

IN THE MAGISTRATES' COURT OF FIJI

AT SUVA

Criminal Case : 1274/2014

STATE

V

NITESH KUMAR

Counsel : Ms.J.Prasad for the State
Mr.Yunus(LAC) for the Accused
Date of Judgment : 28th of June 2016
Date of Sentence : 08th of July 2016

SENTENCE

1. **NITESH KUMAR** , you were convicted after a hearing in this Court to one count of Money Laundering contrary to section 69(3) (b) of the Proceeds of Crime Act 1997.
2. During the hearing it was proved that you were working in a Registrar of Titles Office and got to know one Kapil Samy who was working in ANZ Bank. You gave the Kapil your ATM card and from 22nd day of April 2009 and 12th April 2010 he deposited in to your account \$9,888.67 which were stolen funds. Even though you denied being aware about these funds, I was satisfied that you as a reasonable person could have known these were proceeds of crime and in fact was aware about that.
3. Both parties have filed comprehensive submissions for this sentence and I have carefully considered them also for my sentence.

The Law and tariff

4. The maximum penalty for this offence is 20 years imprisonment or fine of \$120,000 or both.
5. In State v Singh [2015] FJHC 785; HAC250.2014 (19 October 2015) his Lordship Justice Wengappuli said :
"The maximum penalty for money laundering is a fine of \$ 120,000 and /or a term of imprisonment of 20 years. In State v Robin Shyam[2013] FJHC529 and State v

Stephens [2012] FJHC 1010 the tariff for offence of money laundering was accepted as range of imprisonment between 5 years and 12 years.”

6. In Laisiasa Koroivuki v the State (Criminal Appeal AAU 0018 of 2010)the Fiji Court of Appeal discussed the guiding principles for determining the starting point in sentencing and observed :

"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. 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".

7. The Fiji Court of Appeal in O’Keefe v State [2007] FJCA 34 ; AAU 0029.2007(25 June 2007) observed that when sentencing, the Court has to strike a balance between the seriousness of the offence as shown through the maximum penalty and seriousness of the actual acts of the accused that is to be sentenced.
8. The Money Laundering is considered as serious offence in this country. But you played a minor part in this offence and there was no evidence about you benefiting from this. Therefore considering the gravity of offending and your culpability, I select 05 years (lowest end of tariff) as the starting point in this sentence.

Aggravating factors:

9. In UK Sentencing Guidelines of 2014 for Fraud, Bribery and Money Laundering Offences the following are identified as aggravating factors :
 - a. Attempts to conceal/dispose of evidence;
 - b. Established evidence of community/wider impact;
 - c. Failure to comply with current court orders;
 - d. Offence committed on licence;
 - e. Offences taken into consideration;
 - f. Failure to respond to warnings about behavior;

- g. Offences committed across borders;
 - h. Blame wrongly placed on others;
 - i. Damage to third party for example loss of employment to legitimate employees.
10. When sentencing a court in Fiji can consider the above factors and any other grounds that would aggravate the offence. In this case I find above aggravating factors not present.
11. But allowing a third party (Kapil Samy) to access your ATM card, you violated the terms of the agreement with the bank which helped the third party to commit this offence. Even though there was no breach of trust as you were not an employee, I agree with the State submission that there was clear a breach of relationship with the bank which was detrimental to the bank as the monies deposited to your account were bank property. Also this was committed for a long period of time which shows that there was some planning and execution as well as agreement with the third party. I consider these as aggravating factors and add 01 year to reach 06 years imprisonment.

Mitigating Factors:

12. Again I turn in to the UK Sentencing Guidelines of 2014 for Fraud, Bribery and Money Laundering Offences which categorized various mitigating factors and they are :
- a. **No previous convictions ;**
 - b. **no relevant/recent convictions;**
 - c. **Remorse;**
 - d. **Little or no prospect of success;**
 - e. **Good character and/or exemplary conduct;**
 - f. **Serious medical conditions requiring urgent, intensive or long-term treatment;**
 - g. **Age and/or lack of maturity where it affects the responsibility of the offender;**
 - h. **Lapse of time since apprehension where this does not arise from the conduct of the offender;**
 - i. **Mental disorder or learning disability;**

- j. Sole or primary carer for dependent relatives;**
 - k. Offender co-operated with investigation, made early admissions and/or voluntarily reported offending.**
13. The state concedes that you have no adverse record which clearly benefits you in this case.
14. The learned defence counsel in his comprehensive mitigation submission submitted the following :
- a. You are 30 years old married with a 3 year old child;**
 - b. You are the sole bread winner of the family ;**
 - c. You are looking after your elderly parents who are dependent on you. Your father is paralyzed and right leg below the knee is amputated. He is a cardiac patient and suffers from hypertension and diabetics (medical report annexed as NK6). Your mother is also sickly and suffering from malignant hypertension and diabetics (medical report annexed as NK7).**
 - d. You understand your mistake and seeking forgiveness and leniency from the Court.**
15. For all the above mitigating factors, I deduct 04 years to reach 02 years imprisonment which I have the power to suspend pursuant to section 26(2) (b) of the Sentencing and Penalties Decree.
16. You played a minor part in this offence and there is no evidence that you have benefited from that. Further the main person involved in this offence (Kapil Samy) has been already given a suspended sentence by another court and giving a custodial sentence for you would be harsh and excessive in my view. Even though you did not plead guilty and contested this matter, I would not hold that against you as that is your right under the Constitution.
17. Also considering your strong mitigating factors, I believe the main purpose of this sentence is to allow you the chance to rehabilitate. Therefore I sentence you to 02 years

imprisonment and this will be suspended for 03 years. If you commit any offences during next 03 years you can be charge under section 28 of the Sentencing and Penalties Decree.

18. Also your sentence needs to reflect the denunciation of this kind of offences as well as to deter future offenders. Considering your means, I order you to pay a fine of \$2000.00 which would serve these purposes in my view.

19. 28 days to appeal.


Shageeth Somaratne

Resident Magistrate

