 53 of 2012; 27 may 2016].*

*5.4 That the sentence imposed by the Learned Sentencing Judge was manifestly excessive in comparison to the sentence imposed in **State v Monika Arora** [High Court Case No; HAC 125 of 2007S Justice Temo; 17th February 2012].*

5.5 That the sentence and the non-parole period imposed by the Learned Sentencing Judge was manifestly excessive in that it did not allow for conditions to be established to promote or facilitate the Appellant's rehabilitation.

Submission of the learned counsel for the appellant and analysis

[9] The learned counsel in his submissions attempted to make a distinction between the facts in **Nasila v The State** AAU0004 of 2011:6 June 2019 [2019] FJCA 84 . Referring to the amended grounds the learned counsel submitted that not all the grounds are new. But it is clear that all grounds against conviction are new grounds of appeal but the new ground 5.4 and the reference to sentence in ground 5.5 is somewhat similar to original grounds 5.10 and 5.11. The issue on non-parole period being excessive in ground 5.5 is a new ground of appeal. The learned counsel also mentioned the judgments in **Tuwai v The State** [2016] FJCA 35; CAV 13.2015 (26 August 2016) and **Rokete v The State** [2019] FJCA 49; AAU 59.2014 (7 March 2019).

[10] Considering the principle that any new ground has to meet the threshold of enlargement of time the learned counsel submitted that in this case no leave would be required for the reason that the new grounds involve question of law alone. The fact that a ground of appeal involves a question of law does not permit an appellant to disregard the mandatory provisions in section 26(1) of the Court of Appeal Act with regard to the time for

appealing (*i.e.* 30 days of the date of conviction). It has to be noted that the original grounds have been considered as grounds involving facts and law. If the new grounds involve only questions of law, they have to be necessarily different to the grounds submitted in the original notice. If the grounds contain new grounds, should the appellant fall within the yardstick of **Nasila v State** (supra)?

[11] To circumvent this obstacle the learned counsel submitted that on 20 June 2018 the Court of Appeal granted the appellant 14 days to file his amended notice and grounds of appeal for his renewed application for leave to appeal against the conviction and sentence (paragraph 20 (pg. 4) of the written submissions dated 4 July 2019). Once the learned counsel took up the argument that they involved questions of law, the appellant did not need to obtain leave (Section 21 (1) (a) of the Court of Appeal Act and Rule 37 (1) (b) of the Court of Appeal Rules, (**Simeli Bili Naisua v The State** [2013] FJSC 14 CAVCAV 10 of 2013 (20 November 2013). However, as pointed out already it is not a reason to act in breach of section 26(1) of the Court of Appeal Act. In any event the order of the single Judge on 20 June 2018 had been made in view of the fact that the appellant's renewed application had been misplaced at the Registry and the single Judge had not permitted the appellant to file fresh grounds of appeal at all.

[12] The learned counsel for the appellant also submitted that the counsel for the respondent did not object to the appellant being granted leave to file his amended grounds. Rule 37 of the Court of Appeal Rules makes provision for an appellant to amend his notice of appeal with or without leave but Rule 37 of the Court of Appeal Act on the *'Amendment of notice of appeal'* would not come to the rescue of an appellant when totally new grounds are sought to be urged before the full court (vide **Rokodreu v State** AAU0139 of 2014: 29 November 2018 [2018] FJCA 209). The yardsticks have been laid down now by ***Tuwai*** and ***Rokete*** restricting the scope of filing new grounds. These judgments frown upon appellants who until they achieve their object cling on to any ground irrespective of their merits and failing one set of grounds try another.

[13] Admittedly the five grounds raised against conviction in this appeal are fresh grounds filed more than five years after the conviction. The Court of Appeal in **Nasila v The State** (supra) laid down a rule to follow when fresh grounds are filed for the first time after conviction. The Court of Appeal held that the new grounds "*should be considered subject to the guidelines applicable for enlargement of time to file an application for leave to appeal*". The Court of Appeal in Nasila sought guidance of two Supreme Court decisions, namely, **Rasaku v State** [2013] FJSC 4 CAV 9,13 of 2009 (24 April 2013) and **Kumar v State; Sinu v State** [2012] FJSC 17 CAV 1 of 2009 (21 August 2012). In **Kumar** the Supreme Court examined the following five factors before considering the application for enlargement.

The five factors are as follows:-

1. The reason for the failure to file within time.
2. The length of the delay.
3. Whether there is a ground of merit justifying the appellate court's consideration.
4. Where there has been a substantial delay, nonetheless is there a ground of appeal that will probably succeed?
5. If time is enlarged, will the respondent be unfairly prejudiced?

[14] I shall now consider each of the aspects relating to enlargement of time.

The reason for the failure to file within time

[15] The learned counsel strenuously drew the attention of court to a heading titled; "The appellant's reason for the delay in applying for renewed leave to appeal" appearing at page 4 of the further submissions of the appellant dated 5 April 2019. In those submissions the learned counsel states an explanation given by the appellant in an affidavit dated 4 July 2017 stating that;

> 7 a. *Mr. Vosarogo did not tell him what happened to his application for leave to appeal;*
> *b.* *He was advised that the application was struck out for non-appearance;*

c. He is not completely sure what transpired;
d. It had been difficult for his wife to get any sort of information from Mr. Vosarogo's previous office; and
e. He was in no position to get any information in the matter.

[16] The learned counsel submitted that the appellant had been incarcerated since 14 October 2013 and had difficulty in communicating with his previous counsel Mr. Vosarogo. I need not reiterate here the views expressed by the Supreme Court in ***Tuwai*** in this type of situation where complaints are made against counsel who are not before court to answer. As the Supreme Court and the Court of Appeal expressed in ***Tuwai*** and ***Rokete***, these are assertions made in desperation even at the cost of a counsel.

[17] The learned counsel for the appellant submitted that the reason for the delay in filing these new grounds was due to an error made by the Court of Appeal Registry on 19 February 2016 considering the renewed application filed on 27 January 2015 had been abandoned. Although the appellant complains that he could not give instructions to his lawyers, how come an appeal was filed against the conviction and the sentence on 8 November 2013 and a renewed application filed on 27 January 2015. The renewed application was to have this case heard before the Full Court of the Court of Appeal after the refusal of leave on 15 January 2015. The appellant is legitimately before court due to the renewed application filed on 27 January 2015. During all these time periods the appellant laments that he was incarcerated. The appellant also states in the same affidavit in paragraph 8 that, *"I have now chosen to only seek an appeal against the sentence imposed by the Court against me".* I am of the view that the above explanations do not justify the appellant filing totally new grounds and grounds involving the conviction and the sentence.

The length of the delay.

[18] The delay from October 2013 to July 2018 is over 4 ½ years which very substantial and cannot be condoned.

Whether there is a ground of merit justifying the appellate court's consideration? Where there has been a substantial delay, nonetheless is there a ground of appeal that will probably succeed?

[19] The learned counsel made oral submissions only with regard to grounds 5.1, 5.2 and 5.4. The learned counsel submitted that as in **Monika Arora v The State** [2017] FJSC 24; CAV 33.2016 (6 October 2017) the appellant was faced with a rolled up charge. The amended information was contained in pages 137 -139 of the RHC. The charge is as follows:-

> *Robyn Surya Subha Shyam between the 01st day of March 2008 and the 30th day of September 2010 at Suva in the Central division engaged directly or indirectly in transactions involving the sum of $349,870.63 held in bank accounts specified in Schedule A, that is the proceeds of crime, knowing or ought reasonably to have known, that the said sum of money had been derived or realized, directly, from some form of unlawful activity.*

[20] The schedule gives details of the names of the account holder, the names of the bank, the account numbers and the amounts withdrawn. There were in all 19 account holders and 19 bank accounts in three banks. Of the 19 account holders, 9 were called to give evidence. Those account holders were originally charged with the appellant. Subsequently they were all pardoned and called as state witnesses. Their unchallenged evidence is that on receipt of money into their accounts, the amounts shown in the schedule were withdrawn and given to the appellant. Some of those accounts were opened at the instance of the appellant. The appellant was a senior tax officer of the Fiji Inland Revenue Department (FIRD). Several tax refund documents were found in the home of the appellant. The names appearing on these returns were found to be not genuine. The banks' accounts were credited with the refunds deposited by the FIRD. The fact of the accountholders (accomplices) withdrawing the monies in large sums and

giving to the appellant was unchallenged. The total amount was what was contained in the charge. The appellant neither gave evidence nor called any witnesses.

[21] I am of the view that the facts of this case are different to that of Monika Arora's case. In Arora's case there was no schedule filed. The charge in Arora's case was that, "She (Arora) and others laundered money by depositing $472,466.47, being proceeds of crime, for her and others benefit Etc. Calanchini J in Monika Arora (supra) acquitting the appellant on the charge against money laundering stated that under section 70 (2) of the Criminal Procedure Act 2009 the use of a *"rolled up*" charge is permitted. However it was held that, "*section 69 of the Proceeds of Crime Act 1997 does not fall within the description of an "offence involving theft, fraud, corruption or abuse of office". To come within section 70 (2) of the Criminal Procedure Act the many separate acts of alleged offending that it is sought to have "rolled up" into one specimen or representative count must all have as their essential element either theft, fraud, corruption or abuse of office. Since the Criminal Procedure Act came into effect in 2010 it can reasonably be assumed that the offence of money laundering under section 69 of the Proceeds of Crime Act 1997 had been intentionally excluded…and the prosecution should not have proceeded by way of one count alleging some 36 incidents of money laundering*".

[22] The appellant was charged alone under this charge. Unlike in Arora's it is not that several persons unknown were charged. According to the evidence all the monies were credited into several accounts either by the appellant or he was instrumental in so doing. The money referred to in the charge, namely, $349,870.63 was paid to the appellant by the account holders. Nine of those account holders gave evidence. Therefore the charge cannot be classified as a "*rolled up*" charge.

[23] The 2nd new ground is relating to duplicity. This is connected to the 1st ground. The learned counsel submitted that the charge is under section 69 (2) (a) and (3) of the Proceeds of Crime Act of 1997. The appellant is charged for engaging in transactions while the section refers to a "transaction". "*The word "transaction" means an act or a series of acts involving business negotiations";* (**Curtain v Churchill Merchandising**

(1990) 5 DCC 341 quoted in the Dictionary of Law by L.B. Curzon Sixth Edition). As per section 214 of the Criminal Procedure Act 2009, any objection to information should have been made immediately after the information was read and not later. The objection in this case was raised for the first time with the new grounds of appeal, nearly 5 years after the appellant was sentenced. Even if there was a defect in the charge I am of the view that it has not caused any prejudice to the appellant.

[24] The offence in this case was committed prior to 2010. The appellant was charged on 9 August 2012. The trial began in August 2013 and the appellant was convicted on 11 October 2013. Thereafter the appellant filed an appeal and submitted 11 grounds of appeal. If there was any prejudice caused to the appellant he could have objected to the charge at the trial which he did not do. The appellant did not raise this as a ground when he appealed against the conviction. This ground was taken for the first time on 3 July 2018. I am of the view that this has not caused any prejudice and also caused no miscarriage of justice.

[25] The learned counsel did not make oral submissions on grounds 5:3 and 5:5. However, to be absolutely fair by the appellant, I have perused and considered the material available in the copy record carefully and have formed the view that there is no merit in ground 5.3 in as much as there is no serious misdirection on the definition of money laundering in the summing up and no miscarriage of justice and certainly no substantial miscarriage of justice has occurred in that respect.

[26] I have considered the appellant's complaint in ground 5.5 regarding the non-parole period being excessive. In my opinion, the 10 year non-parole period in the sentence of 12 years is not excessive and given the facts and aggravating circumstances present the non-parole period is justified under section 4 of the Sentencing and Penalties Act and there is no sentencing error in that decision of the trial Judge.

If time is enlarged, will the respondent be unfairly prejudiced

[27] This court has already considered the factors 1 to 4 relating to enlargement of time. In view of the negative answers that have been given on the first four factors the 5th factor will not arise. The prejudice however would be the delay in the disposal of a criminal case and possible non-availability of witnesses and documents.

[28] Therefore, I hold that extension of time on all grounds against conviction should be refused and consequently leave to appeal too should be refused.

Renewed ground of appeal against sentence

[29] I shall now consider the only renewed ground of appeal which is 5.4 against sentence. The learned counsel made submissions on ground 5:4. On the basis that the sentence imposed was manifestly excessive. Grounds 5.10 and 5.11 of the previous ground (filed on 8 November 2013) are somewhat similar to the ground No. 5.4. Leave was refused on ground 5.10 and 5.11 too. Under this ground the learned counsel submitted that whilst in Arora's case the accused (Arora) got five years in mitigation the appellant in this case got only one year in mitigation. The learned counsel for the respondent submitted that in this case unlike in Arora's the property involved belonged to the State. Further that the money lost was never recovered.

[30] However the conviction and the sentence imposed on the charge on money laundering was quashed by the Supreme Court in Arora (supra). It was held in **Nabainivalu v The State** [2015] FJSC 22 CAV 27.2014 (22 October 2015) that an appealable error cannot arise by comparing sentences imposed in other cases. Comparative decisions are only relevant in identifying the range of sentence for a particular offence, but each case must be decided on its own facts.

[31] Therefore this ground has no merit and is rejected.

[32] I am of the view that the appellant has failed to pass the test with regard to the threshold issue and therefore extension of time and leave to appeal have to be refused against all the new grounds against conviction and sentence. In spite of the said obstacle this court has considered the grounds canvassed in court at the hearing by the learned counsel for the appellant under '*merit'* consideration.

[33] The only renewed ground against sentence fails as there is no demonstrable sentencing error in terms of the that the trial judge made one of the following errors;

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

(Vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14 following **House v The King** [1936] HCA 40; (1936) 55 CLR 499 as adopted in **Bae v State** AAU0015u of 98s: 26 February 1999 [1999] FJCA 21).

[34] Therefore, I refuse extension of time on all grounds of appeal against conviction (5.1 to 5.3) and 'non-parole' ground against sentence (5.5). I also reject the renewed appeal against sentence (5.4).

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Prematilaka JA

[35] I have read in draft the judgment of Basnayake, JA and agree with proposed orders.

Orders of Court

1. *Extension of time in respect of the appeal against conviction is refused.*

2. *Appeal against sentence is dismissed.*

3. *Conviction and sentence are affirmed.*

Hon. Justice S Chandra
JUSTICE OF APPEAL

Hon. Justice E Basnayake
JUSTICE OF APPEAL

Hon. Justice C Prematilaka
JUSTICE OF APPEAL