

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.**
Judgment : **16 August, 2019.**
Sentence : **31 October 2019.**

SENTENCE

1. In a judgment delivered on 16 August 2019, the court found you guilty and convicted you on the following two counts in the following information:

“First Count

Statement of Offence

OBTAINING PROPERTY BY DECEPTION: *Contrary to section 317 (1) of the Crimes Act of 2009.*

Particulars of Offence

AIDONG ZHANG between the 1st day of June 2014 and the 30th day of September 2014 at Suva, in the Central Division, by deception that a

property at 148 Waimanu Road was being purchased for \$5,500,000.00, dishonestly obtained \$1,240,740.74 belonging to Yong Chen with the intention of permanently depriving the said Yong Chen of the \$1,240,740.74.

“Second Count

Statement of Offence

MONEY LAUNDERING: Contrary to section 69 (2) (a) and (3) (a) of the Proceeds Of Crime Act 1997.

Particulars of Offence

AIDONG ZHANG between the 3rd day of September 2014 and the 5th day of January 2016 at Suva, in the Central Division, engaged directly or indirectly in transactions involving ANZ Bank Account 11779946 to the total sum of \$1,240,740.74 that are the proceeds of crime knowing or ought reasonably to have known that the money was derived directly or indirectly from some form of unlawful activity”.

2. The brief facts of the case were as follows: The complainant (PW1) was a businessman from China. At the date of the trial, he was 65 years old. He was married with a daughter. The accused (DW1), who was also from China, was a businessman also, and had made Fiji his home after settling here since 1991. At the date of the trial, he was 56 years old. He was married with two daughters, who are university students in Australia. As businessmen, it was somewhat not unusual for the two to engage themselves in activities that will earn them a reasonable amount of profit.

3. The two were introduced to each other in May 2012. Mr. Shi Yuhu (SY), a close friend of PW1 since 2002, brought the two together. PW1 was made to understand that DW1 was a good businessman and had the ability to make a \$10 million profit in a year, thus was an excellent business partner. PW1 and DW1 thus became business partners. As partners, they agreed to the purchase of a property in Fiji, that is, 148 Waimanu Road. It was agreed between the two that DW1 would do all that was necessary in Fiji to ensure the purchase of the above property. Between August and December 2014, DW1 did everything that was necessary to purchase the above property. By 4 December 2014, Bairain Group (Fiji)

Limited (BGL), a company owned by PW1's family, owned 148 Waimanu Road property. DW1 had a 10% share control of BGL.

4. In 2015, PW1 came to know that DW1 deceived him. DW1 misrepresented to PW1 that the purchase price of the property was 5.5 million Fijian dollars when in fact it was 3.3 million Fijian dollars. He also misrepresented to PW1 that the deposit for the purchase of the property was 1.5 million Fijian dollars, when in fact it was \$330,000 Fijian dollars. As a result of the above misrepresentations, PW1 sent DW1 \$1,240,740.74 as his share of the purported deposit. DW1 did not pay the same as the deposit, but used it on himself. PW1 sent the above money to ANZ Bank Account 11779946, which DW1 controlled. PW1 reported DW1 to the police in January 2016. The police investigated the matter. On 16 February 2017, the accused was charged with the two counts mentioned in paragraph 1 hereof. After an 18 days trial in the Suva High Court, he was found guilty and convicted on the two counts.
5. "Obtaining property by deception", contrary to section 317 (1) of the Crimes Act 2009, carried a maximum sentence of 10 years imprisonment (count no. 1). In **State v John Miller**, Criminal Appeal No. 29 of 2013S, High Court, Suva, His Lordship Mr. Justice P.K. Madigan, recognized that there were two deception offences in the Crimes Act 2009, that is, "obtaining property by deception" (section 317) and "obtaining a financial advantage by deception" (section 318). On the tariff for the two offences, His Lordship said:

"The penalty for both offences is the same, that is ten years. Under the old Penal Code the maximum for the offence was a term of 5 years and the tariff was between 18 months to three years. As this Court stated in Atil Sharma HAC122.2010, given that the penalty has doubled, a new tariff should be set as being between 2 years and 5 years with the minimum being reserved for minor spontaneous cases with little deception.

From two years to five years then is the new tariff band for these two offences (financial advantage and property) and any well planned and sophisticated deception will attract the higher point of the band or even more if that court gives good reason. It will of course be a serious aggravating feature if the person being defrauded is unsophisticated, naive or in any other way socially disadvantaged".

6. “Money Laundering”, contrary to section 69 (2) (a) and (3) (a) of the Proceeds of Crimes Act 1997, carried a maximum penalty of a fine not exceeding \$120,000 or imprisonment for a term not exceeding 20 years, or both (count no.2). In State v Josefa Saqanavere and Others, Criminal Case No., HAC 251 of 2013S, High Court, Suva, I said the following: “...**The public through their representative in Parliament, view the offence of “money laundering” seriously, and had prescribed it a maximum penalty of 20 years imprisonment, or a fine not exceeding \$120,000, or both (see section 69 (2)(a) of the Proceeds of Crime Act 1997). The tariff for “money laundering” is now set at 5 to 12 years imprisonment: see State v Robin Surya Subha Shyam, Criminal Case No. HAC 146 of 2010S; State v Monika Monita Arora, Criminal Case No. HAC 125 of 2007S, and State v Doreen Singh, Criminal Case No. HAC 086 of 2009S – all Suva High Court authorities. Of course, the actual sentence will depend on the mitigating and aggravating factors...**”

7. The aggravating factors in this case were as follows:

(i) **Serious Breach of Trust:** It was accepted in this case that you and the complainant, Mr. Yong Chen, became business partners from the 21 June 2014 when you and his family, including a Mr. SY, signed the Joint Operation Agreement (JOA). The complainant and his family, entrusted you, through the JOA to form a company in Fiji and through the same, purchase properties. In compliance with the JOA, you formed the Bairain Group (Fiji) Limited (BGL), which was 80% owned by the complainant and his family. The total capital of the company was to be 6 million Fijian dollars. Through BGL, you purchased 148 Waimanu property for 3.3 million Fijian dollars. Everyone was happy with the purchase price until 2015, when PW1 came to know you were deceiving him. You misrepresented to PW1 that the purchase price for the property was 5.5 million Fijian dollars, when it was in fact 3.3 million dollars. You also misrepresented to him that the deposit for the same was 1.5 million Fijian dollars, when it was in fact \$330,000. As a result of the above, PW1 was deceived into sending you \$1,240,740.74, as his family’s share of the

purported 1.5 million Fijian dollars deposit. You did not use the same as the total deposit, but used the same for your own use. You had totally breached the trust that Mr. Chen placed in you. You deceived him by telling him various lies. You said it was your “business secret”, but it was nothing but a bunch of lies. Mr. Chen and his family trusted you, but you misplaced the trust they put in you. As business partners, you should have been upfront and be honest with them. But you chose by your own deeds, to deceive them. You must understand that you will have to be punished for the offences you had committed against the complainant (PW1).

- (ii) **Well planned and executed fraud on complainant.** Through Mr. Shi Yuhu (SY), you were introduced to the complainant in May 2012. SY was a good friend of the complainant since 2002. You were held out by SY as a very successful businessman in Fiji, with the ability to make millions in profit. You cultivated the complainant’s trust in you ever since 21 June 2014, when the Joint Operation Agreement (JOA) was signed. Then you began your fraudulent acts against him, regarding the purchase of 148 Waimanu Road property. You kept the truth away from him. You called it “your business secrets”. You managed to get \$1,240,740.74 and used it on yourself, without telling him the truth. It was a well planned and executed fraud on Mr. Chen.
- (iii) Through your offendings, you had caused Mr. Chen and his family untold miseries. Mr. Chen’s health had been adversely affected. The family had experienced turmoil as a result of your offendings. Money had to be expended by them to see that their complaint was properly processed through the criminal justice system. You had caused them unnecessary stress and miseries.

8. The mitigating factors were as follows:

- (i) At the age of 56 years old, this is your first offending;
- (ii) After trial, you had accepted that you were wrong in keeping “a business secret” from the complainant, and unlawfully obtaining \$1,240,740.74, as a purported deposit for 148 Waimanu Road property. In my view, you had by deed, shown true

remorse, by paying into court 1 million Fijian dollars as restitution to the complainant, on 27 September 2019. I do not take this deed as a way to buy yourself out of a prison sentence. In my view, it was a true expression of remorse, given what you said in Defence Exhibit No. 6, which was not challenged by the State. I note you had paid \$163,863.67 as income tax to the Inland Revenue Department for tax on the \$1,240,740.74 purported deposit received by you. I note you had also refunded \$40,740.74 to the complainant. You had also refunded \$152,000 to BGL. Your actions abovementioned, in my view, appear to show that you are truly remorseful for what you did to the complainant.

- (iii) You had been remanded in custody for a total of 78 days, while awaiting trial and sentencing;
- (iv) As submitted by your counsel in paragraph 3.3 of his written submission, you are a sickly person.
- (v) You are a businessman operating various companies, and your counsel submitted and I accept that 22 staff employees depend on you for their livelihood.

9. I consider count no.2 (money laundering) as more serious than count no. 1 (obtaining property by deception) because it carried a maximum sentence of 20 years imprisonment, as opposed to 10 years imprisonment for count no. 1. Consequently, I have read and carefully considered the following ten money laundering cases to decide what would be the appropriate sentence in this case: **State v Sinha**, HAC 46 of 2008, High Court, Suva; **State v Prasad & Others**, HAC 024 of 2010, High Court, Lautoka; **State v Kapoor**, HAC 042 of 2009, High Court, Suva; **State v Shyam**, HAC 146 of 2010, High Court, Suva; **State v Singh**, HAC 086 of 2009S, High Court, Suva; **State v Singh**, HAC 28 of 2012, High Court, Lautoka; **State v Saqanavere & Others**, HAC 251 of 2013S, High Court, Suva; **State v Vakarewa**, HAC 250 of 2014, High Court, Suva; **State v Raj & Sorby**, HAC 185 of 2017S, High Court, Suva, and **State v Khera**, HAC 195 of 2012S, High Court, Suva.

10. The money laundered in the above cases ranged from the highest of \$936,957 (**State v Prasad**) to the lowest of \$44,611 (**State v Khera**). All the above cases were given prison terms from the highest of 13 years imprisonment (**State v Saqanavere& Others**) to the lowest of 2 years imprisonment (**State v Sinha**). In only two of the cases were some recovery made. In **State v Sinha** (supra), out of a total of \$272,219.57 laundered, only \$85,000 was recovered when the accused's bank account was frozen by the bank. In **State v Singh**, HAC 28 of 2012, the accused laundered \$47,734.58 from the Fiji Island Revenue & Customs Authority, but he couldn't use the same because his bank account was frozen by the bank. In none of the above cases, did the accused make full restitution to the complainant voluntarily. In this case, given the one million Fijian dollars the accused had paid into court on 27 September 2019 and the payments he made as itemized in Defence Exhibit No. 6, which was not challenged by the State, the accused had, in effect, on the facts of this case, made full restitution to the complainant, Mr. Yong Chen.
11. In addition to the above, the accused through his actions, at times unlawful, had effected the sale of the property at 148 Waimanu Road to BGL, a company in which the complainant's family had 80% control of the total shares. Furthermore, the accused had given up his Directorship of BGL, and thus had no further controlling interest in the company.
12. For count no.1 (obtaining property by deception), I start with a sentence of 4 years imprisonment. I add another 4 year for the aggravating factors, making a total of 8 years imprisonment. I deduct 5 years for the mitigating factors, leaving a balance of 3 years imprisonment. On count no.1, I sentence you to 3 years imprisonment.
13. For count no.2 (money laundering), I start with a sentence of 6 years imprisonment. I add another 6 years for the aggravating factors, making a total of 12 years imprisonment. I deduct 9 years for the mitigating factors, leaving a balance of 3 years imprisonment. I also fine you \$100,000. In summary for Count no.2, you are sentenced 3 years imprisonment,

and to pay a fine of \$100,000, to be paid in 4 weeks, in default, you are to serve 6 months imprisonment.

14. Because of the totality principle of sentencing, I make the above prison sentences concurrent to each other, making a final total sentence of 3 years imprisonment.

15. Should I suspend the above 3 years prison sentence? As I had stated in paragraph 9 hereof, count no.2 is more serious than count no.1. I had therefore carefully read and considered the 10 money laundering cases mentioned therein to provide guidance in sentencing today. In all the cases, none of the accuseds made full restitution to the complainants in the money they had stolen from them. In most of the cases, the money laundered by the accused, were not recovered from them, and as a result, most of the custodial sentences were not suspended. This case is unique in that, the accused, after the trial and after the judgment, had accepted that he was wrong and voluntarily agreed to make full restitution to the complainant. He had paid one million Fijian dollars into Court on 27 September, 2019 as restitution to the complainant. He had also indicated, through his Counsel, to give up his directorship and 10% share in Bairain Group (Fiji) Limited (BGL), to the complainant, thereby making the complainant and his family 90% shareholders of BGL. In my view, the accused's above attitude ought to be encouraged among accuseds who had unlawfully laundered money from others. That attitude promotes the interest of justice and must always be encouraged by the Courts. As a result of the above, I suspend the Accused's 3 years prison sentence for 18 months, with effect from today.

16. The summary of your sentence are as follows:
 - (i). Count No.1 : Obtaining Property by Deception - 3 years imprisonment

 - (ii). Count No.2 : Money Laundering - 3 years imprisonment

The above sentences are made concurrent to each other, making a final total sentence of 3 years imprisonment, and suspended for 18 months, effective from today. Meaning of suspended sentence explained to the accused.

- (iii). In addition to the above , on count no.2, the accused is also fined \$100,000, to be paid in 4 weeks, in default, you are to serve 6 months imprisonment.
 - (iv). Pursuant to Section 49(1) (a) of the Sentencing and Penalties Act 2009, the following restitution orders are made:
 - (a) The accused's directorship of Bairain Group (Fiji)Limited(BGL) is terminated forthwith, and the necessary administrative actions to be done to effect the above;
 - (b) Likewise, the accused's 10% shares in BGL is terminated forthwith, and the same transferred to the Complainant forthwith, and the necessary administrative actions to be done to effect the above;
 - (c) The one million Fijian dollars the accused paid into Court on 27 September, 2019 is to be paid to the complainant as soon as possible, as part restitution of the \$1,240,740.74 he stole from the complainant pursuant to count no.1 and 2.
17. Pursuant to Section 4(1) of the Sentencing and Penalties Act 2009, the above sentences are designed to punish you in a manner that is just in all the circumstances, to protect the community, to deter other would-be offenders, to establish conditions for your rehabilitation and to signify that the Court and community denounce what you did to the complainant between 1 June 2014 and 5 January 2016 at Suva in the Central Division.
18. You have 30 days to appeal to the Court of Appeal.




Salesi Temo
JUDGE

Solicitor for the State : Office of the Director of Public Prosecution, Suva.
Solicitor for the Accused: Iqbal Khan & Associates, Barristers & Solicitors, Lautoka.