IN THE HIGH COURT OF FIJI
AT SUVA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 005 OF 2021

BETWEEN : **HANNAN WANG**

Appellant

AND : **STATE**

Respondent

Counsel : **Mr D Sharma for the appellant**
Dr A Jack for the State

Date of Hearing : **28 January 2022**
Date of Judgment : **11 February 2022**

JUDGMENT

[1] This is an appeal against sentence only.

[2] The appellant was jointly charged with another on two counts of money laundering. A third accused was charged alone with money laundering on a third count. All three were tried and acquitted of the charges in the Magistrates' Court.

[3] The Director of Public Prosecutions appealed against the judgment of acquittal of the appellant and his co-accused on counts one and two, but the appeal could only proceed against the appellant as his co-accused had left the jurisdiction immediately after the judgment of acquittal.

[4] On 19 February 2021, the High Court allowed the Director's appeal, entered a judgment of conviction on count one against the appellant and remitted the case

to the trial magistrate to sentence the appellant (*State v Wang* Criminal Appeal No HAA30 of 2019).

[5] The appellant appealed against the High Court's judgment of conviction to the Court of Appeal but that appeal was dismissed pursuant to section 35 (2) of the Court of Appeal Act by a single justice of appeal on 17 September 2021 (*Wang v State* Criminal Appeal No AAU47 of 2021).

[6] While the appellant was pursuing his appeal in the Court of Appeal, on 9 April 2021, the learned magistrate sentenced him to 6 years imprisonment. Since the appellant had spent 2 months in custody on remand, he was ordered to serve the remaining term of 5 years and 10 months with a non-parole period of 4 years.

[7] On 28 September 2021, the appellant filed an appeal against his sentence. The appeal is late. However, I grant an enlargement of time because the appeal period in this case fell within the Covid-19 pandemic lockdown.

[8] The grounds of appeal are as follows:

1. The Learned Magistrate erred in fact and in law in not applying and discussing following principles of law under section 4 (1) (d), 4 (2) (c) , (d) (e), of the Sentencing and Penalties Act 2009 when imposing a total sentence of 6 years imprisonment to the Appellant.

2. The Learned Magistrate erred in fact and in law in not providing any reasoning as to why she had set an initial starting sentencing point of 5 years imprisonment.

3. The Learned Magistrate erred in fact and in law in not setting out the factors she had considered in setting an initial starting sentencing point of 5 years imprisonment especially in light of the fact that the total amount involved in the Appellant's case was $10,000.00.

4. The Learned Magistrate erred in fact and in law in not applying or discussing the criteria set out in section 15(3) of the Sentencing and Penalties Act 2009.

5. The Learned Magistrate erred in fact and in law in not setting out any reasoning why she had only granted a discount of 3 years for twelve genuine mitigating factors set out in the paragraph 15 of the sentence.

6. The Learned Magistrate erred in fact and in law in not setting out any reasoning why she had added 4 years for three aggravating factors contained in paragraph 13 of the Sentence.

7. The Learned Magistrate erred in fact and in law in allowing extraneous or irrelevant matters to guide or affect her such factors being.

    i. Paragraph 3: That the Appellant had withdrawn cash to the total amount of $31,800.00 when in fact the Appellant had only encashed two cheques totaling $10,000.00
    ii. Paragraph 13 (a): That the Appellant had received a high gain of $31,800.00 when the facts were that the Appellant worked for a Company which had received the $10,000.00 he was told to encash.
    iii. Paragraph 13 (b): that the Appellant had targeted foreign credit cards because they were not present in Fiji to lodge a complaint with the Bank when the facts were clear that the appellant had nothing to do with skimming credit cards. That activity was done by individuals who had absconded from Fiji.
    iv. Paragraph 13 (c):That the Appellant was somehow involved in a high degree of planning and sophistication of the offence.

8. That the Learned Magistrate erred in fact and in law by mistaking facts and stating that the Appellant had withdrawn cash to the total amount of $31,800.00 when in fact the Appellant had only encashed two cheques totaling $10,000.00.

9. That the Learned Magistrate erred in fact and in law in failing to take into account the following relevant consideration i.e.

    i. That the Appellant was only an employee of an unrelated company from whom the Money Laundering Company [Chunxiao Tour Company] had purchased goods and paid by way of cash cheques; and

    ii. That the Appellant had acted on instructions of his Employer when encashing the two cheques for $10,000.00; and

    iii. The monies were not used for the Appellant's personal benefit but for the benefit of his employer

    iv. There was no personal gain for the Appellant.

    v. The Appellant had no role or part in the credit card skimming fraud.

[9] Sentencing involves exercise of discretion. An appellate court will only disturb the sentence if there is an error in the exercise of the discretion by the sentencing court. As the Court of Appeal said in *Bae v State* [1999] FJCA 21; AAU0015u.98s (26 February 1999):

> It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (*House v The King* [1936] HCA 40; (1936) 55 CLR 499).

Purpose of punishment

[10] Ground one alleges that the learned magistrate did not apply and discuss the principles of law under sections 4(1) (d), 4(2) (c), (d) (e) of the Sentencing and Penalties Act when imposing a total sentence of 6 years imprisonment.

[11] Section 4(1) of the Sentencing and Penalties Acts states:

> The only purposes for which sentencing may be imposed by a court are —
> *(a)* to punish offenders to an extent and in a manner which is just in all the circumstances;
> *(b)* to protect the community from offenders;
> *(c)* to deter offenders or other persons from committing offences of the same or similar nature;
> *(d)* to establish conditions so that rehabilitation of offenders may be promoted or facilitated;
> *(e)* to signify that the court and the community denounce the commission of such offences; or
> *(f)* any combination of these purposes.

[12] Section 4(2) of the Sentencing and Penalties Acts states:

> In sentencing offenders a court must have regard to —
> *(a)* the maximum penalty prescribed for the offence;
> *(b)* current sentencing practice and the terms of any applicable guideline judgment;
> *(c)* the nature and gravity of the particular offence;
> *(d)* the offender's culpability and degree of responsibility for the offence;
> *(e)* the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;
> *(f)* whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;

(g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;

(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;

(i) the offender's previous character;

(j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and

(k) any matter stated in this Act as being grounds for applying a particular sentencing option.

[13] The main contention of the appellant is that the learned magistrate erred in principle by not giving effect to the principle of rehabilitation as the primary purpose of sentence after considering the seriousness and circumstances of the offender including the role of the appellant.

[14] There is a duty on the sentencing court to explain the sentence to an offender and the public. What is required of the court is an application of the relevant law to the facts of the case. A brief discussion of the relevant law will suffice and there is no requirement to provide a detailed exposition of the sentencing principles.

[15] In her sentencing remarks, the learned magistrate expressly stated that she had 'considered the principles of sentencing in sections 4(1), 4(2), 15 and 16 of the Sentencing and Penalties Act'. The learned magistrate rejected the appellant's submission not to record conviction and to impose a fine, saying:

> ...considering the serious nature of the offence and the circumstances of offending, a custodial term is inevitable.
>
> People who get themselves involved in money laundering must face the consequences of their actions. (see, para [20] – [21] of the sentencing remarks).

[16] At this stage it is necessary to refer to the factual foundation for the appellant's conviction as outlined by the learned High Court judge in paragraphs [55]-[56] of the appeal judgment:

> 56. Accordingly, the Prosecution had successfully proven beyond reasonable doubt that the Respondent and the Second Accused had cashed $31800 from the bank account of CTC bearing the account number 12339449 on three separate occasions using three cheques drawn from the said bank account on the 18th and 22nd of June 2015. Furthermore, the Prosecution had successfully proven beyond reasonable doubt that the said amount of $31800 were proceeds of crimes as defined under section 3 and 4(1A) of the Proceeds of Crimes Act. In addition to that, the Prosecution had successfully proven beyond reasonable doubt that the Respondent and the Second Accused knew or ought reasonably to have known that the money they had withdrawn had been derived, directly or indirectly, from some form of unlawful activities, thus proving beyond reasonable doubt that the Respondent and the Second Accused are guilty of the first count of money laundering.
>
> 57. I am mindful of the fact that the particulars of the offence of the first count states that the Respondent and the Second Accused had been involved in transactions to a total of $675,774.98. However, the Prosecution has established that they had actually been involved in transactions worth $31800. The change of the figures does not exonerate the Respondent, and the Second Accused from their above stated criminal liability in committing the offence of money laundering. (underlining mine)

[17] In her sentencing remarks, the learned magistrate referred to the facts upon which the appellant was convicted as follows:

> The High Court found you guilty and convicted you for being involved in transactions worth $31,800.00

> The brief facts of the case as revealed by the evidence is that you between 9th June, 2015 and 24th June 2015 had withdrawn cash to the total amount of $31,800.00 from ANZ Bank account number 12339449 belonging to Chunxiao Tour Company (CTC). The funds in CTC account were derived from unauthorized transfers from several foreign credit cards. There is evidence that EFTOPS machines installed at the CTC office at 160 Waimanu Road, Suva were used to illegally skimmed foreign cards.

[18] It is clear that the learned magistrate considered the seriousness and circumstances of the offending and then decided to give effect to the principle of deterrence over the principle of rehabilitation. The appellant was a principal offender together with his co-accused. Both were equally complicit in laundering $31,800 using the bank account of CTC. That is how the learned High Court judge who convicted the appellant on appeal construed the charge in order to convict the appellant.

[19] In her sentencing remarks, the learned magistrate cited the case of *State v Stephen* [2012] FJHC 1010; HAC088.2010 (12 April 2012) to adopt the principles enunciated by the Hong Kong Court of Appeal in KSAR v *Javid Kamran* (CACC 400/2004):

> Money laundering is a very serious offence as it is an attempt to legitimise proceeds from criminal activities. Serious criminal offences are very often motivated by financial gains and those who assist criminals in laundering money indirectly encourage them in their criminal activities. Successful deterrents against money laundering could be effective measures against crime.

[20] The offence of money laundering is indeed serious. The maximum penalty prescribed for the offence is 20 years imprisonment. The appellant elected to be tried. That was his right. But by doing that he also deprived himself of any credit for an expression of remorse. It is wrong in principle to give weight to rehabilitation in a case where an offender expresses little remorse for a serious crime. Therefore,

the contention that the learned magistrate did not adequately consider the relevant laws under sections 4(1) and 4(2) of the Sentencing and Penalties Act is without merits.

Starting Point

[21] Grounds two and three were argued together. The appellant's contention is that the learned magistrate did not explain why she picked 5 years imprisonment as her starting point in light of the fact that the total amount involved in his case was $10,000.00. The appellant's contention that he was only involved in transactions worth $10,000.00 flies in the face of the express finding by the High Court on appeal that the appellant was guilty of laundering $31,800.00 - a finding that the appellant was unsuccessful to set aside when he appealed to the Court of Appeal. The learned magistrate was bound by the findings of the High Court.

[22] The learned magistrate referred to a number of cases of money laundering including the case of Stephen (supra) where the High Court had set guidelines for sentencing. The learned magistrate was bound to consider those guidelines by virtue of section 4(2) (b) of the Sentencing and Penalties Act.

[23] The learned magistrate considered the lower end of the recommended tariff by picking 5 years imprisonment as a starting point. She gave adequate explanation for the term she had picked for a starting point before adjusting the sentence for aggravating and mitigating factors. There is no suggestion that she double counted the same factors twice to punish the appellant. Grounds two and three lack merits.

Non-custodial options

[24] Ground four alleges that the learned magistrate did not consider other non-custodial options available under the law or a lesser penalty for the appellant.

[25] The learned magistrate took into account the objective seriousness of the offence and the applicable guidelines set by the High Court to impose a term of 6 years imprisonment on the appellant. The sentence is within the acceptable range for the offence of money laundering. The learned magistrate expressly rejected the

non-custodial options saying that a custodial term was inevitable due to the serious nature of the offence and the circumstances of the offending.

Discount for mitigating factors

[26] Ground five alleges that the learned magistrate did not explain why she only gave 3 years discount for 12 genuine mitigating factors set out in paragraph 15 of the sentence.

[27] The appellant is fortunate to receive a discount of 3 years for mitigating factors. The appellant's personal and family circumstances carried little mitigating value. His claim to have cooperated with the police investigation was based on thin grounds. He expressed no remorse for his crime to deserve credit. The only genuine mitigation was that the appellant was a first time offender. The charge was hanging over him for four years since 2016. Fortunately he was on bail during that period. However, some adjustment could have been made to sentence to reflect the post-charge delay of 4 years. The discount of 3 years adequately cover the mitigating factors and the post-charge delay.

Aggravating factors

[28] Grounds six and seven were argued together.

[29] The complaint is that the learned magistrate did not explain why she had added 4 years for three aggravating factors set out in paragraph 13 of the sentence. This complaint is misconceived. There is a duty to give reasons for the sentence and not for every remark made by the magistrate in giving reasons. How much weight is attached to a relevant factor is a matter of discretion for the sentencing court. Unless an appellant can show that the sentencing court gave undue weight to the aggravating factors to enhance the sentence, the sentencing discretion will not be disturbed by an appellate court.

[30] The appellant submits that the learned magistrate considered extraneous or irrelevant matters as aggravating factors.

[31] The following were regarded as aggravating factors by the learned magistrate:

(a) The high gain you received ($31,800.00)
(b) You targeted foreign credit cards because they are not present in Fiji to lodge a complaint with the Banks; and
(c) The high degree of planning and sophistication of the offence.

[32] The appellant's claim that he received only $10,000.00 and not $31,800.00 is misconceived. He was found guilty of laundering $31,800.00 together with his co-accused. The High Court found the appellant and his co-accused "were involved in and knew the activities of CTC and JTC" (see, para [54] Cr App No HAA30 of 2019).

[33] It is clear that the High Court found that the appellant and his co-accused knew or ought reasonably to have known that the money in CTC's bank account had been derived from the said fraudulent credit card skimming. This appeal is not a proper forum to question or review those findings of the High Court.

[34] The learned magistrate was bound to adopt the findings of the High Court that the appellant and his co-accused knew the activities of CTC and JTC. It was further open on the evidence for the learned magistrate to infer that the appellant knew that the money was derived from a serious predicate offence and that a high degree of planning was involved to launder the money.

[35] As the HK Court of Appeal in *Xu Xia-Li* (CACC 395/2003) said:

> By the nature of the offence itself, in our judgment, the nature of the indictable offence from which the money was derived should be of no particular significance in sentencing, save that if the defendant knew that the money was derived from very serious crimes, it would be an aggravating feature to be taken into account in sentencing.

[36] Grounds six and seven are without merits.

Whether facts were mistaken?

[37] Ground eight alleges that the learned magistrate mistook the facts by stating that the appellant had withdrawn cash to the total amount of $31,800.00 when in fact the appellant had only encashed two cheques totaling $10,000.00. This ground is misconceived because the appellant was convicted of laundering $31,800.00 with another by the High Court.

Whether relevant considerations ignored?

[38] Under this final ground, the appellant submits that the learned magistrate failed to take into consideration certain relevant facts. I disagree. The facts alluded to by the appellant as relevant considerations were not the facts upon which the appellant was convicted by the High Court. This appeal is not a proper forum for review of the facts upon which the appellant was convicted for money laundering. It is clear that the appellant was sentenced on the facts that formed the basis for his conviction. The ground lacks merit.

Result

[39] The appeal against sentence is dismissed.

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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State

R Patel Lawyers for the Appellant