

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 061 OF 2017S

STATE
vs
AIDONG ZHANG

Counsels : Mr. A. Singh and Mr. S. Shiraz for State
Mr. I. Khan, Mr. D. Toganivalu and Mr. S. Gosaiy for Accused

Hearings : 10, 15, 17, 22 to 26, 29 to 31 July, 1, 2, 5 to 9 and 13 August 2019.

Summing Up : 15 August, 2019.

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State and Defence Counsels have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives

of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

B. THE BURDEN AND STANDARD OF PROOF

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt so that you are not sure about his guilt, then you must express an opinion, that he is not guilty.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

C. THE INFORMATION

7. You have a copy of the information with you, and I will now read the same to you:

“... [read from the information]...”

D. THE MAIN ISSUES

8. In this case, as assessors and judges of fact, each of you will have to answer the following questions:

- (i) On count no. 1, did the accused, between 1 June and 30 September 2014, at Suva in the Central Division, by deception that a property at 148 Waimanu Road was being purchased for \$5,500,00, dishonestly obtained \$1,240,740.74 from Yong Chen, with the intention to permanently deprive him of the same?
- (ii) On count no. 2, did the accused, between 3 September 2014 and 5 January 2016, at Suva in the Central Division, engage directly or indirectly in transactions involving ANZ Bank Account 11779946 to the total of \$1,240,740.74, which are proceeds of crime, knowing or ought reasonably to have known that the money was derived directly or indirectly from some form of unlawful activity?

E. THE OFFENCES AND THEIR ELEMENTS

9. In count no. 1, the accused was charged with “obtaining property by deception”, contrary to section 317 (1) of the Crimes Act 2009. For the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:

- (i) the accused,
- (ii) by a deception,
- (iii) dishonestly
- (iv) obtains property belonging to another
- (v) with the intention of permanently depriving the other of the property.

10. The key word in the above offence is the word “deception”. According to the **Concise Oxford English Dictionary**, Oxford University Press, 12th edition, 2011, the word “deception” is a noun, and it means “the action of deceiving”. In the same dictionary, the word “deceive” is a verb, and it means “deliberately cause (someone) to believe something that is not true”. It also means “to intentionally induce a person, by words or conduct, to believe that a thing is true which is false”. In the above offence, the word “deception” is

followed by the word “dishonestly”. “Dishonestly” is an adverb which comes from the adjective “dishonest”. According to the **Concise Oxford English Dictionary** (supra), the word “dishonest” means “not honest, trustworthy or sincere”. “Honest” means “free of deceit, truthful and sincere”.

11. So, the accused must intentionally induce a person, by words or conduct, to believe a thing is true which is false, and in the process, he must dishonestly obtain the person’s properties, with an intention of keeping the properties for himself and/or others. You must carefully examine what the accused said and did, and the surrounding circumstances, in order to decide the above issues. In this particular case, you will also have to examine and consider all the documents submitted by the parties, in deciding the above issues.

12. In count no.2, the accused was charged with “money laundering”, contrary to section 69(2)(a) and (3)(a) of the Proceeds of Crimes Act 1997. For the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused
 - (ii) engages
 - (iii) directly or indirectly
 - (iv) in a transaction
 - (v) that involves money
 - (vi) that is, proceed of crime,
 - (vii) and the accused
 - (viii) knows or ought reasonably to know
 - (ix) that the money is derived
 - (x) directly or indirectly
 - (xi) from some form of unlawful activity.

13. In order to understand the terms used in describing the elements of “money laundering” as described above, you must consider them within the context of this case. Here we are

dealing with two Chinese businessmen. The accused (DW1) originally came to Fiji from China in 1991. At first, he worked for a Chinese company engaged in land sub-division. He later formed his own company importing goods from China and selling the same to MH Supermarkets throughout the country. In 1998, he obtained a Fiji passport. The complainant (PW1) was a Chinese investor from China. He first visited Fiji in May 2012. At that time, PW1 was first introduced to DW1. PW1 was a multi-millionaire from China.

14. The phrase "engages directly or indirectly in a transaction that involves money" meant the accused must be involved in an activity that concerns money. The accused's involvement can either be directly or indirectly. The money involved in the activity or transaction must be proceeds of crime. It therefore follows that the activity or transaction the accused directly or indirectly involved himself in must be a crime, or alternatively, an unlawful activity. The word "engages" could also mean "receiving and disposing of any money". It must also be proven by the prosecution beyond reasonable doubt that the accused knew, or ought reasonably to have known that, the money, involved in the activity or transaction, was derived directly or indirectly from some form of unlawful activity.
15. In the context of this case, PW1, DW1 and others in June 2014, in a meeting in China, decided to invest in properties in Fiji. DW1, in August 2014, found a property in Suva, Fiji. DW1 allegedly submitted false informations on the purchase price and deposit on the property (unlawful activity). DW1 told PW1 to send in an inflated deposit of \$1.2 million. PW1 sends DW1 the \$1.2 million deposit money, and he received the same (engages in transactions /proceeds of crime). DW1 did not use the \$1.2 million as a deposit on the property, but used it on other matters. If the accused asked the complainant for an inflated deposit of \$1.2 million on the Suva property by submitting false and misleading informations (unlawful activity/transactions), and receives and disposes of the same on himself and others (money/proceeds of crime), and he knew or ought reasonably to know that the \$1.2 million was derived directly or indirectly from some form of unlawful activity (eg. obtaining property by deception, fraud etc), he is then liable for money laundering. Money laundering is basically dealing with tainted money, which are proceeds of crime, and

he knew or ought to have reasonably known that the money was derived from some form of unlawful activity.

16. Remember, there are two counts in the information. You must consider them separately, in the light of the whole evidence, presented during the trial.

F. THE PROSECUTION'S CASE

17. The prosecution's case were as follows. The complainant, Mr. Yong Chen (PW1) is 65 years old, married with one daughter. He resided in Xiamen City, China. He is a real estate businessman and a company director in China. The accused, Mr. Aidong Zhang (DW1) is 53 years old and a businessman in Fiji. He is originally from China, but settled in Fiji since 1991. In Fiji, he started off working for a Chinese company involved in land subdivision, then he started his own company importing goods from China and supplying MH Supermarkets throughout Fiji. He got married in 1998 and has two daughters.
18. In May 2012, PW1 and his wife (PW2) first visited Fiji. Mr. Shi Yuhu (SY), a close friend of PW1 since 2002, introduced DW1 to PW1. SY informed PW1 that DW1 was a good person, a big businessman, well-known in Fiji and can generate \$10 million profit per year. SY informed PW1 that DW1 and him can start something in Fiji. As a result of the above, PW1, PW2, their daughter, Chen Linlin, SY and DW1 met in Xiamen, China on 21 June 2014. The result was a "Joint Operation Agreement". The parties agreed to start a company in Fiji, called "Bairain Group (Fiji) Ltd" (BGL). The company would have a capital of \$6 million, and PW1's family would have 80% share of the company, while SY and DW1 would have 10% share each. The parties agreed for BGL to be formed in Fiji; a property to be purchased, and they entrusted DW1 to carry out the above.
19. After the above agreement, SY and DW1 returned to Fiji. According to the prosecution, DW1 rang PW1 in China in August 2014. DW1 allegedly told PW1 that 148 Waimanu Road property was up for sale for 5.5 million Fijian dollars. DW1 allegedly told PW1 that he wanted BGL to buy the property, and if BGL does not buy it, others are willing to buy it for

5.8 million Fijian dollars. PW1 believed DW1 and allegedly told him to proceed with the purchase. On 27 August 2014, DW1 allegedly sent an email to PW1's secretary in China, with a draft copy of the sale and purchase agreement attached thereto. The agreement confirmed 5.5 million Fijian dollars as the purchase price and 1.5 million Fijian dollars as the deposit and the same cannot be amended. PW1 then allegedly told DW1 to sign the sale and purchase agreement on behalf of BGL. A few days later, DW1 allegedly rang PW1 and told him he had signed the sale and purchase agreement, and he to send him his share of the 1.5 million dollars deposit, that is, 1.2 million, and the balance to be paid by SY and DW1.

20. As BGL had not been registered, DW1 and PW1 agreed for the 1.2 million deposit money to be sent to DW1's Ostanding (Fiji) Limited's (OFL) ANZ Bank Account No. 11779946. On 3 September 2014, PW1 deposited \$1,240,740.74 in the above account as his family's share of the alleged \$1,500,000.00 deposit for 148 Waimanu Road property. BGL was incorporated on 14 October 2014. It opened an ANZ Bank Account No. 12137828. Still believing that the purchase price for 148 Waimanu Road was 5.5 million Fijian dollars, PW1 sent \$4,037,620.65 to BGL's above account on 18 November 2014. Settlement for the property at 148 Waimanu Road was completed on 4 December 2014, with the vendor taking its money minus expenses, and BGL taking ownership of the property. Between January and March 2015, questions were raised among the shareholders of BGL whether or not the purchase price for 148 Waimanu Road property was 5.5 million or 3.3 million Fijian dollars. After consulting the vendor and his solicitor Neel Shivam, it was later revealed that the real purchase price for the above property was 3.3 million, not 5.5. million Fijian dollars.
21. According to the prosecution, the accused did not use PW1's \$1,240,740.74 as the deposit for 148 Waimanu Road property. They alleged the accused used the same on himself. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged on both counts. That was the case for the prosecution.

G. THE ACCUSED'S CASE

22. On 15 July 2019, the first day of the trial proper, the information was put to the accused, in the presence of his counsels. He pleaded not guilty to the two counts. In other words, he denied the allegations against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he chose to give sworn evidence and called no witness. That was his right.
23. The accused's case appeared simple. In the purchase of 148 Waimanu Road from Supreme Fuels Limited (SFL), the accused (DW1) appeared to be saying that he was doing two separate property deals at the same time. DW1 agreed he was introduced to PW1 by SY in May 2012. That was in Fiji. Accused agreed he attended BGL's shareholders meeting on 21 June 2014 at Xiamen, China, which resulted in the "Joint Operation Agreement" (JOA). He agreed that as a result of the JOA, he was entrusted by BGL's shareholders to register the company in Fiji, and purchase some properties for BGL. In August 2014, DW1 said he returned to Fiji. Mr. Dharmendra Kumar (PW8), a real estate agent, introduced 148 Waimanu Road property to him. PW8 was also dealing with Mr. Shailesh Kumar Khatri (PW11), the real estate agent for the vendor, SFL. DW1 and PW11 agreed that the purchase price for the property would be 3.3 million Fijian dollars, plus VAT if applicable, and the deposit would be \$330,000.00
24. Accused said, after obtaining the above information, he advised SY in China. Accused (DW1) was advised by SY that the property would be worth 30 million Fijian dollars in China. DW1 said, he and SY then agreed to sell it to PW1 for 5.5 million Fijian dollars. SY and DW1 are shareholders in Ostanding Fiji Limited (OFL). According to SY and DW1, the 5.5 million purchase price was still cheap by Chinese standard. DW1 said OFL will buy the property first, then sell the same to PW1 for a 2.2 million dollar profit minus expenses. DW1 later contacted PW1 and told him about 148 Waimanu Road property. DW1 said, PW1 was interested in buying the same and he told DW1 to sign the sale and purchase agreement. DW1 advised PW1 the purchase price was 5.5 million and the deposit was 1.5

million. DW1 asked PW1 to send in 1.2 million deposit as his family's share, and the balance to be paid by SY and DW1.

25. DW1 said, PW1 sent in \$1,240,740.74 on 3 September 2014 as deposit for the purchase of the property. On 4 September 2014, DW1 signs the sale and purchase agreement for the property, the purchase price been 3.3 million dollars and the deposit been \$330,000.00 [Prosecution Exhibit No. 3, File No. 3, Tab 93]. With PW1 and DW1's agreement, the money was deposited in OFL's ANZ Bank Account No. 11779946, as BGL had not been registered yet. After signing the above agreement, DW1 nominated OFL as the intended purchaser of 148 Waimanu Road property. [Prosecution Exhibit No. 2, File No. 2, Tab 42]. BGL was incorporated on 14 October 2014. Believing that the purchase price in the property was still 5.5 million Fijian dollars, PW1 sent his family's 80% share of the purchase price a sum of \$4,037,620.65 to BGL's ANZ Bank Account, on 18 November 2014. On 11 November 2014, DW1 as director of OFL nominated BGL as the intended purchaser of 148 Waimanu Road. On 4 December 2014, settlement of the property was completed. DW1 said, OFL and himself were not registered real estate agents. However, in purchasing the property for BGL and PW1, he was acting as a middleman and the \$1,240,740.74 sent by PW1 to OFL's ANZ account was the profit for OFL, minus the expenses. DW1 said, it was nothing unusual in business.
26. Because of the above, the accused is asking you, as assessors and judges of fact, to find him not guilty as charged, on both counts. That was the case for the defence.

H. ANALYSIS OF THE EVIDENCE

(a) Introduction:

27. In analyzing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors and judges of fact, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analyzing the evidence, we will first discuss the "Agreed Facts"; then the Prosecution and Defence's

Exhibits; then the State’s case against the accused; then the accused’s case, and finally the need to consider all the evidence.

(b) The Agreed Facts:

28. The parties submitted an “Agreed Facts”, dated 15 July 2019. The “Agreed Facts” had 20 paragraphs of Agreed Facts. Because the parties are not disputing the above 20 paragraphs of “Agreed Facts”, you may take the same as established facts and that the prosecution had proven those facts beyond a reasonable doubt. The “Agreed Facts” provide background information to the case, and they somewhat introduce you to the case.

(c) The Prosecution and Defence Exhibits:

29. Below is a summary of the prosecution and defence’s exhibits, their numbers, their details, the dates on which they were tendered and by whom. The admissibility of most of the documents had not been challenged, and you must consider them carefully as evidence. Some of the documentary evidence you may safely ignore, but we will highlight the significant ones as we progress in our analysis of the evidence.

TRIAL PROPER PROSECUTION AND DEFENCE EXHIBIT LIST

DATE	MFI NO:	EXHIBIT NO:	DESCRIPTION OF EXHIBITS	TENDERED BY:	WIT. PRODUCING
22/7/19		PE-1	File 1:Tab 1-Tab 39	Prosecution	Consent
22/7/19		PE-2	File 2:Tab 40-Tab 81	Prosecution	Consent
22/7/19		PE-3	File 3:Tab 82-Tab 105	Prosecution	Consent
23/7/19		PE-4	Sales and Purchase Agreement (5.5m)	Prosecution	PW-1
23/7/19		PE-5 (a)	Meeting Minutes Chinese Version	Prosecution	PW-1
23/7/19		PE-5 (b)	Meeting Minutes English Version	Prosecution	PW-1
24/7/19		PE-6	Certified Company Copy of Sales and Purchase Agreement from Supreme Fuel	Prosecution	PW-1

DATE	MFI NO:	EXHIBIT NO:	DESCRIPTION OF EXHIBITS	TENDERED BY:	WIT. PRODUCING
31/7/19		PE-7	Real Estate Agents Licensing Board (Public Notice)	Prosecution	PW-7
6/8/19		PE-8 (1)	CD Containing Caution Interview of AZ Dated 21/11/16	Prosecution	PW-13
6/8/19		PE- 8 (2)	CD Containing Caution Interview of AZ Dated 21/11/16	Prosecution	PW-13
6/8/19		PE-8 (3)	CD Containing Caution Interview of AZ Dated 21/11/16	Prosecution	PW-13
6/8/19		PE-8 (4)	CD Containing Caution Interview of AZ Dated 21/11/16	Prosecution	PW-13
6/8/19		PE-9	Transcript of Caution Interview of AZ (213 pages)	Prosecution	PW-13
25/7/19		DE-1	Business Card of PW-1 (Mr. Yong Chen)	Defence	PW-1
26/7/19		DE-2	Writ of Summons Civil Action No. 44 of 2016	Defence	PW-1
8/8/19		DE-3 (a)	Certificate of Title 24806	Defence	DW-1
8/8/19		DE- 3(b)	Certificate of Title 27343	Defence	DW-1
8/8/19		DE-4	ANZ Interim Statement of Account No. 11779946	Defence	DW-1
8/8/19		DE-5	Tax Letter from FRCS	Defence	DW-1
8/8/19		DE-6	Summary of Expenses by Aidong Zhang	Defence	DW-1
8/8/19		DE-7	Title Certificate of Mead Road Property	Defence	DW-1
8/8/19		DE-8	Financial Statement of 2011	Defence	DW-1
8/8/19		DE-9	Financial Statement of 2013	Defence	DW-1
8/8/19		DE-10	Financial Statement of 2014	Defence	DW-1
9/8/19		DE-11	Shareholders List of Ostanding Fiji Ltd	Defence	DW-1

(d) **The State's Case Against the Accused:**

30. The State called 13 witnesses against the accused. However, the State's case against the accused is based principally on the sworn direct evidence of the complainant, Mr. Yong Chen (PW1), and the circumstantial evidence arising from the evidence of all 13 prosecution's witnesses. We will start first with PW1's direct evidence, and then consider the circumstantial evidence of the other witnesses.

31. PW1 said, a close friend of his, Mr. Shi Yuhu (SY), introduced the accused (DW1) to him in May 2012 when he visited Fiji. It was his first visit to Fiji. SY held DW1 out to PW1 as a good person, a good businessman, wealthy and that he can make a \$10 million profit in one year. As a result of the above, PW1, his wife PW2, their daughter Ms. Chen Linlin, SY and DW1 met in PW1's company office in Xiamen, China, on 21 June 2014. They reached an agreement known as the "Joint Operation Agreement" (JOA) [please refer to Prosecution Exhibit No. 1, File No. 1, Tab 12 (a) and (b)]. In the JOA, the parties agree to form the Bairain Group (Fiji) Limited (BGL) company in Fiji, and the same to be their vehicle for investment in Fiji. BGL would buy properties in Fiji and engage in an import and export type business, including tourism. The parties entrusted DW1 to incorporate BGL in Fiji, and buy properties for the company. PW1's family will have 80% share in BGL, while SY and DW1 will have 10% share each in BGL. PW1 said, after signing the JOA, SY and DW1 returned to Fiji.

32. PW1 said, sometimes in August 2014, DW1 rang him in China informing him that he had located a property at 148 Waimanu Road, and he wanted BGL to purchase the same. DW1 said, the purchase price was 5.5 million Fijian dollars and it was an excellent investment. PW1 said, DW1 told him if BGL doesn't buy, others are willing to buy the same for 5.8 million Fijian dollars. PW1 said, he accepted DW1's idea as he was a shareholder of BGL and was an expert in the area. PW1 said, because of the above, he told DW1 to proceed with the purchase. PW1 said, DW1 later rang him and told him that he had sent

an email to his secretary in China, with a draft sale and purchase agreement attached thereto [please, refer to Prosecution Exhibit No. 1, File No. 1, Tab 23 (b) and 23 (a)]. PW1 said, in the draft sale and purchase agreement, the purchase price was 5.5 million, with a 1.5 million Fijian dollars deposit. PW1 said, he rang DW1 and asked him to negotiate the purchase price down, but was told the contract cannot be amended. PW1 said, he told DW1 to represent BGL and sign the sale and purchase agreement.

33. PW1 said, he later received a call from DW1 saying he had signed the sale and purchase agreement. This was in late August 2014. PW1 said, DW1 told him to send PW1's family share of the 1.5 million deposit, that is, 1.2 million Fijian dollars. PW1 said, DW1 said the balance of the deposit would be paid by SY and himself. As BGL had not been registered yet, PW1 said, DW1 told him to send the money to Ostanding (Fiji) Limited (OFL), a company DW1 and SY owned. PW1 said, he trusted DW1, and later sent their 1.2 million Fijian dollars plus to OFL's ANZ Bank Account No. 11779946 in Fiji [please, refer to Prosecution Exhibit No. 1, File No. 1, Tab 23 (10), 23 (13) and 23 (14)]. OFL received the same on 3 September 2014.
34. PW1 said, he asked DW1 to bring the sales and purchase agreement to China. On the last week of September 2014, PW1 said, DW1 brought a copy of the sale and purchase agreement to China. PW1 said, DW1 gave the same to him [please, refer to Prosecution Exhibit No. 4]. The sale and purchase agreement confirmed the purchase price as 5.5 million dollar and the deposit was 1.5 million dollars. PW1 said, he asked DW1 for the original copy, but DW1 told him, the same was with the lawyers, Neel Shivam. PW1 said, DW1 told him that he had given the 1.2 million deposit he sent to his lawyers, who gave the same to the vendor. PW1 said, he came to Fiji in October 2014 and stayed for a few days. PW1 said, BGL was registered on 14 October 2014 and opened a ANZ Bank Account No. 12137828. PW1 said, DW1 rang him in China and told him that everything were confirmed and he to send the balance of the purchase price for 148 Waimanu Road. PW1 said, he sent US\$2.1 million (FJ\$4,037,620.65) to BGL's above ANZ Bank Account on 18

November 2014 [please, refer to Prosecution Exhibit No. 2, File 2, Tab 67, and Prosecution Exhibit No. 1, File No. 1, Tab 21 (16)].

35. PW1 said, he later asked DW1 that he had paid his share of the purchase price for 148 Waimanu Road, and when will he and SY pay their share of the same. PW1 said, DW1 told him he had paid his share directly to the lawyers. PW1 said, he asked DW1 for proof, but it was not forthcoming. PW1 said, BGL's Deputy Manager, Mr. Liang Shi Kai (LSK) later rang him in China, and advised that the purchase price for 148 Waimanu Road was not 5.5 million Fijian dollars, but 3.3 million Fijian dollars. PW1 said, he rang DW1 in Fiji to check on the above, but DW1 told him that what LSK told him was fake. On 4 December 2014, settlement of the property at 148 Waimanu Road was completed, Supreme Fuel Limited (SFL) taking their money minus their expenses, and BGL taking ownership of the property [please, refer to Prosecution Exhibit No. 1, File no. 1, Tab 21 (a) and 21 9b)]. PW1 said, as a result of what LSK and DW1 said above, he was confused. In January 2015, PW1 said, he sent his wife (PW2) and his company lawyer to Fiji, to check on the above. PW2 returned to China and informed PW1 that what LSK said was the truth. On 16 March 2015, PW1 called for a meeting in his office in China, to confirm whether or not the purchase price for 148 Waimanu Road was 5.5 million or 3.3 million. PW1, PW1's wife, SY, DW1, LSK and others were present. [Please, refer to Prosecution Exhibit No. 5 (a) and 5 (b) for the minutes of the meeting]. PW1 said, DW1, at the meeting said the purchase price was 5.5 million dollars, not 3.3 million dollars. PW1 said, he was further confused.
36. PW1 said, he decided to come to Fiji on 22 May 2015. He was accompanied by the BGL company manager. PW1 said, he went to Neel Shivam Lawyers to check on the above. PW1 said, Neel Shivam confirmed that the purchase price for 148 Waimanu Road was 3.3 million Fijian dollars, not 5.5. million Fijian dollars. PW1 said, Neel Shivam gave him a copy of the sale and purchase agreement [please, refer to Prosecution Exhibit No. 1, File No. 1, Tab 23 (1)(a) to 23 (1)(l)]. PW1 said, he now believed the lawyer's version, not DW1's version. PW1 said, he rang DW1 and told him the above. PW1 said, DW1 maintained his

position. PW1 told DW1, that if he cheated him, he would take him to court. PW1 said, DW1 replied “no problem”. PW1 said, he now realized that DW1 had cheated him of the 1.2 million dollars he sent him/OFL as the deposit for 148 Waimanu Road property on 3 September 2014.

37. PW1, from the above evidence, appeared to be saying that the accused (DW1), by deceiving him that 148 Waimanu Road property was sold for 5.5 million dollars, rather than the real purchase price of 3.3 million dollars, managed to dishonestly obtain the supposedly \$1,240,740.74 deposit for the property from him, between 1 June and 30 September 2014. Furthermore, PW1 also appeared to be saying that the accused, between 3 September 2014 to 5 January 2016, engaged directly and indirectly in transactions involving ANZ Bank Account No. 11779946 in the sum of \$1,240,740.74, that are proceeds of crime, and he knew or ought reasonably to have known that the money was derived directly or indirectly from some form of unlawful activities. If you accept PW1’s above evidence, you may, find the accused guilty as charged on both counts. If otherwise, you may find him not guilty as charged. It is a matter entirely for you.

38. The second type of evidence the State is relying upon to support its case is what is often called “circumstantial evidence”. Reference has been made to the type of evidence which you have received in this case. Sometimes assessors are asked to find some fact proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw an accused commit a crime; if there is a video recording of the incident which plainly demonstrates his guilt; or if there is reliable evidence of the accused himself having admitted it, these would all be good examples of direct evidence against him. On the other hand, it is often the case that direct evidence of a crime is not available, and the prosecution relies upon circumstantial evidence to prove guilt. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and the accused, which they say when taken together, will lead to the sure conclusion that it was the accused who committed the crime. It is not necessary for the evidence to provide an

answer to all the questions raised in a case. You may think it would be an unusual case indeed in which the assessors can say “we now know everything there is to know about this case”. But the evidence must lead you to the sure conclusion that the charge which the accused faces is proved against him. Circumstantial evidence can be powerful evidence, but it is important that you examine it with care, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt. Furthermore, before convicting on circumstantial evidence you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution’s case. Finally, you should be careful to distinguish between arriving at conclusion based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, and neither the prosecution, the defence nor you should do that.

39. Now we will discuss the “evidence of various circumstances relating to the crime and the defendant, which the prosecution say when taken together will lead to the sure conclusion that it was the defendant who committed the crime.

(i) **Mr. Yong Chen’s (PW1) Sworn Evidence:**

40. We have previously discussed PW1’s evidence. He was the complainant in this matter. One thing you can see from PW1’s evidence in his professional and financial relationship with the accused (DW1) was that he delivered the money for the purchase of 148 Waimanu Road, as and when requested by the accused, who was in Fiji, dealing with the matter. For PW1 to send millions of dollars to OFL and BGL, which were controlled in Fiji by the accused, PW1 must have a lot of trust in the accused. The question for you in this case was; was that trust misplaced?

(ii) **The 21 June 2014 Joint Operation Agreement (JOA):**

41. This agreement brought to the fore the professional and financial relationship between PW1 and the accused (DW1). The shareholders of BGL agreed to invest in Fiji. PW1’s

family will have 80% share and control of BGL. DW1 and SY will have 10% share each and have 10% control each. However, DW1 was entrusted by all shareholders to register BGL in Fiji and purchase BGL's properties in Fiji, on its behalf. On the ground in Fiji, the accused occupied a powerful position when it comes to spending BGL money. He was in a sense, acting as a trustee for BGL's shareholders, while operating in Fiji. He was trusted by the others [refer to Prosecution Exhibit No. 1, File No. 1, Tab 12 (a) and 12 (b)].

(iii) Email to PW1's Secretary in China by Accused:

42. DW1 sends an email to PW1's secretary in China, attaching a draft copy of the sale and purchase agreement for 148 Waimanu Road property [please, refer to Prosecution Exhibit No. 1, File No. 1, Tab 23 (3)(a) and 23 (3)(b)]. PW1's first look at the draft sale and purchase agreement stating that the purchase price was 5.5 million and the deposit was 1.5 million. From the prosecution's point of view, in addition to his verbal misrepresentation to PW1 on the real purchase price for the property, DW1 sends in to PW1 an alleged misrepresentation of the real purchase price and deposit, via email.

(iv) PW1 Sends DW1 via OFL's ANZ Bank Account US\$670,000 (FJ\$1,240,740.74):

43. Please, refer to Prosecution Exhibit No. 1, File No. 1, Tab 23 (a), 23 (10), 23 (13), 23 (14) and Prosecution Exhibit No. 2, File No. 2, Tab 62 (b) and 62 (c). PW1 sent accused (DW1), through OFL's Bank Account, FJ\$1,240,740.74, as 80% share of the alleged 1.5 million dollar deposit for the purchase of 148 Waimanu Road property. From the prosecution's viewpoint, the accused had misrepresented the real deposit of \$330,000 to be 1.5 million dollars. According to the prosecution, PW1 had acted on the accused's alleged misrepresentation.

(v) Sale and Purchase Agreement (Accused's version): Prosecution Exhibit No. 4:

44. According to PW1, accused brought the above sale and purchase agreement to him in China. This version said the sale and purchase price was 5.5 million and the deposit was 1.5 million.

(vi) **PW1 sent US\$2.1 million (FJ\$4,037,620.65) to BGL's ANZ Bank Account in Fiji:**

45. PW1 sends FJ\$4,037,620.65 to BGL for the purchase of 148 Waimanu Road property. Please, refer to Prosecution Exhibit No. 1, File No. 1, Tab 21 (16), 21 (18). From the prosecution's point of view, PW1 send the above to the accused via BGL's account, because of the accused's repeated misrepresentation that the purchase price was 5.5 million, not 3.3 million.

(vii) **\$1.5 Million Cheque Accused Wrote for Neel Shivam Lawyers:**

46. Please, refer to Prosecution Exhibit No. 1, File No. 1, Tab 39. This is the Ostanding ANZ Cheque No. 11 the accused wrote for Neel Shivam Lawyers as the purported 1.5 million deposit for the accused's version of the 5.5 million purchase price for 148 Waimanu Road. This cheque was written on 15 September 2014 and presented to Neel Shivam Lawyers on the same date. On 16 September 2014, Accused wrote to Neel Shivam not to cash the cheque, as there were no funds. Neel Shivam asked for the original receipt. But accused never returned it. Accused gave the same to PW1's wife, to take to PW1 in China in January 2015. Please, refer to Prosecution Exhibit No. 1, File No. 1, Tab 23 (4)(a), 34, 35 and 39. Accused's failing to return the original receipt, Neel Shivam Lawyers cancelled their file copy receipt. From the prosecution's viewpoint, these actions were accused's ways of deceiving PW1 that the 1.5 million deposit for 148 Waimanu Road was paid.

(viii) **16 March 2015 Meeting in PW1's Company Office in China:**

47. PW1, the accused, PW1's wife PW2, SY, LSK and others met in PW1's company office in China to confirm whether or not the purchase price for 148 Waimanu Road was 5.5 million or 3.3 million. Please, refer to Prosecution Exhibit No. 5 (a) and (b). Accused still maintained that the purchase price for 148 W aimanu Road was 5.5 million. The settlement done on 4 December 2014 said the purchase price was 3.3 million. From the prosecution's point of view, accused was still misrepresenting the facts to PW1. In other words, he was allegedly deceiving PW1.

(ix) **Yong Chen (PW1) Visits Neel Shivam Lawyers:**

48. In May 2015, PW1 visits Neel Shivam Lawyers. The lawyers confirm the sale and purchase price for 148 Waimanu Road property was 3.3 million. They gave PW1 a copy of the sale and purchase agreement - please, refer to Prosecution Exhibit No. 1, File No. 1, Tab 23 (1)(a). PW1 now accepts that the purchase price was 3.3 million, not 5.5 million. PW1 now realized he had been cheated by the accused. PW1's people also got a copy of the sale and purchase agreement from the vendor. Please, refer to Prosecution Exhibit No. 6. It also confirms the purchase price to be 3.3 million, not 5.5 million. According to the prosecution, PW1 now felt he was cheated by the accused, and later reported him to police in January 2016.

(x) **Mr. Vinal S. Singh (PW7), Compliance & Monitoring Officer for Real Estate Agents Licensing Board (REALB):**

49. PW7 works for the Real Estate Agents Licensing Board (REALB). REALB functions under the Real Estate Agents Act 2006. According to PW7, anyone who acts or holds himself out to be a real estate agent, without a license, is committing an offence. According to the 2006 Act, a real estate agent is anyone who "acts or holds himself out to the public as ready to act, for reward, as an agent, for the sale or other disposition of land, or the purchase or acquisition of land". PW7 said, in 2014, neither the accused nor OFL were licensed real estate agents.

(xi) **Settlement Papers:**

50. Please, refer to Prosecution Exhibit No. 1, File No. 1, Tab 21 (a) and 21 (b). This is the settlement papers prepared by Neel Shivam Lawyers. It stated the purchase price for 148 Waimanu Road property was 3.3 million, instead of 5.5 million as being alleged by the accused, in his alleged dealings with PW1 in 2014 and 2015. It would appear to confirm

that the accused was allegedly misrepresenting the purchase price to PW1 throughout 2014 and 2015.

(xii) **OFL's ANZ interim Statement of Account:**

51. Please, refer to Prosecution Exhibit No. 2, File No. 2, Tab 62 (b) and 62 (c), 64 (1) to (20), which shows OFL's ANZ Statement of Account from 3 September 2014 to 5 January 2016, and the OFL ANZ Cheque the accused signed during the above dates. One could see that Mr. Chen Yong (PW1) sent the \$1,240,740.74 specifically to buy a house. Given what PW1 said in his evidence, the above was his family's contribution to the 1.5 million purported deposit for the purchase of 148 Waimanu Road. So, in a sense, it was trust money, held by OFL and DW1 for a particular purpose. However from the evidence, he spent only \$100,000 on the deposit. He spent the rest on other matters, not connected with the purpose it was given for. In most cases, he spent the same on himself and on his family.
52. What do the above circumstantial evidence tell you? Was the accused guilty of count no. 1 and 2, or otherwise? The answer to the above question is entirely a matter for you.

(e) **The Accused's Case:**

53. I had summarized the accused's case to you from paragraphs 22 to 26 hereof. I repeat the same here. In his sworn evidence, and his statements to the police during his caution interview, accused maintained he was acting as a middleman for BGL in the purchase of 148 Waimanu Road property. He said, on the real facts concerning the 3.3 million purchase price and the \$330,000 deposit, he was keeping that as a business secret from PW1. He said, when he put the 5.5 million purchase price and the 1.5 million deposit to PW1, he was happy with the same. He said, the scheme was devised by SY and him, because according to Chinese standard, the land was worth 30 million dollars in China, and at 5.5 million, PW1 was getting a good deal. He said, there was no business obligation on him to reveal his "business secret" to PW1. He said, he wanted to make a profit for OFL.

He said, the \$1,240,740.74 PW1 sent to OFL's ANZ Bank Account No. 11779946, became OFL's money and not PW1's money the moment it enters OFL's ANZ Account. As a result, as a shareholder of OFL, it was OFL's money, and he was entitled to spend as and when OFL and him pleases. He said, in writing the cheques mentioned in OFL's Interim Statement of Account, he was spending OFL's money, not PW1's money.

54. If you accept the accused's evidence and version of events, you must find him not guilty as charged on both counts. If otherwise, you must still consider the strength of the prosecution's case as a whole, and decide accordingly. It is a matter entirely for you.

(f) **The Need to Consider All the Evidence:**

55. The prosecution called 13 witnesses. All are civilians except one police officer. The accused chose to give sworn evidence in his defence. Altogether, there are 14 witnesses, on whose evidence you will have to make a decision. Both prosecution and defence submitted exhibits and the details thereof are described in paragraph 29 hereof. You must consider all the evidence together. You must compare them and analyze them together. If I hadn't mentioned a piece of evidence you consider important, please take it onboard in your deliberation. If you find a witness credible, you are entitled to accept the whole or some of his/her evidence, in your deliberation. If you find a witness not credible, you are entitled to reject the whole or some of his/her evidence in your deliberation. You are the judges of fact.

I. **SUMMARY**

56. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged on both counts. If you

do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged on both counts.

57. Your possible opinions are as follows:

- (i) Count No. 1: Obtaining Property By Deception: Accused: Guilty or Not Guilty
- (ii) Count No. 2: Money Laundering: Accused: Guilty or Not Guilty

58. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive your decisions




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JUDGE

Solicitor for the State : Office of the Director of Public Prosecution, Suva.

Solicitor for the Accused : Iqbal Khan & Associates, Barristers & Solicitors, Lautoka.