IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO : CAV 17 of 2015
[Court of Appeal No. AAU 11 of 2011]

BETWEEN	:	**VILITATI VASUCA**
		Petitioner
AND	:	**THE STATE**
		Respondent
Coram	:	**The Hon. Chief Justice Anthony Gates, President of the Supreme Court**
		The Hon. Justice Saleem Marsoof, Justice of the Supreme Court
		The Hon. Justice Priyasath Dep, Justice of the Supreme Court
Counsel	:	**Mr. S. Waqainabete for the Petitioner**
		Ms. S. Puamau for the Respondent
Date of Hearing	:	**9 October 2015**
Date of Judgment	:	**22 October 2015**

JUDGMENT

Hon. Anthony Gates, P

[1] I have read in draft the judgment of Marsoof JA. I agree with the orders proposed and with the reasoning for such orders.

Hon. Saleem Marsoof, JA

[2] The petitioner seeks special leave to appeal from the decision of the Court of Appeal dated 28th May 2015 by which it refused leave to the petitioner to adduce fresh evidence and dismissed the petitioner's appeal against conviction and sentence.

[3] The petitioner's letter dated 2nd June 2015 captioned "application for appeal against conviction", sets out two grounds of appeal against conviction, namely –

(a) the learned trial judge erred in law and fact in proceeding with the trial with the assessors when it was mentioned by one of the prosecution witnesses that the petitioner was a wanted man at the Lautoka Police Station; and

(b) the learned trial judge erred in wrongfully admitting the petitioner's confession.

[4] Although towards the tail end of the said letter dated 2nd June 2015, the petitioner had stated that he would file further submissions with respect to his sentence appeal, the petitioner has not filed any appeal on the sentence, and learned Counsel for the petitioner confined his submissions at the hearing before this Court to the aforesaid grounds against conviction.

[5] Before considering the aforesaid grounds urged by the petitioner, it might be useful to outline the background facts of this case.

Background Facts

[6] The petitioner was charged before the High Court of Fiji at Lautoka with two counts of robbery with violence contrary to sections 293(1)(b) of the Penal Code, Cap 17.

[7] Particulars of the first of the aforesaid counts was that on 7th February 2009, the petitioner with others robbed Hemant Kumar cash $100, a Hewlett Packard laptop valued at $2500, a Nokia mobile phone valued at $240 all to the total value of $2,840 at Lautoka in the Western Division, and at the time of such robbery did use personal violence on the said Hemant Kumar.

[8] The second count was that on 7th February 2009, the petitioner with others robbed Pratima Kumar of a 22 carat gold chain valued at $220.00, a ladies gold wrist watch valued at $90, a 22 carat mangal sutra valued at $2000.00, a 22 carat ladies ring valued at $90.00 all to the total value of $2400.00 at Lautoka in the Western Division, and at the time of such robbery did use personal violence on the said Pratima Kumar.

[9] It was the contention of the prosecution that on 7thFebruary 2009, the petitioner and his two accomplices, who were armed with knives, entered the domestic premises of the Kumar family at Saweni, Lautoka, at mid night while the members of the family were asleep, and that while the petitioner waited outside as a lookout, the accomplices entered the bedroom of Hemant Kumar, pinned him to the bed while his legs were stomped on and a cane knife was placed against his stomach and demanded money and gold. One of them slapped Hemant Kumar's wife, Pratima Kumar and another booted her on her back.

[10] According to the prosecution, the intruders then entered the next door room occupied by Hemant Kumar's niece and his elderly and sickly mother, beat the latter and demanded gold from her, but could not take anything from her as they had to make a hasty retreat when a nephew of Hemant Kumar shouted that the police were on their way. The petitioner, who had been on the look-out, then entered Mrs. Kumar's room, saying in Fijian language "be fast Police coming" and grabbed the gold chain, ring, wrist watch, laptop, mobile and cash and fled the premises with his accomplices.

[11] The petitioner was arrested on 16th May 2009, more than three months after the incident of robbery with violence, in connection with an altogether unrelated matter, and after being identified as a suspect in the instant case was caution interviewed on 18th May 2009 and his charge statement recorded on the very next day.

[12] Having been subsequently charged before the High Court of Fiji at Lautoka with two counts of robbery with violence contrary to sections 293(1)(b) of the Penal Code, Cap 17, the petitioner was after trial, convicted on both counts, and sentenced with respect to these counts, to an aggregate of 14 years' imprisonment with a non-parole period of 11 years.

[13] The aforesaid convictions and sentence were affirmed by the Court of Appeal.

Application for Special Leave to Appeal

[14] The petitioner seeks to invoke the appellate jurisdiction of this Court in terms of section 98(3)(b) of the Constitution of the Republic of Fiji which confers on the

Supreme Court the exclusive jurisdiction, "subject to such requirements as prescribed by law", to hear and determine appeals from all final judgments of the Court of Appeal. It is noteworthy that section 7(2) of the Supreme Court Act No. 14 of 1998, sets out stringent criteria for the grant of special leave to appeal in the following manner:-

> "In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless –
> (a) a question of general legal importance is involved;
> (b) a substantial question of principle affecting the administration of criminal justice is involved; or
> (c) substantial and grave injustice could otherwise occur."

[15] It is therefore necessary to examine whether the grounds urged, and submissions made, by or on behalf of the petitioner are of sufficient substance to cross the stringent threshold laid down in Section 7(2) of the Supreme Court Act for the grant of special leave to appeal.

[16] It is convenient to deal with the second ground of appeal urged by the petitioner against his convictions before getting to the first. The second ground of appeal is that the learned trial judge erred in wrongfully admitting the petitioner's confession.

[17] As the Court of Appeal noted in paragraph 2 of the impugned judgment, the basis for the petitioner's convictions was his confession contained in his caution interview dated 18th May 2008. In that interview, which was conducted by Sgt. Tuitati and was recorded in writing and signed by the petitioner, the petitioner admitted participating in the alleged robbery.

[18] The petitioner was represented by counsel in the High Court, when the petitioner challenged the admissibility of the petitioner's confession on the grounds that it was obtained by force, duress, pressure and verbal abuse, that he was handcuffed, blindfolded and beaten, threatened with the application of chillies to his genitals, and that the statements were not read back to him and he was forced to sign.

[19] At the *voir dire* hearing to determine the admissibility of the petitioner's confession, the prosecution called evidence from four witnesses, and the petitioner elected to remain silent and not to call any evidence. The trial judge after assessing all the evidence was satisfied beyond reasonable doubt that the petitioner's confession was made voluntarily, and ruled the petitioner's caution interview was admissible in evidence. The Court of Appeal had no reasons to differ from this finding of the learned trial judge.

[20] Mr. S. Waqainabete, who appeared for the petitioner, submitted at the hearing of this application for special leave to appeal that the petitioner had not been advised as regards his right to have legal counsel when his charge statement was recorded on 19th May 2009. It is clear from the record that the petitioner's charge statement was recorded by Cpl. Manoa on 19th May 2009, one day after his caution interview was conducted by Sgt. Tuitati on 18th May 2009, and that the petitioner's right to legal counsel was explained to him at the very commencement of the caution interview by Sgt. Tuitati. The petitioner at that stage declined legal counsel including the assistance of a lawyer from Legal Aid.

[21] Given that the petitioner's charge statement added nothing of significance to his confession made in the course of his caution interview, except for clarifying that the person he had described as "Mali" in his caution interview was the petitioner's co-accused Lemeki Vakausausa, it is difficult to see how any prejudice was caused to the petitioner due to the failure on the part of Cpl. Manoa to explain to the petitioner his right to legal counsel prior to recording his caution statement. Even if the petitioner had been prejudiced in any manner, the point could have been raised in the *voire dire* proceedings or on appeal to the Court of Appeal, without raising it for the first time before this Court.

[22] It is manifest from the language used in section 7(2) of the Supreme Court Act No. 14 of 1998 that special leave should not be granted as a matter of course. As this Court was constrained to observe in *Aminiasi Katonivualiku v. The State* [2003] FJSC 17; CAV0001.1999 (17 April 2003) at page 3, "the Supreme Court is not a Court of criminal appeal or general review nor is there an appeal to the Court as a matter of right".

[23] In granting special leave to appeal in criminal cases, this Court is necessarily confined within the legal parameters of section 7(2) of the Supreme Court Act, which are demarcated by the concepts of "general legal importance", "substantial question of principle" and "substantial and grave injustice", which were amply illustrated in the following *dictum* of Lord Sumner in *Ibrahim v Rex* [1914] A.C. 599 at page 614:-

> "Leave to appeal is not granted 'except where some clear departure from the requirements of justice' exists: *Riel v. Reg* (1885) 10 App. Case. 675; nor unless by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done': In *re Abraham Mallory Dittet* (1887) 12 App. Case. 459. It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing: *Riel's* case *supra; ex parte Deeming* [1982] A.C. 422. The Board cannot give special leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it."

[24] It is noteworthy that the above quoted *dictum* of Lord Sumner was adopted as the *locus classicus* on the matter when dealing with applications for leave to appeal to the Judicial Committee of the Privy Council in decisions such as *Seneviratne v. The King* [1936] 3 All ER 36, AIR [1936] P.C. 289, *Pritam Singh v. The State* AIR [1950] SC 169 and *Badry v. The Director of Public Prosecutions* [1982] UKPC 1. The same principles have been incorporated into section 7(2) of the Supreme Court Act.

[25] I am clearly of the opinions that the second ground of appeal raised on behalf of the petitioner does not satisfy the threshold criteria set out in section 7(2) of the Supreme Court Act as it does not raise any question of general legal importance, substantial question of principle or substantial and grave injustice. In the result, special leave to appeal on the basis of this ground, is refused.

[26] I now turn to the first ground of appeal urged by the petitioner, which is whether the learned trial judge erred in law and fact in proceeding with the trial with the assessors when it was mentioned by one of the prosecution witnesses that the petitioner was a wanted man at the Lautoka Police Station. A perusal of the record of the High Court trial reveals that three prosecution witnesses, police officers Aisake Salato and Rupeni

as well as Sgt. Asesela Tuitai, did advert to the petitioner as a wanted man in the course of their testimony.

[27] In this connection, Mr. Waqainabete has submitted before this Court that grave prejudice was caused to the petitioner as a result of what came out of prosecution testimony in regard to the character of the petitioner. He further submitted, relying on the decisions in *R v. Hemingway* (1912) 8 Cr. App. R. 47 and *R v. Lilian Grace Palmer* [1935] 25 Cr App R 9, that the proper course in order to avoid the occurrence of a serious miscarriage of justice in such circumstances, would have been to discharge the assessors and order a fresh trial with a different panel of assessors. He contended that the failure of the trial judge to do so resulted in irreparable damage to the prospects of obtaining a trial according to law, and that the Court of Appeal erred in law and in fact in upholding the conviction. He submitted that it would be appropriate in these circumstances to grant special leave to appeal.

[28] Ms. Puamau who appeared for the Respondent submitted that the learned trial Judge had made very clear directions in the course of his summing up which would have effectively removed any prejudice that might have been caused to the petitioner, and in the circumstances, the trial judge acted properly in continuing with the trial without discharging the assessors and recommencing the trial before a new panel of assessors. She submitted that the directions of the trial judge in paragraph 21 of his summing up made it clear to the assessors, and himself, that the references to the petitioner as a wanted man must be disregarded and the case must be judged on the evidence that was heard in court and on nothing else. She submitted that in those circumstances, there was no basis for granting special leave to appeal.

[29] In my considered opinion, the first ground urged by the petitioner falls within the kind of situations contemplated in the above quoted *dictum* of Lord Sumner in *Ibrahim v Rex* as being the cases in which special leave to appeal may be granted. In my view, this ground raises a substantial question of principle within the meaning of section 7(2) of the Supreme Court Act, and it would be necessary for this Court to examine closely whether the disclosures made by the prosecution witnesses at the trial before assessors caused the petitioner substantial and grave injustice and deprived the

petitioner of a trial according to law. I have no hesitation in granting the petitioner special leave to appeal on the first ground urged by him.

Prejudice arising from Witness describing the Petitioner as a "Wanted Man"

[30] I have taken the liberty of reformulating in the following manner the first ground raised by the petitioner on which special leave is granted: Did the Court of Appeal err in law and in fact in affirming the conviction of the petitioner in the circumstance that the learned trial judge proceeded with the trial with the assessors even after it was mentioned by prosecution witnesses that the petitioner was a wanted man at the Lautoka Police Station?

[31] Before considering the legal issues, it may be useful to set out in brief the testimony of prosecution witnesses which allegedly contained certain disclosures that put the petitioner's character in a poor light before the trial judge and the three assessors.

[32] As already noted, police officer Aisake Salato was the first of the prosecution witnesses to refer to the petitioner as a wanted man. Salato had arrested the petitioner on 16th May 2009 between 10 and 11 pm, and testified at the trial regarding the circumstances that led to the arrest of the petitioner. His testimony was as follows:-

> "I was doing work in caravan in Savou Street, an Indian boy came to complain of man drunk and causing trouble. I assisted Indian man. We went to his house at Sukanaivalu Road. Found unknown Fijian man lying in compound lying face down. Got to see his face, I identified him as Vilitati Vasuca. He was sleeping. Same time took handcuffs and handcuffed him. I knew him. I then called for assistance. He was still sleeping. Never woke up. This took 5 minutes. Assistance arrived – they helped me to load Vasuca into police vehicle. Carried into van because he was sleeping."

[33] In cross-examination, Mr. Terere, who appeared for the petitioner at the trial, put to the witness Salato, the following question:

> "Q: After arrest and investigation you recognised him as Vasuca?
> A: Yes."

[34] When his turn came to re-examine, Mr. Sovau, who appeared for the Respondent, questioned the witness as follows:-

"Q: Reason why recognised?
A: Wanted for many cases. Photo in the station"

[35] The next witness who referred to the petitioner as a wanted man was police officer Rupeni. In the course of his examination in chief, he stated that:-

> "I was working in Crime Stoppers – an unknown Fijian man drunk in the compound. Went with 2 others, went and saw him lying in compound; sleeping. Tried to wake him but couldn't wake him. Lifted him and loaded him onto the van and took him to station. He was never awake – never conscious again. At the station other officer with him and identified him as wanted person. (He is the accused in Court today)."

[36] Cross-examined by the petitioner's counsel, Mr. Terere, the witness responded to questions as follows:-

"Q: You didn't have a warrant for the robbery case?
A: No.

Q: Only there to arrest drunk (disorderly)?
A: Yes.

Q: Took him to station and suddenly identified by officers?
A: Yes.

Q: He a wanted man?
A: Other officers knew that.

Q: He on bench warrant?
A: Don't know."

[37] At the end of the testimony of this witness, it would appear that Mr. Terere did raise the question as to whether in view of these disclosures the assessors should be discharged and trial started afresh. The learned trial judge decided to go ahead with the trial, and made order as follows:-

> "Order:
> There is prejudicial material before the assessors because Mr.T. Terere, you opened up the question of recognition and how was he

recognised that allowed Mr. Sovau to jump in at re-examination and ask the witness how he recognised. Led to the questions of being wanted as a suspect in other cases.

That is your fault, Mr. Terere and I will address the issue in my Summing Up."

[38] An examination of the testimony of these two witnesses would reveal that the learned trial judge probably had in mind Mr. Terere's cross examination of witness Salato when he made the above observation, and while Mr. Terere may have been somewhat tactless in raising the question of recognition, it was learned counsel for the Respondent who elicited the prejudicial evidence. However, when it came to the cross-examination of witness Rupeni, it was Mr. Terere himself who brought out the damaging evidence, adding salt to the injury sustained by the petitioner.

[39] The third witness to refer to the petitioner as a wanted man was Sgt. Asesela Tuitai, who had caution interviewed the petitioner on 18th May 2009. He testified briefly about the conduct of the caution interview and produced in evidence the handwritten and typed versions of the caution interview respectively as Exhibits P1 and P1A. In the course of a long cross-examination of this witness by Mr. Terere, the following questions were put to the witness:-

"Q: When he (the petitioner) was interviewed, you knew he had been questioned in other cases?
A: Correct.

Q: And your effort to get a suspect for the robbery you took the opportunity to charge accused in this case?
A: He was wanted in this case, and I was looking for him.

Q: Why saying he was wanted?
A: Another guy arrested when he gave the name."

[40] Mr. Terere objected to the answer on the basis that it is hearsay. However, the objection was overruled by the trial judge, who made order as follows:-

"Court:
It is not hearsay. It is a fact; a name given and your fault because you asked a fatal question."

[41] After all the witnesses had been heard, the trial judge adverted to the references to the petitioner as a wanted man in the testimony of witnesses in paragraph [21] of his summing up in the following manner :-

> "[21] Before I leave you to deliberate, there is one matter that I must address you on. You are not to take into account any references to this accused being a wanted man in the Lautoka Police station. This case is to be judged on the evidence brought before you in this Court and not on some prejudicially bad reputation that somebody says he has. Similarly, you are to disregard one Police Officer's evidence that this accused's name was mentioned in connection with the Saweni crime. Again we are judging this case on the evidence we have heard here and on nothing else."

[42] I take it that in the above passage of the summing up, the learned trial judge referred to the very case that was being tried by him as the "Saweni crime", probably because it arose from incident of the robbery with violence that took place at the residence of Hemant Kumar at Saweni, Lautoka on 7th February 2009. The Court of Appeal, adverted to the question of prejudice caused by the reference to the petitioner as a wanted man in paragraph [12] of its impugned judgment, which is reproduced below:-

> "[12] The appellant's final contention is that during the trial, one of the prosecution witnesses mentioned he was a wanted man by the police. This evidence was elicited by the appellant's counsel in cross-examination of a prosecution witness when counsel suggested that the appellant was a wanted man. When this evidence was led, the trial judge excused the assessors and admonished counsel for leading prejudicial evidence. In his summing up, the trial judge at para [21] directed the assessors to disregard this evidence. In my judgment, the direction dispelled any prejudice that arose from the bad character evidence led by the appellant's own counsel."

[43] The question that this Court has to consider on this appeal is whether the Court of Appeal erred in law and in fact in affirming the decision of the trial judge not to discharge the assessors and proceed with the trial with the same assessors before whom some prejudicial material had been placed. It has been contended with great force by Mr. Waqainabete that the moment the learned trial judge realised that prejudicial evidence had been led, he should have taken the legal option open to him to discharge the assessors and trial started afresh, because it was impossible to have a trial according to law before the assessors who were prejudiced by such extraneous

material without violating the petitioner's constitutional right to a fair trial. Ms Puamau has equally forcefully argued that the directions of the learned trial judge contained in paragraph [21] of his summing up were sufficient to dispel any prejudice that may have been caused to the petitioner in all the circumstances of this case.

[44] In this context, it is important to note that even in jurisdictions where major criminal trials are conducted before judge and jury, as was observed by Sachs LJ *R v Weaver* [1968] 1 QB 353 at 360, there is no rule that where inadmissible or prejudicial evidence is admitted through inadvertence, a jury must be discharged. It is for the trial judge to decide whether it is in all the circumstances of the case necessary to discharge the jury and hold a fresh trial.

[45] As Dawson J. observed in *Crofts v R* [1996] HCA 22; (1996)186 CLR 427-

> "5. Whether or not a jury should be discharged by reason of some incident which occurs during the course of a trial is a matter within the trial judge's discretion. But it is a discretion which is to be exercised in favour of a discharge only when that course is necessary to prevent a miscarriage of justice. It is in that sense that it has been said that the underlying principle is that of necessity and that "a high degree of need for such discharge" must appear before a discharge will be ordered. *When a trial judge's refusal to discharge a jury is called in question, it must be borne in mind that he or she is ordinarily in a better position than an appeal court to assess whether, having regard to the course which the trial has taken and the atmosphere in which it has been conducted, any prejudice may be dispelled by a clear warning to the jury.*" (*Emphasis added*)

[46] The English Court of Appeal has also adopted the same approach in decisions such as *R v Lawson* [2007] 1 Cr. App. R 20 and *R v. Jerome Mills* [2008] EWCA Crim 3001. As was observed by Lord Justice Auld in *Lawson's case* -

> "65 Whether or not to discharge the jury is a matter for evaluation by the trial judge on the particular facts and circumstances of the case, *and this court will not lightly interfere with his decision.* It follows that every case depends on its own facts and circumstances, including: 1) the important issue or issues in the case; 2) the nature and impact of improperly admitted

material on that issue or issues, having regard, inter alia to the respective strengths of the prosecution and defence cases; 3) the manner and circumstances of its admission and whether and to what extent it is potentially unfairly prejudicial to a defendant; 4) the extent to and manner in which it is remediable by judicial direction or otherwise, so as to permit the trial to proceed. *We repeat, all these matters and their combined effect are very much an evaluative exercise for the trial judge in all the circumstances of the case. The starting point is not that the jury should be discharged whenever something of this nature is put in evidence through inadvertence.* Equally, there is no sliding scale so as to increase the persuasive onus on a defendant seeking a discharge of a jury on this account according to the weight or length of the case or the stage it has reached when the point arises for determination. The test is always the same, whether to continue with the trial would or could, by reason of the admission of the unfairly prejudicial material, result in an unsafe conviction." (*Emphasis added*)

[47] These principles are of equal relevance to jurisdictions such as Fiji, where major criminal trials are conducted before judge and assessors, subject to the qualification that as was pointed out by this Court at paragraph 79 of its judgment in *Ram v State* [2012] FJSC 12; CAV0001.2011 (9 May 2012)-

> ".....The system of trial by a judge and assessors differs in one important aspect from trial by jury, as unlike under the jury system, even the unanimous opinion of the assessors does not bind the trial judge, who is free in appropriate cases, to differ and pronounce his own verdict."

[48] Indeed the system of trial before judge and assessors provides a greater safeguard to accused persons in the form of the mandatory vigilance of the trial judge to evaluate the soundness of the findings of assessors.

[49] In this backdrop, it is relevant to note that the argument advanced on behalf of the petitioner in this appeal was that whenever prejudicial material is placed before the assessors, it is incumbent upon the trial judge to discharge the assessors and recommence trial before different assessors, but as will be seen from the authorities referred to in this judgment, that is not a sound proposition of law. Neither the oral submissions of Mr. Waqainabete at this appeal hearing nor the elaborate written

submissions filed by the petitioner take up the position that that the trial judge had erred in law or fact in his decision not to discharge the assessors and start trial afresh.

[50] I have given anxious consideration to the four non-exhaustive factors adverted to in the judgment of Lord Justice Auld in *R v Lawson, supra,* and am of the view that considered in the light of those factors, the decision of the trial judge to continue with the trial before the same assessors cannot be faulted in all the circumstances of this case. I find that 1) the convictions of the petitioner on both counts were based on his confession, which was found to be voluntary at the *voir dire* and his convictions were affirmed by the Court of Appeal in the impugned judgment, and this Court finds that there is no basis to grant leave to appeal on that point; 2) the reference to the petitioner as a wanted man did not have any bearing on the admissibility of the petitioner's confession; 3) a review of the manner and circumstances of the admission of the prejudicial material will show that learned counsel for the petitioner was to be blamed as much as learned counsel for the respondent for the bringing in of such material, but such admission did not unfairly prejudice the petitioner as his conviction was based on his confession and in any event, the opinions of the assessors were not binding on the trial judge who had independently evaluated the same; and 4) any prejudice that may have been caused to the petitioner was remediable by the directions of the trial judge in his summing up.

[51] For all these reasons, I am of the opinion that the appeal of the petitioner on the first ground urged by him must be dismissed.

Hon. Priyasath Dep, JA

[52] I have perused the judgment of Marsoof JA in draft, and I agree with his reasons and conclusions.

Orders of Court

[53] In the result, this Court makes order -

(a) having granted leave to appeal to the petitioner on the first ground urged by him, dismissing his appeal on that ground; and

(b) refusing leave to appeal to the petitioner on the second ground urged by him.

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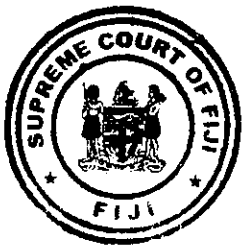
Hon. Justice Anthony Gates, P
PRESIDENT OF THE SUPREME COURT



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Hon. Justice Saleem Marsoof, JA
JUSTICE OF THE SUPREME COURT

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Hon. Justice Priyasath Dep, JA
JUSTICE OF THE SUPREME COURT

Solicitors:

Office of the Legal Aid Commission for the Petitioner
Office of the Director of Public Prosecutions for the Respondent