IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 47 of 2021
[In the High Court at Suva Case No. HAA 30 of 2019]
[In the Magistrates Court at Suva case No.239/16]

BETWEEN : **HANNAN WANG**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Mr. D. Sharma for the Appellant**
: **Dr. A. Jack for the Respondent**

Date of Hearing : **15 September 2021**

Date of Ruling : **17 September 2021**

RULING

[1] The appellant with two others had been arraigned in the Magistrates' Court at Suva on two counts (first and second charges) of **MONEY LAUNDERING** contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act 1997 as amended by Proceeds of Crime (Amendment Act) Act 7 of 2005 and Proceeds of Crimes (Amendment) Decree 61 of 2012. The charges were as follows:

'***FIRST COUNT***

Statement of Offence (a)

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

Particulars of Offence (b)

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

SECOND COUNT

Statement of Offence (a)

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

Particulars of Offence (b)

HANNAN WANG AND GUANGWU WANG *between the 17th day of June 2015 to 19th day of June 2015 at Suva, in the Central Division, engaged directly or indirectly in transactions involving ANZ Bank Account No. 12346956 to the total sum of $11, 334.16 that are the proceeds of crime, knowing or ought reasonably to know that the money is derived directly or indirectly from some form of unlawful activity.*

THIRD COUNT

Statement of Offence (a)

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

Particulars of Offence (b)

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

[2] The appellant had been acquitted of both charges after trial by the learned Magistrate on 22 February 2019.

[3] The respondent had appealed to the High Court at Suva against the acquittal. Both parties had filed written submissions and a hearing into the appeal had been conducted. The learned High Court judge had pronounced the judgment on 19 February 2021 setting aside the acquittal, convicting the appellant of the first count (acquittal on the second count remained undisturbed) and sending the case back to the Magistrates court for sentencing. On 09 April 2021, the learned Magistrate had sentenced the appellant to 05 years and 10 months of imprisonment with a non-parole period of 04 years.

[4] The appellants' solicitors had filed a notice and grounds of appeal against the High Court judgment on 21 April 2021 in terms of section 22 of the Court of Appeal Act. As far as the HC judgment is concerned the appeal is out of time by two days but the appellant has made no application for enlargement of time to appeal. The notice of appeal states that the appellant was seeking to have the HC judgment of 19 February 2021 and the sentence imposed on 09 April 2021 set aside and to have the judgment of the learned Magistrate dated 22 February 2019 reinstated. However, no grounds of appeal had been urged against the sentence.

[5] In any event, there is no direct appeal against the sentence imposed by the Magistrate to the Court of Appeal in terms of section 22 of the Court of Appeal Act. Any appeal against sentence therefore should have been filed in the High Court as of right within time or out of time after enlargement of time being obtained.

[6] It has been treated as settled law that the right of appeal against a decision of the Magistrates court lies directly with the Court of Appeal pursuant to section 21 of the Court of Appeal Act only if the Magistrates court had acted under extended jurisdiction under section 4 (2) of the Criminal Procedure Act [vide **Kirikiti v State** [2014] FJCA 223; AAU00055.2011 (7 April 2014), **Kumar v State** [2018] FJCA 148; AAU165.2017 (4 October 2018)]. However, there is a contrary view that even when the Magistrates court acts under extended jurisdiction an appeal should lie to the High Court in the face of the constitutional provisions (see **Tuisamoa v State** [2020] FJCA 155; AAU0076.2017 (28 August 2020).

[7] Subsequently, the appellant's solicitors had filed an application for bail pending appeal on 07 July 2021 supported by an affidavit by the appellant. The written submissions of the appellant had been tendered on 14 September 2021. The state's written submissions had been filed on 26 July 2021. The single Judge hearing into the appeal and the bail pending appeal application in the Court of Appeal was concluded *via* Skype with the participation of counsel for both parties.

[8] The right of appeal against a decision made by the High Court in its appellate jurisdiction is given in section 22 of the Court of Appeal Act. In a second tier appeal under section 22 of the Court of Appeal Act, a conviction could be canvassed on a ground of appeal involving a question of law only [see also paragraph [11] of **Tabeusi v State** [2017] FJCA 138; AAU0108.2013 (30 November 2017)] and a sentence could be canvassed only if it was unlawful or passed in consequence of an error of law or if the High Court had passed a custodial sentence in substitution for a non-custodial sentence [vide section 22(1)(A) of the Court of Appeal Act].

Jurisdiction of a single Judge under section 35 of the Court of Appeal Act

[9] There is no jurisdiction given to a single judge of the Court of Appeal under section 35 (1) of the Court of Appeal Act to consider such an appeal made under section 22 for leave to appeal, as leave is not required under section 22 but a single judge could still exercise jurisdiction under section 35(2) [*vide* **Kumar v State** [2012] FJCA 65; AAU27.2010 (12 October 2012] and if the single judge of this Court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal the judge may dismiss the appeal under section 35(2) of the Court of Appeal Act (vide **Rokini v State** [2016] FJCA 144; AAU107.2014 (28 October 2016)].

[10] Therefore, upon filing an appeal under section 22 of the Court of Appeal Act a single judge of the Court of Appeal is still required to consider whether there is in fact a question of law that should go before the full court. Designation of a point of appeal as a question of law by the appellant or his pleader would not necessarily make it a question of law [see **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014). What is important is not the label but the substance of the appeal point. This

exercise should be undertaken by the single judge not for the purpose of considering leave under section 35(1) but as a filtering mechanism to make sure that only true and real questions of law would reach the full court. If an appeal point taken up by the appellant in pith and substance or in essence is not a question of law then the single judge could act under section 35(2) and dismiss the appeal altogether [vide **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014), **Bachu v State** [2020] FJCA 210; AAU0013.2018 (29 October 2020)], **Munendra v State** [2020] FJCA 234; AAU0023.2018 (27 November 2020) and **Dean v State** AAU 140 of 2019 (08 January 2021), **Verma v State** [2021] FJCA 17; AAU166.2016 (14 January 2021) and **Narayan v State** [2021] FJCA 143; AAU39.2021 (10 September 2021)].

[11] It is therefore counsel's duty properly to identify a discrete question (or questions) of law in promoting a section 22(1) appeal (vide **Raikoso v State** [2005] FJCA 19; AAU0055.2004S (15 July 2005). The following general observations of the Supreme Court in **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013) are helpful to identify a question of law in a given situation.

> *'[14] A summary of these cases show that questions that have been accepted as a point of law alone include causational issue in homicide cases, jurisdiction to try an offence, existence of a particular defence, mens rea for a particular offence, construction of a statute and defective charge. The list, however, is not exhaustive. In* ***Hinds*** *(1962) 46 Cr App R 327 the English Court of Appeal did not define the phrase 'a question of law alone', but suggested that the determination of whether a ground of appeal involves a question of law alone be made on a case by case basis.'*

[12] In **Morgan v Lal** [2018] FJCA 181; ABU132.2017 (23 October 2018) Calanchini P said on an instance of a 'question of law':

> *'[9] The immediate issue that is properly before the Court of Appeal at the leave stage is whether any of the grounds of appeal raise an error of law alone. To that end the issue is whether the learned judge has applied the correct test for determining whether Morgan should be granted leave to appeal the Master's interlocutory Ruling. This is not the same as the question whether the learned Judge has applied the test for granting leave correctly. The first question does not involve the exercise of a discretion and is a question of law only. The second question does raise the issue whether there has been an error in the exercise of the*

discretion whether to order security for costs and my opinion involves mixed law and fact.'

[13] In **Ledua v State** [2018] FJCA 96; AAU0071.2015 (25 June 2018) once again Calanchini P had identified what can be regarded as a question of law in relation to a decision on an application for enlargement of time in the High Court.

> *'[5] ……Put another way, the issue is whether the learned High Court Judge has applied the correct test for determining the application for an enlargement of time rather than whether he has applied the test correctly. In my opinion the first question involves question of law only and the second involves a question of mixed law and fact.'*

[14] In another instance in **Turaga v State** [2016] FJCA 87; AAU002.2014 (15 July 2016) where the High Court dismissed the appellant's application for an enlargement of time to appeal against sentence without giving the appellant an opportunity to be heard and without reasons for the dismissal, Goundar J. held the following grounds of appeal to be questions of law alone.

1. *The Learned Appellate Judge erred in law when he dismissed the Applicant's application without hearing the Applicant contrary to Section 256(1) (a) of the Criminal Procedure Decree.*

2. *The Learned Appellate Judge erred in law when he failed to give a written ruling stating the reasons for the dismissal of the Applicant's application seeking leave to appeal out of time contrary to Section 27 of the High Court Act Cap.13 (formerly Supreme Court Act Cap.13).*

Grounds of appeal

[15] The eight grounds of appeal urged on behalf of the appellant are as follows:

> ***Grounds of Appeal***
>
> ***Ground 1***
>
> *THAT the Learned Judge erred in law in holding that the Learned Magistrate had not properly evaluated the evidence adduced at the trial when the Learned Magistrate had in fact applied all the correct legal principles relating to the charge, considered the State's case, considered the evidence of all State witnesses, considered the evidence of all Defence witnesses and having*

analyzed the key facts came to the conclusion that the Appellant was not guilty of the offence.

Ground 2

THAT the Learned Judge erred in law in substituting his own views and inferences about the matters contained in paragraph 47 of the judgment to make the finding that these factors constituted corroborative evidence of the Appellant's guilt when none of these factors had any corroborative value at all about the core legal issue i.e. whether the Appellant knew, or ought reasonably to have known, that the money held in ANZ bank account number 12339449 on account of Chunxiao Tour Company was derived or realized, directly or indirectly, from some form of unlawful activity. The matters set out in paragraph 47 are speculations made by the Learned Judge.

Ground 3

THAT the Learned Judge erred in law in substituting his own views and inferences about the evidence of Aradhana Singh and Tikoduadua as being credible, reliable and truthfully and without any proper lawful basis or analysis disregarded the evidence of Annie Gu [paragraph 6 of the Judgment] and ruled that Annie Gu's evidence was not credible.

Ground 4

THAT the Learned Judge erred in law by substituting his own findings and inferences at paragraph 40 of the judgment by holding without any lawful basis that the evidence and materials at the trial provided a basis to suggest that Annie Gu was either a participant or involved in this crime either unintentionally or ignorantly and hence the Court must proceed with caution in evaluating her evidence when the Prosecution never suggested or led evidence to suggest that Annie Gu was either a participant or involved in the crimes either unintentionally or ignorantly.

Ground 5

THAT the Learned Judge erred in law by substituting his own views and inferences about the Appellant paying rent on one occasion for Chunxiao Tour Company as well as the usage of the Appellant's mobile phone by Mr Ling on a few occasions to come to the conclusion that such evidence could be used to infer that the Appellant knew or reasonably ought to have known about the matters and transactions of Chunxiao Tour Company and flowing on from that making the further inference that the Appellant knew or ought reasonably to have known that the moneys in Chunxiao Tour Company's bank account had been derived or realized from the credit card skimming or any unlawful activities involving the EFTPOS machines [page 47 and 48 of the Judgment]. There was nothing unreasonable about the findings and inferences made by the Learned Magistrate on the same evidence that warranted the Learned Judge to set aside the decision made by the Learned Magistrate.

Ground 6

THAT the Learned Judge erred in law in saying that the Learned Magistrate's comments about the expatriate Chinese community at paragraph 114 of her Judgment did not fall within the category of evidence that could be taken into account by way of judicial notice when in fact the Learned Magistrate was entitled to rely on her own local knowledge as long as it was properly and within reasonable limits. It is a widely known fact in Fiji that minority communities do network and work closely together to assist each other especially where there is a language barrier when it comes to down to engaging in business or other activities in English.

Ground 7

THAT the Learned Judge erred in law in substituting his own views and inferences about the credibility of witnesses and the evidence adduced in the Magistrates Court when there was nothing unreasonable or manifestly erroneous about the analysis and conclusions made by the Learned Magistrate on whether the Appellant knew or ought reasonably to have known that the funds for the two cheques totaling $10,000.00 given by Mr Zu Haiming a.k.a Mr Ling to Yiwu International to purchase goods from Yiwu International had been derived from some form of unlawful activity.

Ground 8

THAT the Learned Judge erred in law in paragraph 55 of the Judgment where he held that the Prosecution had proved beyond a reasonable doubt that the Respondent and the Second Accused knew or ought reasonably to have known that the money that they had withdrawn had been derived directly or indirectly from some form of unlawful activities when the only fact that had been established by the Prosecution was that the Appellant had cashed two cash cheques at ANZ Bank totaling $10,000.00 given by Mr Zu Haiming a.k.a Mr Ling to Yiwu International to purchase goods from Yiwu International. Inferences can only be drawn from established facts and not be drawn from opinions.

[16] Upon a perusal of the learned Magistrate's judgment it appears that she had embarked on a detailed consideration of the evidence for both sides and had come to her finding of not guilty and acquitted the appellant. On appeal the learned High Court judge too had engaged himself in an equally elaborate discussion of the evidence and decided to find the appellant guilty only of the first count. It is not the function of this court at this stage to carry out a similar exercise; nor is it required, permissible or possible to undertake such a task without the full transcript of the proceedings in the Magistrates court (and perhaps the High Court).

[17] The only thing that requires the attention of the court at this stage is to see whether in fact there a question of law only that should go before the full court. The consideration of the bail pending appeal application is only incidental thereto, for if there is no question of law the appeal will be dismissed under section 35(2) of the Court of Appeal Act. However, even if the appeal passes that threshold and is allowed to proceed to the full court it does not mean that the appellant *ipso facto* is entitled to bail pending appeal, for merely because there is a question of law for consideration by the full court that would not necessarily guarantee the appellant a decision in his favour in the end.

[18] Perhaps, realising that all the grounds of appeal raised by the appellant are either questions of fact alone or of mixed fact and law the appellant's counsel submitted that the question of law he raises is that the High Court judge had not applied the correct principles in determining the appeal. However, other than submissions there is no such ground of appeal raised in the notice of appeal. The grounds of appeal set out are all questions of fact alone or of mixed fact and law. None of them come under section 22 of the Court of Appeal Act.

[19] He cited **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012) where the Supreme Court had stated:

> *'80. ……..The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case.'*

[20] It has been held that as far as the Court of Appeal is concerned the test to be applied is not whether the conviction is unsafe and dangerous which is the law in the UK but not in Fiji. Section 23 (1) of the Court of Appeal Act provides that the court shall allow the appeal if the court thinks that (1) the verdict should be set aside on the ground that it is unreasonable or (2) it cannot be supported having regard to the evidence or (3) the judgment of the court should be set aside on the ground of a wrong decision of any question of law or (4) on any ground there was a miscarriage of justice. In any

other case the appeal must be dismissed. The proviso to section 23(1) enables the court to dismiss the appeal notwithstanding that a point raised in the appeal might be decided in favour of the appellant if the court considers that no substantial miscarriage of justice has occurred [see paragraphs [54] in **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)].

[21] It appears from section 251 of the Criminal Procedure Act that the decision being unreasonable and cannot be supported having regard to the evidence are two grounds upon which an appeal lies to the High Court but the appealable grounds are not limited to those two grounds. Section 256 shows that the High Court also has powers similar to the proviso to section 23(1) of the Court of Appeal Act.

[22] Therefore, 'the verdict is unsafe and dangerous' referred to in ***Ram*** does not appear to be the test applicable in Fiji given its unique statutory framework different from the UK. The 'verdict is unsafe and dangerous' is the statutory test applicable in the UK. In any event the observations of the Supreme Court at paragraph 80 in ***Ram*** had been made in a different context namely regarding trial by the judge with assessors in the High Court and not where a judge sits alone on an appeal. ***Ram*** has not laid down any specific test or principles for the High Court to follow in dealing with an appeal from the Magistrates court. What could be gathered as a general position of law from ***Ram*** is that the appellate court should evaluate and make an independent assessment of the evidence in carrying out the appellate function and be satisfied that the ultimate decision is supported by legal evidence and the guilt has been established to the requisite standard of proof namely beyond reasonable doubt.

[23] Following **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493) the Court of Appeal attempted to formulate the correct approach to an appeal based on 'unreasonable and cannot be supported having regard to the evidence' in **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021) and **Degei v State** [2021] FJCA 113; AAU157.2015 (3 June 2021). Similarly guided and assisted by **Aziz v State** [2015] FJCA 91; AAU112.2011 (13

July 2015) and **Baini v R** (2012) 246 CLR 469; [2012] HCA 59) the Court of Appeal also made a similar attempt to come up with the correct approach in the case of a ground of appeal based on 'miscarriage of justice' in **Degei v State** [2021] FJCA 113; AAU157.2015 (3 June 2021).

[24] Therefore, I conclude that there is no question of law alone among the grounds raised by the appellant; nor in the written or oral submissions made at the hearing.

[25] The respondent had appealed to the High Court against the acquittal only on two grounds of appeal as given below:

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

[26] The learned High Court judge had not held with the respondent on the first ground of appeal (see paragraphs 7-11 of the judgment). Regarding the second ground of appeal the High Court judge had admitted that the Magistrate correctly identified the physical and fault elements of the offence of money laundering but she found that the prosecution had failed to establish the fault element (vide paragraph 107 of the MC judgment). At paragraph 30 of the judgment the High Court judge had said that the main dispute that the learned Magistrate had to determine was whether the appellant and the two accused knew or ought reasonably to have known that the money, they had cashed from the four cheques, had been derived from directly or indirectly from unlawful activity *i.e.* the fault element of the offence of money laundering. The High Court had evaluated, analysed and independently assessed the evidence in relation to that issue from paragraphs 31– 46 of the judgment and listed the items of evidence the Magistrate had failed to take into account at paragraph 47 the judgment and concluded as follows:

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

55. In addition to that, the Prosecution had successfully proven beyond reasonable doubt that the Respondent and the Second Accused knew or ought reasonably to have known that the money they had withdrawn had been derived, directly or indirectly, from some form of unlawful activities, thus proving beyond reasonable doubt that the Respondent and the Second Accused are guilty of the first count of money laundering.'

[27] Finally, the High Court had concluded:

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

[28] The appellant has not demonstrated that the trial judge had applied the wrong legal principles relating to the fault element of money laundering and no such ground of appeal had been raised either. Even if correct legal principles had been applied wrongly it is not a question of law alone. It is a question of mixed law and fact. The appellant had ample opportunity of meeting both grounds of appeal urged before the High Court through his counsel. The matters raised by the appellant under the grounds of appeal in the Court of Appeal should and could have been canvassed in the High Court as matters of fact or of mixed fact and law. The fact that the appellant has come up with some grounds to criticise the High Court judgment does not make them questions of law.

[29] The appellant cannot seek a rehearing of the appeal before the High Court in the Court of Appeal. The narrow jurisdiction under section 22 of the Court of Appeal Act is for the Court of Appeal to rectify any error of law or clarify any ambiguity in law and not to deal with any errors of fact or of mixed fact and law which is the function of the High Court. That is the intention of the legislature and the court must give effect to that legislative intention.

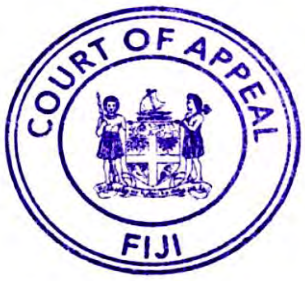
[30] Therefore, I conclude that no question of law alone has been urged by the appellant and therefore, the appeal should be dismissed in terms of section 35(2) of the Court of Appeal Act.

[31] Therefore, in view of the dismissal of the appeal it is superfluous to consider the application for bail pending appeal, for when there is no pending appeal there is no question of bail pending appeal. Accordingly, application for bail pending appeal too is formally refused.

Orders

1. Appeal (bearing No. AAU 47 of 2021) is dismissed in terms of section 35(2) of the Court of Appeal Act.

2. Bail pending appeal is refused.



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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL