

IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO: CAV 0008 of 2019
[Court of Appeal No: AAU 169 of 2016]

BETWEEN: JOHNNY ALBERT STEPHEN

Petitioner

AND: THE STATE

Respondent

Coram: Hon. Justice Suresh Chandra
Judge of the Supreme Court
Hon. Madam Justice Chandra Ekanayake
Judge of the Supreme Court
Hon. Justice Frank Stock
Judge of the Supreme Court

Counsel: Petitioner in person
Mr Y Prasad for the Respondent

Date of Hearing: 18 October, 2019

Date of Judgment: 31 October, 2019

J U D G M E N T

Chandra, J

[1] The Petitioner was convicted of two counts of money laundering contrary to Section 69(3) (b) of the Proceeds of Crime Act. The particulars of the offences, as set out in the information, were as follows:

- (i) That the Petitioner had received money in an amount of \$17,420.90 between 06 August 2009 and 24 September 2009 in Suva and disposed of the same, that is the proceeds of crime, knowingly it to be proceeds of crime; or he ought to have reasonably known that such money was derived or indirectly from some form of unlawful activity; and
- (ii) That the Petitioner had received money in an amount of \$21,440.50 on 25 September 2009 in Suva knowingly it to be proceeds of crime; or ought to have reasonably known that such money was derived directly or indirectly from some form of unlawful activity.

[2] After trial, the learned High Court Judge concurred with the unanimous opinion of the assessors, convicted the Petitioner and on 8 December 2016 sentenced him to three years imprisonment with a non parole period of 2 years imprisonment.

[3] The Petitioner appealed against his conviction and sentence to the Court of Appeal and by Judgment delivered on 7 March 2019 his appeal was dismissed in respect of his conviction regarding count 1 and his appeal against conviction was allowed in respect of count 2.

[4] The Petitioner filed a notice of appeal against the judgment of Court of Appeal setting out the following grounds:

Ground 1 (i) (ii) (iii)

1. That the learned Judge erred in law and in fact when he unfairly summed up as follows:

- (i) Failed to define the element of ought reasonably to know.*

- (ii) *Unfairly drew the minds of the Assessors to question and answer 72 only in the process prejudicing my defence.*
- (iii) *Unfairly stated at paragraph 37, line 2 -3 of the Summing Up that I described how I used my account for fraudulent activities from questions and answers 73 to 79 and 88 to 103 when my answer to 73 only said someone sent money into my account neither do any of my answers I mentioned the word fraudulent [Amended Ground].*
- (iv) *Incorrectly stated and mislead the assessors that my defence counsel and conceded to the fact that the complaint's monies were those found in my account.*

Ground No. 2 (i) (ii) (iii)

The Learned Trial Judge erred in fact when:

- (i) *When he only considered Epeli Racule's evidence without confirmation from the complainant Brue Moonie or Coconut Rentals Limited.*
- (ii) *When the in-house report was not tendered to confirm the paper trail of money from the complainant's account to my account.*
- (iii) *When the assessors were not invited to consider the inconsistency in the evidence of Epeli Racule and Tomasi Tukana in terms of the in-house report.*

Ground No. 3

That David being identified as a sender of the funds and it would be proper to consider him as a first party and this raises the question as to why I have been charged for the offence when there were no evidence to prove that I know the funds were proceeds of the crime and came from some form of unlawful activity.

Grounds No. 4 (i) (ii) (iii)

That Ms. Lynne Carlos being identified as the receiver of the fraudulent email link and in her own will submitted the genuine password and pin. It would be proper to consider her as a first party also and this raises the question as to why I have been charged for the offence when there were no evidence to prove.

- (i) *That I knew she received a fraudulent email like a same of Westpac bank email.*
- (ii) *That I was with her and told her to enter her password and pin into that fraudulent email which link into a fraudulent website.*

- (iii) *That the email send to Ms. Lynne Carlos came from me Mr. Johnny Albert Stephens or I created the email.*

Ground No. 5

That the learned Trial Judge erred in law and in fact when he unfairly summed up the Assessor in paragraph 17, line 6 – 7 stated and tell them, 'The accused was to take 20 % of the same and use it on himself and send the 80% balance to a Sherill Strampher in America, when no such statement has been made by the accused to prove that 80% balance to be sent to Sherill Stampher. Therefore there was a substantial miscarriage of justice miscarriage in a Court of law in denial of the accused rights to a fair trial. [Amended Ground]

Ground No. 6

That the Appellant strongly submits the charge and the particulars of Count No. 1 are lacking in details and wanting in accurate precision and that when the Prosecution failed to state Ms. Lynne Carlos Bruce Moonie and the Westpac Bank as the crime scene and complaints in order to corroborate the Prosecution evidence. Therefore there was a fundamental flaw in the charge details and as such denial of the accused rights to a fair-trial before a Court of Law. [Amended Ground]

Factual Background

- [5] The case for the prosecution as set out in the judgment of the Court of Appeal was that customers of the Westpac Bank had been tricked by way fraudulent email to access a bogus website resembling the genuine bank website and made the customer to disclose confidential information such as the customer identification and password of the account holders. This trickery had resulted in access to the accounts of three customers on the bank's online banking platform. The monies were later found to have been transferred into the account of the Appellant at Westpac Bank.

The money that got credited to the account of the Petitioner within a period of seven weeks between 6 August 2009 and 25September 2009 had the following particulars:

- (i) An amount of \$12,420.90 from the account belonging to Sun Vacations (Fiji)) Limited in two instances at\$6210.45 each on 6 August 2009 and;

- (ii) An amount of \$5000.00 from the account of Mr. Bruce Moonie in five instances at \$ 1000.00 each on 18, 21, 22 and 23 September 2009.

The receipt of the amounts in the account of the Petitioner, as set out above, formed the basis of the particulars in Count No.1.

- (iii) An amount of \$21,440.56 from the account of Coconut Rentals, a Company registered in Cook Islands, on 25 September 2009.

The receipt of the above amount in the account of the Appellant formed the basis of the particulars in Count No. (2).

- [6] The position of the Petitioner as revealed in his caution interview statement was that he was from Vanuatu, was unemployed and resident in Fiji. He had opened a bank account with Westpac Bank with \$10.00. He had come to know an individual whom he knew as David Turner ("DT") through email contact. DT had contacted him by email and phone and suggested a "business/investment arrangement". The petitioner never met DT and thought he came from England, or perhaps Nigeria. The petitioner acceded to his suggestion of business and agreed to have his bank account made available to DT for these purposes. DT was to remit US\$15,000,000 to the accused which the petitioner was to invest for DT. These funds were locked in the Bank of America in the USA and could only be unfrozen and remitted to the petitioner on the payment of taxes to the bank. The money to pay these taxes would be credited to the petitioner's account by DT and they were then to be sent on to a named lady in Washington, U.S.A. who DT said worked for the Bank of America and she would use the money to settle the outstanding taxes.
- [7] The Petitioner and DT had entered into a written agreement that US\$15 million were to be credited into the account of the accused; the petitioner was to keep 20% of that for his own use and the balance to be remitted as instructed by DT. The petitioner never knew DT, nor did he know the lady in the USA to whom he was sending the money.
- [8] The Petitioner received two amounts of \$6,210 into his account in August 2009 which he sent on to the lady as instructed. In September he received F\$5,000 which he sent on,

Most of the remittances were made through the Western Union remittance service. In September 2009 his account was credited with \$21,440 by telegraphic transfer from the Cook Islands; however, he was unable to remit these funds to Washington because he was arrested on the same day.

- [9] Officers from the Westpac Bank gave evidence that these amounts (\$6,210 x 2), \$5,000 and \$21,440 were fraudulently taken from the accounts of genuine Westpac clients who had been tricked into divulging their passwords and P.I.N numbers on line. Their accounts were subsequently accessed on line and the amounts transferred to the petitioner's bank account.
- [10] At the trial, the prosecution led the evidence of Mr. Epeli Racule, Chief Investigating Officer at Westpac Bank, Mr. Tomasi Tukana, Detective Sergeant of Anti-Money Laundering Unit of the Fiji Police and Ms. Carlos, Managing Directress of Sun Vacations (Fiji) Limited, from whose company account \$6210.45 had been debited twice which were the exact amounts that had got credited in the Petitioner's Account which he had been remitted by the Petitioner on instructions received from DT.
- [11] In the course of the trial through the evidence of Mr. Racule and Ms. Carlos, it was revealed that a fake website had appeared in customer's accounts which requested an update of the account number and the password of the customers and Ms. Carlos had responded to same and given her account number and password in complying with such request believing that the request was genuine. It was also revealed that a total amount of \$5000 in five instances had been debited from the account of Mr. Bruce Moonie and credited to the account of the Petitioner. The Bank statement of the Petitioner which had been produced as PE 7 revealed such entries.
- [12] The Petitioner remained silent and did not call any other witnesses on his behalf to give evidence.

Consideration of the grounds of appeal

Ground 1(i)

- [13] The Petitioner urged the same ground before the Court of Appeal as well. The Court of Appeal has dealt with this ground in great detail citing the paragraphs in the summing up of the learned trial Judge (paragraphs 9 -13) where Section 69(3) (b) of the Proceeds of Crime Act and the relevant evidence was explained to the Assessors and also considered the submissions made on behalf of the Petitioner and the Respondent in arriving at the conclusion that the learned trial Judge had directed himself and summed up the case to the Assessors in accordance with section 69(3) (b) of the Proceeds of Crime Act, 2007. The Petitioner has not made any submissions regarding the manner in which the Court of Appeal has deal with this ground.
- [14] The matters under consideration in the present petition is after the Court of Appeal had ordered a re-trial on the Petitioner being convicted and sentenced by the High Court on the same charges in 2012. Justice Prematilaka was a member of the Panel of Judge in the Court of Appeal which had ordered a re-trial in the earlier appeal. The Petitioner has submitted that Justice Prematilaka who had agreed with the other two Judges in the earlier appeal which allowed the appeal on both counts and ordered a re-trial, was a member of the present panel of the Court of Appeal and had agreed with the judgment of the Justice Nawana in allowing the appeal only on the 2nd count. Presumably on that basis the Petitioner has submitted that there is merit in this ground of appeal.
- [15] The second occasion where the Court of Appeal had to deal with his appeal was after the re-trial and therefore the same considerations that applied in the earlier appeal do not apply regarding the present appeal. There is no merit in this ground of appeal.

Ground No.1 (ii)

- [16] The Petitioner has submitted that the learned trial Judge had unfairly drawn the minds of the assessors and misdirected them about his caution interview by stating that he had confessed to the crime alleged against him.
- [17] The Petitioner had been subjected to a long line of questioning when he was caution interviewed, in fact 441 questions had been asked which were answered by the Petitioner. The learned Trial Judge in his summing up drew the attention of the Assessors at paragraphs 31 and 32 as follows:

“31. In question and answer 72, the following were recorded;

Q.72: What can you say in regards to the allegation levelled against you?

A.72: Yes, it is true.”

32. The above questions and answers, when taken in its totality and within the context in which it was taken, amount to a confession by the accused to the crimes alleged against him. ”

- [18] The Court of Appeal in dealing with this ground of appeal found that there was no merit in this ground on the basis of considering that there was a confession by the Petitioner.
- [19] The answer to question 72 given by the Petitioner has to be viewed in the light of the entirety of the caution interview statement which had been admitted as a voluntary statement given by the Petitioner. The statement as stated ran into 441 questions and answers and having considered the nature of the questions that had been put to the Petitioner, as to whether his statement amount to a confession is questionable even though the answer to question 72 seems to be an acceptance of the charges against him.
- [20] The following questions and answers give the impression that the Petitioner was not admitting the charges as opposed to what he had said answering question 72:

- Q.246: Did you have a feeling that the money you were using was obtained illegally?*
A.246: No I don't know all that I know the money came from David Turner. I sent what he told me to send to the lady (Sherrill) the rest I used it.
- Q.254: Did you at the time you were using those money have any knowledge that they were obtained illegally?*
A.254: I have no idea that the money was obtained illegally. All I know that David was sending me the money.
- Q. 302: Do you really believe that David was telling you the truth?*
A.392: Yeah.
- Q.304: Isn't it the fact that you were using some money from the money you said was sent by David that made you believe in him more than anything else?*
A.304: No, I believe him because we have signed an agreement and that I know he was telling the truth.
- Q. 330: Didn't you at this point in time started to have some doubts in you about David?*
A.330: Never, because what he says he does, and he gets angry on me when I don't obey him.
- Q.338: Just have a look at the entry dated 22/09, which says \$1000 came into your account; can you explain where this money came from?*
A.339: I don't know where it came from but David called me and say to check my account as a friend was sending some money.
- Q.437: What I have gathered after going through all the email correspondences you have been corresponding with those supposedly intended investors, I strongly believe that you know that what they were saying was false and that the money they were sending was obtained in a fraudulent manner but yet you concealed all those information because you were making money out of it, isn't it?*
A.437: No.
- Q.438: Is there anything else that you wish to say in regards to this allegation?*
A.438: Like to me I believe it is a genuine thing."

- [21] Although the learned trial Judge had stated in his summing up that considering the totality of the statement of the Petitioner that he had confessed to the charges against him, a consideration of the above questions that were put to the Petitioner after question 72 does not warrant the conclusion that he had confessed to the charges in his statement.
- [22] Therefore the direction of the learned trial Judge would amount to a misdirection and there is merit in this ground of appeal.

Ground No.1 (iii)

- [23] The Petitioner submits that the learned Trial Judge has misdirected the Assessors in his summing up at paragraph 37 by stating that the Petitioner had described how he used his account for fraudulent activities from questions and answers 73 to 79, 88 to 103. He submits that what he said was that someone had sent money into his account and that he had not mentioned the word "fraudulently".
- [24] In his caution interview statement question 73 was:

"Q.73: How was your account involved in this fraudulent activity?"

A.73: Someone sent money into my account."

- [25] The questions that followed from Question 73 to 79 and 88 to 103 and answers to them do not refer to the word fraudulent. They refer to the communications he has had with David Turner and others regarding monies that could be sent to him for investment.
- [26] In view of this position the fact that the learned Trial Judge had at paragraph 37 stated that the Petitioner had described how he used his account for fraudulent activities would amount to a misdirection and therefore there is merit in this ground.
- [27] The Court of Appeal dealing with this ground took a cautionary approach by stating that it would have been desirable for the learned Trial Judge to have avoided that kind of adjectival phraseology and left it open to consider whether the activities concerned were, in fact, fraudulent or not.

Ground 1(iv)

[28] The Petitioner submits that the learned trial Judge at paragraph 38 had stated that his Counsel had conceded to the fact that the complainants' monies were those found in his account.

[29] At paragraph 38 of the summing up, the learned trial Judge had stated:

38. In their closing submission, the defence admitted that Sun Vacation (Fiji) Ltd. Mr. Bruce Monnie's and Coconut Rental Ltd's funds went into the accused's Westpac Bank Account. However, in his police caution interview statement (Prosecution Exhibit 12(B), he said he never knew the funds were proceeds of crime (see questions and answers 246, 254, 437 and 438). As a result he denies the allegation against him."

[30] The said paragraph has to be looked into in its entirety. The second part in the paragraph sets out the position taken up by the Petitioner. In the first sentence what was stated by the learned Trial Judge was what had transpired in the evidence led by the prosecution to show that the complainants' monies had gone into the Petitioner's account as stated by Defence Counsel in his closing submissions. The second and third sentences have the effect of negating what had been said in the first sentence.

[31] The Court of Appeal also considered this ground and concluded that no prejudice was caused to the Petitioner. There is no merit in this ground of appeal.

Ground 2(i)

[32] The Petitioner submits that the learned trial Judge only considered Epeli Racule's evidence without confirmation from the complainant Bruce Moonie or Coconut Rentals Limited.

[33] Mr. Epeli Racule, the chief Investigating Officer of Westpac Bank gave evidence regarding the accounts of Bruce Moonie and Coconut Rentals limited and as to the debits

that had been made from those accounts. He also gave evidence regarding the Petitioner's account where it had been seen that the exact amounts of the debits on the exact dates had gone into the Petitioner's account.

- [34] The Court of Appeal had considered this ground in detail and held in favour of the Petitioner regarding the account of Coconut Rentals Limited as a result of which he was acquitted of the second count which related to the account of Coconut Rentals Ltd.
- [35] As regards Mr. Bruce Moonie, evidence was to the effect that he had passed away sometime before the trial. Mr. Epli Racule had referred to the Bank Account of Mr. Moonie which showed debits of \$1000.00 on five different occasions from 18th to 23rd September 2009 and on the exact dates that the debits had occurred the exact amounts had been credited to the account of the Petitioner. The nexus had therefore been established between the Petitioner's account and Mr. Moonies account. These monies had been disposed of by the Petitioner and he admitted disposing them.
- [36] The consideration by the Court of Appeal was correct and therefore this ground of appeal has no merit.

Grounds 2(ii) and (iii)

- [37] In ground 2(ii) the Petitioner submits that the learned trial Judge failed to consider that the in house report was not tendered to confirm the paper trail of money from the complainants' accounts to his account.
- [38] The Court of Appeal in considering this ground of appeal was of the view that the in-house report would have been only a compilation of evidence referring to the documents that were relevant to the investigation. Further, that the Officer who conducted the investigation had given evidence and produced the relevant documents that were necessary to prove the charges against the Petitioner.

- [39] Since the primary evidence necessary to establish the charges was before Court it was not necessary for the in-house report to be made available. This ground of appeal has no merit.
- [40] In ground 2(iii) the petitioner submits that there were inconsistencies in the evidence of Epli Racule and Tomasi Tukana regarding the in-house report.
- [41] In ground 2(ii) the necessity of the in-house report was dealt with and therefore this ground of appeal has no relevance. However, the inconsistencies referred to by the Petitioner were not material to establish the charges against the petitioner and therefore this ground too lacks merit.

Ground 3

- [42] The Petitioner submits that David Turner has been identified as the sender of the funds and that he should have been considered as the first party to be charged and not him as he did not know that the funds were proceeds of the crime and came from some form of unlawful activity.
- [43] It was the Petitioner who mentioned about David Turner and it was his creation, he had stated in his caution interview statement that he had never met him and got to know Turner only through emails and telephone calls. The Petitioner had mentioned throughout that he was to receive \$15,000,000.00 from David Turner for purposes of investment. However, the evidence at the trial was that some of the accounts of customers of Westpac Bank had been hacked into and the monies from those accounts had gone into the Petitioner's account from which he had sent out monies that were in his account, on his version that they were sent out on the instructions of David Turner.
- [44] The Court of Appeal did not consider this ground to have sufficient basis either factual or legal. In those circumstances, this ground of appeal would be baseless and not of any merit.

Ground 4

- [45] In this ground of Appeal the Petitioner submits that Ms. Lynne Carlos should be considered as a first party and raised the question as to why he had been charged for the offence.
- [46] Ms. Carlos gave evidence at the trial and had stated that she was in receipt of an email regarding her Company's Bank account requiring her to give the Account number and the password which she did believing that to be a request of the Bank, which ultimately turned out that the said email which resembled an email from Westpac Bank was a fake one. Presumably as a result of her giving such details, subsequently it was found that there were some unauthorized debits from her Company's Account regarding which she complained to the Bank which set about an investigation. It was in that investigation that it was revealed that the debits from her account had got in to the Petitioner's account which the Petitioner had subsequently disbursed.
- [47] As submitted by the Respondent on this ground, under s.69 (4) of the Proceeds of Crime Act, the State does not have to prove that the predicate offence was committed by the Petitioner. Therefore, there was no necessity to prove that the Petitioner had sent the fake email. However, the prosecution was able to prove through circumstantial evidence that the Petitioner ought to have reasonably known that the monies in his account were from some form of unlawful activity.

In those circumstances this ground of appeal has no merit.

Ground 5

- [48] This ground of appeal refers to paragraph 17 of the summing up where the learned Trial Judge had set out the facts pertaining to the prosecution case. The learned trial Judge was placing before the Assessors the prosecution case for them to consider.
- [49] This ground is baseless and has no merit.

Ground 6

- [50] This ground relates to the contents of the charge against him. This ground had not been canvassed at the trial stage nor was it placed before the Court of Appeal.
- [51] In **Balekivuva v The State** [2016] FJSC Criminal Petitioner No.CAV 14 of 2016 (26 August 2016), the Supreme Court expressed very strongly about the reluctance to entertain new grounds of appeal. This is a new ground of appeal and therefore cannot be entertained. In any event it would not satisfy the threshold required for special leave to appeal to the Supreme Court.

Ground 7

- [51] This is another new ground of appeal. It would attract the same consideration as in ground 6 and will not be considered as having any merit.

Conclusion

- [52] Out of the 7 grounds of appeal advanced by the Petitioner seeking leave to appeal from the Supreme Court, as discussed above Grounds 1(ii) and 1(iii) have merit. However, there has been overwhelming evidence in this case which was sufficient to convict the Petitioner of the 1st Charge leveled against him (the conviction on the 2nd charge being set aside by the Court of Appeal). Although there was a misdirection by the learned Trial Judge in relation to the caution interview statement of the Petitioner being treated as a confession, when considering the totality of the evidence in the case it cannot be considered as a substantial miscarriage of justice. The Petitioner, who was from Vanuatu, having come to Fiji and not being employed dealing in substantial sums from a person who he never met and sending monies to another country to another person he had never met and when there was obviously no good reason for the monies to be routed through a third country (Fiji). In the circumstances of this case, I would grant leave to appeal. However, in considering the appeal I hold that this case falls within the proviso to Section 23(1)(a) of the Court of Appeal Act. Hence, I uphold the conviction in respect of the first charge against the petitioner and dismiss the appeal.

Ekanayake, J

[53] I have read in draft the judgment of Chandra, J and I agree with his reasons, conclusions and orders proposed.

Stock, J

[54] I have read the draft judgment of Chandra J and I agree with it and with the orders he proposes.

Orders of Court:

- (1) The application for special leave to appeal is allowed.*
- (2) The appeal of the petitioner is dismissed.*
- (3) The judgment of the Court of Appeal is affirmed.*
- (4) The conviction of the Petitioner in respect of charge 1 by the High Court is affirmed.*



**Hon. Justice Suresh Chandra
Judge of the Supreme Court**



**Hon. Justice Chandra Ekanayake
Judge of the Supreme Court**



**Hon. Justice Frank Stock
Judge of the Supreme Court**