

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No: HAC 088 of 2010

BETWEEN : **STATE**
[Respondent]

AND : **JOHNNY ALBERT STEPHEN**
[Accused]

BEFORE : **Mr. Justice P. K. Madigan**

COUNSEL : **Ms J. Prasad with Mr. A. Singh for the State**
Ms N. Nawasaitoga (L.A.C.) for the accused

Dates of Hearing : **3, 4 April 2012**

Date of Summing Up : **11 April 2012**

SUMMING UP
[MONEY-LAUNDERING]

- [1] Madam and Gentlemen assessors; we have now come to the stage in the trial where it is my duty to sum up the evidence to you; and to direct you on the law. You will then be required to deliberate together and each of you must give a separate opinion whether the accused is guilty or not guilty of the charge.

- [2] Our functions have been and remain quite different throughout this trial. The law has been my area of responsibility and I must now give you directions as to the law which applies in this case. When I do so, you must accept those directions and follow them.
- [3] The facts of this case are your responsibility. You will wish to take into account the arguments in the speeches you have heard from Counsel but you are not bound to accept them. Equally, if in the course of my review of the evidence I appear to express any views concerning facts, or emphasise a particular aspect of the evidence, do not adopt those views unless you agree with them and if I do not mention something which you think is important you should have regard to it and give it such weight as you think fit. When it comes to the facts of this case it is your judgment alone that counts.
- [4] In arriving at your conclusions you must consider only the evidence you heard in this case. You must disregard anything you heard from friends, relatives or through any media outlet about this case. You must ignore any suggestions or advice made to you by anyone, no matter how well meaning it may be.
- [5] You must decide this case only on the evidence which has been placed before you that includes witnesses and exhibits which have been produced. There will be no more evidence. You are entitled to draw inferences; that is to come to common sense conclusions based on the evidence which you accept, but you must not speculate about what evidence there may have been or allow yourselves to be drawn into speculation.
- [7] In assessing the evidence, you are at liberty to accept the whole of a witness' evidence or accept part of it and reject the other part or reject the whole. In deciding on the credibility of any witness you should take into account not only what you heard but what you saw. You must take into

account the manner in which the witness gave evidence. Was he or she evasive? How did he or she stand up to cross examination? You are to ask yourselves was the witness honest and reliable?

- [8] As assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding upon any proposition put to you and in evaluating the evidence in this trial. You are to ask yourselves whether it accords with common sense or is it contrary to common sense and experience.
- [9] I ask you to please put aside any feelings of prejudice you may have against certain people and to put aside any sympathy you might feel for anyone connected with the trial. This court room has no place for sympathy or prejudices – you must arrive at your opinions calmly and dispassionately.

Onus and Burden of Proof

- [10] In this case, as in every case in Fiji, the prosecution must prove that the defendant is guilty. He does not have to prove his innocence. In a criminal trial the burden of proving the defendant's guilt is on the prosecution.
- [11] How does the prosecution succeed in proving the defendant's guilt? The answer is – by making you sure of it. That is the same as beyond reasonable doubt as Counsel have submitted to you. Nothing less will do. If after considering all the evidence you are sure that the defendant is guilty you must return a verdict of "Guilty". If you are not sure, your verdict must be one of "not guilty".

- [13] You must consider each count separately. Just because you think that the accused is guilty of one count does not necessarily mean he is guilty of both counts that he is charged with.
- [14] The accused faces two charges of money laundering. Money laundering is the handling of money obtained from illegal sources to disguise the illegality of the funds and make the money look as if it has come from legitimate sources. To prove the offence of money laundering the state has to prove to you, so that you are sure the following elements:
- (i) That it was this accused
 - (ii) That he received and/or disposed of the funds
 - (iii) The funds were the proceeds of crime and
 - (iv) That he knew, or ought reasonably to have known that the funds came from some form of unlawful activity.
- [15] I propose first to go briefly through the evidence with you and then come back to these elements to see how you can be assisted in coming to opinions on these particular elements.
- [16] We heard from bank officers of the Westpac Bank. They told us, and proved through documentary evidence that following complaints from their customers, they detected unauthorized withdrawals from the accounts of Bruce Moonie in the sum of \$5,000, from Sun Vacations in 2 sums of \$6,210.45 each, and a suspicious Telegraphic Transfer from the Cook Islands, from the account of Coconut Rentals in the sum of \$21,440. All of these unauthorized withdrawals were credited to the accused's Westpac account. The defrauded account holders had all been tricked into giving their account passwords and P.I.N numbers to a site holding itself out to be an official Westpac Bank site, but which was in fact bogus. You have seen the documents produced which show you the credits to the accused's accounts with narrations that were not provided by the defrauded account

holders. None of the account holders knew about those withdrawals. Following the disclosures of passwords and PINs their accounts were "hacked" on line and the sums transferred to the accused's account.

- [17] We heard evidence from the bank officers, of the accused accessing his account after these sums were credited mostly by ATM withdrawals but also by what the bank calls "paper withdrawals" for example the sum of \$7,159.76 on the 7th August.
- [18] The bank officers agreed with counsel for the defence that they had no idea who had hacked into the three victim accounts and who had transferred the money into the accused's account.
- [19] We then heard evidence of the use of Western Union whereby the accused remitted various sums of money out of Fiji and usually to a Sherryl Strampher in Washington State, USA. The accused used his wife and a neighbor both of them telling us that they had signed a Western Union remittance form at the accused's request. His wife (Ilisapeci Viwa) told us that the accused told her that his friend David Turner was sending him the money and that David instructed the accused to send it on to Sherryl Strampher. She did not know David, had never met him but thought he lived in England. Once David told him to use some of the money for himself, so he bought a mobile phone, some groceries and beer for his friends. She admitted in cross-examination that she thought that the money all came from David, and her husband as an experienced businessman had entered into a "business arrangement" with him.
- [20] The policeman, D.Sgt.Tomasi Tukana, gave evidence that he was the investigating officer of this suspected crime. He received the first report of fraud from the Westpac Bank and he collected the relevant documents from the Bank. He conducted searches at Western Union and discovered that the accused was using Western Union to send money overseas. He saw that in most of the Western Union documents the accused was the sender

of the money but in 2 or 3 instances others had been used to be the "sender".

[21] D.Sgt. Tukana was in addition the officer who conducted the formal police interview with the accused. It is called a "caution interview" because the accused is cautioned that whatever he says may be used in evidence against him. He is also told that he need not say anything. This interview was placed before you with the consent of defense counsel. It was long interview and you heard it read to you and you have a copy. The main points to be gleaned from the interview are these:

- (i) David Turner used to send money to his account.
- (ii) He got lots of phone calls from David in Nigeria and he first started communicating with him "about three months ago"
- (iii) He contacted him by email and they made an agreement whereby David ("DT") would put US\$15,000,000 into his account - it would be sent by the Bank of America from the US. It was for investment but the accused could keep 20%.
- (iv) Before the money could be released he would have to send money to Sherryl Strampher to pay taxes.
- (v) Sherryl Strampher worked in the Bank of America and would facilitate the transfer of the \$15m, after the payment of the taxes.
- (vi) DT would send him the money to send to Sherryl for the taxes and he did send it on through Western Union.
- (vii) All of the moneys, claimed by the Westpac Bank to be illegal transfers, were credited to his account by DT.

[22] After the D/Sgt had finished his evidence, the State closed their case. You heard me tell the accused his rights in defence and he elected to give sworn evidence. Now I must tell you that the accused did not have to give evidence for the very reason that it is for the State to prove to you, so that you are sure that he is guilty of the two counts he faces. The accused does

not have to prove anything to you but once he has elected to give evidence, it is therefore evidence you must take into account and give it the weight you think fit.

- [23] The accused, Johnny Albert Stephen, told us that he is a businessman, resident in Fiji but a native of Vanuatu married to a Fijian lady. He came to know David Turner through email and phone because David wanted to invest in Fiji. He says in his evidence that they had been in contact since March 2009.

David had made enquiries of him as to what sort of person he was, and he was even asked for a Police Clearance Certificate from Vanuatu. On the 25th September 2009 David "wired" him \$21,000 odd, telling him he should send the money to Sherryl Strampher, because she is a lady working for the Bank of America. (You will recall that this money came from Coconut Rentals). When David did learn more about Johnny, he sent an agreement to be signed. An agreement to invest \$15,000,000 US dollars. Johnny thought that this was a great opportunity so he signed the agreement and returned it to David. Then they stopped communicating, but in August 2009 there was more contact and David told Johnny that he was finalizing the deal. All of this was by email or in phone calls and Johnny says he sent money to Sherryl in Washington State and he even went once to the Reserve Bank to get approval for a remittance of \$6,159.00. He says that an officer at the Reserve Bank told him to put as a reason for the remittance; "family support (assistance)". He sent the money to Sherryl because David told him that she would use the money to finalise the taxes on the eventual transfer of US\$15m to his account. It was David who put the two \$6,210.00 deposits in his account on 6 August and again it was David who put 5 deposits of \$1,000 into his account in September. He had no idea where the money came from or even what country it was sent from. He admitted receiving the deposit of \$21,440 on the 25th September. David told him three days earlier that it was being sent and he was instructed to send it on to Sherryl Strampher. He never sent it however, because he was

arrested. He admitted that he had used others to send money through Western Union. He trusted David Turner because David had checked his background and because they had signed an agreement. He had no idea of the source of the funds. He had business experience and was even involved in a new social networking internet company being set up in England, called Me2everyone. He was a shareholder - had sent \$40 to the promoters to be a member/shareholder. He had no idea that the funds in his account had come from Sun Vacations, Bruce Moonie or Coconut Rentals. He had never heard of these people. He was certainly unaware of the bogus website to which these three had divulged their confidential banking identities and he did not even know how to set up a website. He was questioned by the Police and all his answers as recorded are true and correct.

[24] In cross-examination Johnny admitted that he did nothing to arrange or even make a proposal for investing the US \$15 million that was coming to him. He had no information about David Turner, even though they were going to be investment partners. Even though David had hacked his email and "compromised" his email account he still did not suspect that there was anything wrong with the dealings between them. He admitted to Ms. Prasad the prosecutrix, that the purpose of David sending him the money was so that he would send it on to Sherryl. He agreed that any reasonable person in these circumstances would have thought that the transactions were illegal and that he was being used as a pawn to launder money.

[25] The accused called 2 witnesses on his behalf who gave evidence to us from Vanuatu by "skype". This evidence was rather unhelpful except to say that the accused has for want of a better word "dabbled" in business over the years in Vanuatu before he came to Fiji. It is for you to make what you want of this evidence.

[26] Well, Madam and Gentlemen that is the evidence and how should you use that to satisfy yourselves, so that you are sure, that the State has proved

each of the elements I outlined to you earlier in this summing up? First there is no dispute that it was this accused that we are dealing with. It has never been suggested that the State has charged the wrong person. Secondly I do not think you will have any trouble given the banking evidence in finding that he received the funds and that in respect of the first charge he disposed of them, nor I suggest will you have difficulty in finding that these funds were the proceeds of crime. It is a matter for you, and I repeat that whatever I think, you do not have to accept unless you agree with me.

[27] The real question (in fact it is two questions) that you have to decide on in this case is this:

(a) Would any common sense right thinking member of the community in these same circumstances have the reasonable assumption that the property that the accused was dealing with was derived, either directly or indirectly from some form of illegal activity, and

(b) Did the accused know of those same circumstances, or were there reasonable grounds existing that should have reasonably led him to believe that the funds were illegal.

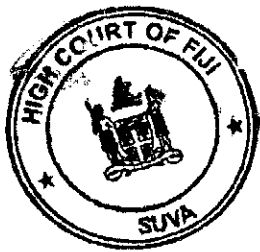
These two tests are referred to in law as the objective and subjective tests, but you need not worry about that terminology. Just what needs to be proved by the State is not a belief by the accused that the funds were illegal – that is irrelevant, but a much less stringent test of were there reasonable grounds to a right thinking person that the funds were illegal, and were those grounds known to the accused.¹

[28] In coming to your opinions on that question you will examine all the

¹ Privy Council in AG of HK v Lee Kwong Kut [1993]AC 951, 964.
HK Court of Final Appeal in Seng Yut-Fong [1999] 2 HKC 833.

circumstances; the relationship between the accused and David Turner, the relationship between the accused and Sherryl Strampher the likelihood of the Bank of America being a party to this transaction, the likelihood of David Turner choosing this accused above all people, etc. etc. it is all a matter for you.

- [29] You will each give me your opinion individually and it is better if you all agreed on your opinions but that is not essential.
- [30] The accused faces two charges and it is important that you look at each of these charges separately. The first charge deals with receiving and sending money; the second charge with receiving only. You will recall that he did not have time to send it because he was arrested.
- [31] Your possible opinions on each count is "guilty" or "not guilty". You will retire now and let my staff know when you are ready and I will reconvene the Court.
- [32] Any redirections, Counsel?



Paul K. Madigan

JUDGE

At Suva

11 April 2012