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

CRIMINAL APPEAL NO.AAU 162 of 2019
[High Court of Suva Criminal Case No. HAC 061 of 2017S]

BETWEEN	**:**	**STATE**
		Appellant
AND	**:**	**AIDONG ZHANG**
		Respondent
Coram	**:**	**Prematilaka, JA**
Counsel	**:**	**Mr. A. Singh for the Appellant**
	:	**Mr. S. Deo for the Respondent**
Date of Hearing	**:**	**08 February 2021**
Date of Ruling	**:**	**09 February 2021**

RULING

[1] The respondent had been charged in the High Court of Suva on one count of obtaining property by deception contrary to section 317(1) of the Crimes Act, 2009 and one count of money laundering contrary to section 69(2) (a) and (3)(a) of the Proceeds of Crime Act, 1997. The charges were as follows.

'First Count

Statement of Offence

OBTAINING PROPERTY BY DECEPTION: Contrary to section 317 (1) of the Crimes Act of 2009.

Particulars of Offence

AIDONG ZHANG between the 1st day of June 2014 and the 30th day of September 2014 at Suva, in the Central Division, by deception that a property at 148 Waimanu Road was being purchased for $5,500,000.00, dishonestly

obtained $1,240,740.74 belonging to Yong Chen with the intention of permanently depriving the said Yong Chen of the $1,240,740.74.

*"**Second Count***

Statement of Offence

MONEY LAUNDERING: Contrary to section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act 1997.

Particulars of Offence

AIDONG ZHANG between the 3rd day of September 2014 and the 5th day of January 2016 at Suva, in the Central Division, engaged directly or indirectly in transactions involving ANZ Bank Account 11779946 to the total sum of $1,240,740.74 that are the proceeds of crime knowing or ought reasonably to have known that the money was derived directly or indirectly from some form of unlawful activity".

[2] After the summing-up, on 15 August 2019 the assessors had expressed a unanimous opinion of guilty against the respondent on both counts. The learned High Court judge in the judgment delivered on 16 August 2019 had agreed with the assessors and convicted the respondent of both counts. He was sentenced on 31 October 2019 to 03 years of imprisonment each on the two counts (to run concurrently) suspended for 18 months and imposed a fine of $100,000.00 on the second count with a default term of 06 months of imprisonment. The complete sentence read as follows.

'16. The summary of your sentence are as follows:

(i). Count No.1 : Obtaining Property by Deception - 3 years imprisonment

(ii). Count No.2 : Money Laundering - 3 years imprisonment

The above sentences are made concurrent to each other, making a final total sentence of 3 years imprisonment, and suspended for 18 months, effective from today. Meaning of suspended sentence explained to the accused.

(iii). In addition to the above , on count no.2, the accused is also fined $100,000, to be paid in 4 weeks, in default, you are to serve 6 months imprisonment.

(iv). Pursuant to Section 49(1) (a) of the Sentencing and Penalties Act 2009, the following restitution orders are made:

(a) The accused's directorship of Bairain Group (Fiji)Limited(BGL) is terminated forthwith, and the necessary administrative actions to be done to effect the above;

(b) Likewise, the accused's 10% shares in BGL is terminated forthwith, and the same transferred to the Complainant forthwith, and the necessary administrative actions to be done to effect the above;

(c) The one million Fijian dollars the accused paid into Court on 27 September, 2019 is to be paid to the complainant as soon as possible, as part restitution of the $1,240,740.74 he stole from the complainant pursuant to count no.1 and 2.

[3] The state had filed a timely notice of appeal on 28 November 2019 against sentence. The state had tendered its written submissions on leave to appeal on 20 November 2020 and the respondent's submissions had been filed on 16 October 2020.

[4] The grounds of appeal are as follows.

Sentence

1. That the Learned Trial Judge imposed a sentence which was manifestly lenient and disproportionate in all circumstances of the case in that

(i) He erred in principle by accepting the restitution as genuine and allowing excessive discount for it when the restitution was only made after the Respondent was convicted;

(ii) He erred in principle by allowing excessive discount to the mitigating factors for the offences of money laundering;

(iii) He erred in principle when he allowed the whole sentence to be suspended.

[5] The learned High Court judge has summarized the facts of the case as follows in his judgment.

2. The brief facts of the case were as follows: The complainant (PW1) was a businessman from China. At the date of the trial, he was 65 years old. He was married with a daughter. The accused (DW1), who was also from China, was a businessman also, and had made Fiji his home after settling here since 1991.

At the date of the trial, he was 56 years old. He was married with two daughters, who are university students in Australia. As businessmen, it was somewhat not unusual for the two to engage themselves in activities that will earn them a reasonable amount of profit.

3. The two were introduced to each other in May 2012. Mr. Shi Yuhu (SY), a close friend of PW1 since 2002, brought the two together. PW1 was made to understand that DW1 was a good businessman and had the ability to make a $10 million profit in a year, thus was an excellent business partner. PW1 and DW1 thus became business partners. As partners, they agreed to the purchase of a property in Fiji, that is, 148 Waimanu Road. It was agreed between the two that DW1 would do all that was necessary in Fiji to ensure the purchase of the above property. Between August and December 2014, DW1 did everything that was necessary to purchase the above property. By 4 December 2014, Bairain Group (Fiji) Limited (BGL), a company owned by PW1's family, owned 148 Waimanu Road property. DW1 had a 10% share control of BGL.

4. In 2015, PW1 came to know that DW1 deceived him. DW1 misrepresented to PW1 that the purchase price of the property was 5.5 million Fijian dollars when in fact it was 3.3 million Fijian dollars. He also misrepresented to PW1 that the deposit for the purchase of the property was 1.5 million Fijian dollars, when in fact it was $330,000 Fijian dollars. As a result of the above misrepresentations, PW1 sent DW1 $1,240,740.74 as his share of the purported deposit. DW1 did not pay the same as the deposit, but used it on himself. PW1 sent the above money to ANZ Bank Account 11779946, which DW1 controlled. PW1 reported DW1 to the police in January 2016. The police investigated the matter. On 16 February 2017, the accused was charged with the two counts mentioned in paragraph 1 hereof. After an 18 days trial in the Suva High Court, he was found guilty and convicted on the two counts.

[6] In terms of section 21(1) (c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[7] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November

2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows.

> *(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.*

01st (i) ground of appeal

[8] The trial judge had taken the sentencing tariff for 'Obtaining property by deception' as 02 to 05 years and for money laundering as between 05 to 12 years. Having already set out the aggravating and mitigating factors the judge had started with a sentence of 06 years for count 02 on money laundering being the more serious of the two offences. Thereafter, 06 years had been added for aggravating features and after giving a discount of 09 years for mitigating factors the trial judge had arrived at the final sentence of 03 years. As for count 01, the trial judge had picked 04 years as the starting point, added 04 years for aggravating features and deducted 05 years for mitigating factors leaving the final sentence at 03 years.

[9] The state complains that by accepting restitution as genuine and allowing excessive discount for it when the restitution was only made after the respondent was convicted the trial judge had committed a sentencing error resulting in a manifestly lenient and disproportionate sentence in all circumstances of the case.

[10] The state counsel submitted that the respondent paid a sum of $1,000,000.00 restitution only after he was convicted after a fully contested trial and could not be treated as a demonstration of true and genuine remorse as admitted by the trial judge at paragraph

8(ii) of the sentencing order. The state counsel who had appeared at the trial as the lead counsel for the prosecution also submitted that in fact the suggestion or the offer as to whether the Respondent was ready to pay $1million as restitution after the conviction and before he was sentenced came from court as a surprise to the prosecution and not a gesture volunteered by the Respondent even at that late stage. When pointed out by this court that the sentencing order does not indicate that it was the case he submitted that the transcript of trial proceedings or the audio recording would prove his submission. The trial judge had fortified his conclusion that it was a true expression of remorse based on DE No.06 (summary of expenses by the respondent) admitted by the complainant (PW1) which the state counsel submitted had no direct relationship to the sums involved in the two charges. It appears that DE06 is dated 08 August 2019 which means that it was a document sent to PW1 by the appellant while the trial was in progress.

[11] There is nothing to indicate that the Respondent had shown his willingness to pay part or full amount he had obtained by deception from PW1 at any stage before he was convicted after full trial. He had ample opportunity to return the money to PW1 earlier had he been genuinely remorseful but instead chosen to contest the matter to the very end. He was eventually facing the inevitable after the conviction and appears to have merely grabbed the opportunity offered by court for restitution or decided on his own to pay back a part of the proceeds of crime clearly as an attempt to escape a harsher sentence by way of incarceration.

[12] The Supreme Court held in **Khera v State** [2016] FJSC 2; CAV0003.2016 (1 April 2016) on the effect of genuine restitution as follows

> *[7] On the sentencing ground for which leave had been granted the question of restitution was raised. Restitution if made genuinely in a spirit of remorse can reduce the harshness otherwise due in final sentences……*
>
> *'[22] On the issue of the details of the monies paid to FRCA, I have to rely on the judgment below. The full record including of the High Court trial proceedings will be available for the hearing before the Supreme Court. The petitioner for this hearing has not chosen to submit details of what was before the High Court judge. Restitution could prove an important issue in Sentence.*

> *[23] However the making of restitution is regarded as an expression of sorrow for what has admittedly been done, and as a demonstration of regret and remorse. The conviction in this case has been fought all along. The petitioner's case is that it was not him, but another, who carried out the false pretenses on the Revenue and laundered the money. On that defence, remorse or regret does not arise. You cannot defend your innocence all the way to the Supreme Court, and simultaneously say you regret what you did and argue that repayment of the monies found to have been dishonestly obtained or utilized, was an act of remorse. In such circumstances whether there was an obligation to pay the monies as administrative penalties or they were paid voluntarily by the petitioner is of much lesser significance.*

[13] The state has also cited **State v Deo** [2005] FJHC 64; HAA0008J.2005S (23 March 2005) where Shameem J had said on the effect of restitution as follows.

> *'It is now settled that the tariff for fraud and breach of financial trust cases ranges from 18 months to 3 years imprisonment. Where the accused has expressed remorse and has manifested such remorse in an early earnest attempt to compensate the victim for the losses caused by the theft, a suspended sentence can be imposed. In **Mahendra Prasad**, not only did the accused sell his assets to pay his employers back, his employers forgave him and tried to persuade the DPP to drop the charges. When this did not succeed, representatives of his employers came to court to give evidence on the accused's behalf. In **Raymond Roberts** the accused had made attempts to restore the money stolen to his employers, even before the theft was discovered. In **State v. Sanjay Shankar Sharma**, I imposed a suspended sentence on a 19 year old University student, who had confessed to the offences as soon as he was apprehended by the police, who told the police immediately that he wanted to restore the stolen money to his employers and who never spent a penny of that money before he was apprehended. Clearly in those circumstances suspended sentences were not wrong in principle, because the offender had not effected restitution merely to buy himself out of a suspended sentence. The issue is not just restitution. The issue is true and sincere remorse, an early guilty plea and confession, and restitution to the victim as evidence of such remorse and apology.*

[14] Therefore, mere restitution would not necessarily signify or demonstrate remorse but would be treated as evidence of such remorse by court provided it is done at the earliest opportunity available coupled with the overall conduct of the accused manifesting such intention from the earliest time possible.

[15] The previous decisions cited above show that the accused had been treated lightly when restitution had been preceded or accompanied by manifestation of true remorse at the earliest opportunity. Otherwise, the prospective offenders would be tempted to wait

until they get caught and convicted by a court of law and then offer to effect restitution knowing that they could buy themselves out of incarceration.

[16] Therefore, I am of the view that the trial judge had committed a sentencing error having a reasonable prospect of success in appeal in treating the respondent's restitution as a true expression of remorse and giving him an excessive discount of 09 years for mitigating factors in respect of count 02 with restitution appearing to have been the most important mitigating feature highlighted by the judge. In addition, the trial judge appears to have allowed DE6 not directly relevant to the charges to guide him in coming to the above conclusion.

01st (ii) ground of appeal

[17] The state complains that the trial judge had accorded excessive discount to the mitigating factors for the offence of money laundering. The mitigating factors had attracted only 05 years in respect of count 01 whereas for count 2 the trial judge had given a discount of 09 years for the same mitigating features where the starting point had been taken as 06 years and another 06 years had been added for aggravating factors. In contrast, having taken 04 years as the starting point in respect of count 01 the trial judge had added only 04 years for the same aggravating factors.

[18] The whole sentencing exercise sounds somewhat artificial and mechanical and it seems that the trial judge had already decided to keep the ultimate sentence on both counts at 03 years of imprisonment possibly because that would enable him to suspend the sentence. That may be the reason why there is such a significant difference of the discount for the same mitigating factors (also for aggravating factors) for count 01 and 02.

[19] The ultimate sentence of 03 years is less than the lower end of the tariff identified by the trial judge but he had not given any reasons why it had to be outside the sentencing range. **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013) it was held that as a matter of good practice, the starting point should be picked from the lower

or middle range of the tariff and after adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.

[20] The Supreme Court questioned the appropriateness in identifying the exact amount by which the sentence is increased for each of the aggravating factors stating that it is too mechanistic an approach in **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) and said that sentencing is an art, not a science, and doing it in that way the judge risks losing sight of the wood for the trees.

[21] Thus, it appears that there is merit in the concern expressed by the state on excessive discount given to mitigating factors for money laundering charge which led to the ultimate sentence of 03 years which seems somewhat premeditated. This may have constituted a sentencing error which appears to have a reasonable prospect of success in appeal.

[22] In **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) the Supreme Court stated

> *'13…… **It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered**. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence.'.*

[23] Similar sentiments had been expressed earlier in **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015) where the Court of Appeal stated:

> *[45] In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, **that the sentence imposed lies within the permissible range**. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls*

> *within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust*.'

[24] However, when the final sentence is reviewed by the Court of Appeal one of the essential matters that would be considered is the range of sentences for money laundering. In **Naidu v State** [2020] FJCA 80; AAU0099.2018 (16 June 2020), I looked at this aspect in somewhat detail as the trial judge had remarked that the tariff for money laundering was not well settled in Fiji and it was difficult to lay down guidelines for sentencing in money laundering cases but the trial judge in the end had concluded that the tariff for money laundering should range from 05 years to 12 years of imprisonment. Having examined all the decisions cited by the trial judge, I found that not all judges in the High Court have applied the above range of sentences and the sentences imposed on accused in money laundering cases have varied considerably across a wide range depending on the individual cases. Therefore, I felt that it would be better for the state to seek a guideline judgment from the Court of Appeal on the appropriate tariff in money laundering cases to ensure that there is some degree of uniformity as remarked in ***Koroivuki.*** [See paragraph 33 of **Nadavulevu v State** [2020] FJCA 14; AAU119.20215, 115.2015, 129.2015 (27 February 2020) for similar comments]

> '*[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.'*

[25] The same sentiments were expressed in **Raj v State** [2020] FJCA 122; AAU0096.2018 (5 August 2020) and **Sorby v State** [2020] FJCA 123; AAU0102.2018 (7 August 2020) as well.

[26] This is yet another reason why leave to appeal should be allowed against sentence.

01st (iii) ground of appeal

[27] The appellant complains that the trial judge should not have suspended the whole sentence. Gounder J said in **Balaggan v State** [2012] FJHC 1032; HAA031.2011 (24 April 2012):

> *[20] Neither under the common law, nor under the Sentencing and Penalties Decree, there is an automatic entitlement to a suspended sentence. Whether an offender's sentence should be suspended will depend on a number of factors. These factors no doubt will overlap with some of the factors that mitigate the offence. For instance, a young and a first time offender may receive a suspended sentence for the purpose of rehabilitation. But, if a young and a first time offender commits a serious offence, the need for special and general deterrence may override the personal need for rehabilitation. The final test for an appropriate sentence is – whether the punishment fits the crime committed by the offender?*

[28] The state argues that the only reason why the sentence could be suspended was because the trial judge had decided it to be 03 years and in that process had committed sentencing errors highlighted under the first and second ground of appeal.

[29] The trial judge had stated at paragraph 15 of the sentencing order that on account of the respondent's restitution and his having agreed to transfer 10% of his share in the company to the complainant the sentence of 03 years should be suspended in order to encourage all the accused who are alleged to have committed 'money laundering' and 'obtaining property by deception' to make restitution to the aggrieved party.

[30] I have already discussed the matter of so called 'voluntary' restitution by the respondent earlier. The state counsel also submitted that even the agreement by the respondent to transfer 10% of his share in the business to the complainant did not come voluntarily but in response to a suggestion by court. However, the trial judge had indicated otherwise regarding both at paragraph 15. Only the trial proceedings in the form of the audio recording or the transcript thereof would reveal exactly what transpired after the respondent was convicted until he was sentenced.

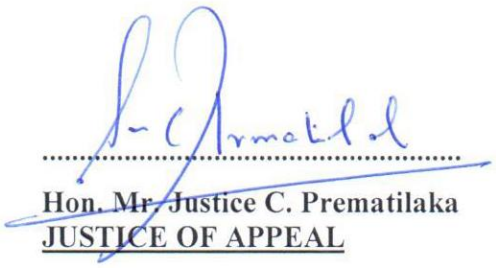
[31] In any event, I have reservations regarding the reasoning of the trial judge in the decision to suspend the sentence as to whether accused, who show 'remorse' only after conviction should be encouraged to make restitution as an expression of such 'remorse in return for lenient or suspended sentences in lieu of an appropriate custodial sentence. In my view, on the contrary this approach will be an incentive to the offenders not to

show true and sincere remorse at the earliest opportunity by way of an early guilty plea, confession and restitution at the earliest to the victim as evidence of such remorse, because they would know that they could achieve the same result even after taxing the system of justice to the very end till conviction.

[32] The pronouncements in **Khera v State** (supra) and **State v Deo** (supra) are sufficient to grant leave to appeal on the possible sentencing error of making the respondent's sentence suspended. Going by the trial judge's reasoning too, it appears that there is a sentencing error in the suspended sentence imposed on the respondent.

Order

1. Leave to appeal against sentence is allowed.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL