IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No. CAV 0013 of 2017
(On Appeal from Court of Appeal No. AAU 090 of 2013)

BETWEEN : **ADRIU TUILAGI**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Chief Justice Anthony Gates, President of the Supreme Court**
Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court
Hon. Mr. Justice Buwaneka Aluwihare, Judge of the Supreme Court

Counsel : **Petitioner in Person**
Mr. S. Vodokisolomone for the Respondent

Date of Hearing: **12 April 2018**

Date of Judgment: **26 April 2018**

JUDGMENT

Gates, P

1. I have been able to read the judgment of Aluwihare, J in draft. I agree with the reasoning and with the orders.

Marsoof, J

2. I have read in draft the judgment of Aluwihare, J and agree with his reasoning and conclusions.

Aluwihare, J

The Background

3. The Petitioner aggrieved by the decision of the Court of Appeal had sought Special Leave to appeal from this court by filing the present petition which is timely.

4. The incidents germane to the charges and the evidence given by the virtual complainants who set the investigation in motion relating to the alleged crimes has little or no relevance in deciding the issues raised before the Supreme Court. For the sake of convenience, however, I wish to recapitulate them briefly.

5. One of the complainants Jo Beddham Whettam Llew, who gave evidence at the trial testified to the effect that on the 3rd March 2008, a few intruders broke into her house and after gagging her, relieved her of some of her belongings and then drove away in her car. In her evidence, she had said that she could not positively identify any of the persons who were responsible for the crimes.

6. The other two lay witnesses, Adlip Sing and his wife, Sital Wati had also testified to the effect that they faced a similar incident on the night of 5th March 2008 and that they too had been relieved of some valuables by a gang who had come to their house on the night of the said date. Both these witnesses have stated in their evidence that they were unable to identify any of the intruders that came to their house on that day.

7. No evidence had been placed by the prosecution at the trial that any of the items robbed from the complainants had been recovered nor had they placed any other independent evidence linking the Petitioner to the alleged crimes.

8. It would be pertinent to note that the prosecution failed to place one iota of evidence linking the petitioner to the alleged crimes save for the caution interview statement which is alleged to have been made by him and the said statement is pivotal to the entire case for the prosecution.

9. Based on the complaints made by the witnesses referred to earlier and the caution interview statements, Information was exhibited by the Director of Public Prosecutions (hereinafter referred to as the DPP) against the present Petitioner and one Uliano Waqa before the High Court on the following counts:

That on 3rd March 2008 at Navua-

(1) Robbed Jo Beddham Llew of jewellery to the value of FD$ 5880 (Robbery with violence Section 293 (1) (b) of the Penal Code)

(2) Unlawful use of motor vehicle of Jo Beddham Llew (Section 292 of the Penal Code) (The above charges were only against the Petitioner) And the Petitioner along with Uliano Waqa were charged that on the 5th March 2008 at Nasinu-

(3) Robbed Prem Adip Sing of items valued at FD$3110.00 (Robbery with violence, Section 293 (1) (b) of the Penal Code).

(4) Robbed Sitla Wati of items valued at FD$5,150 (Robbery with violence, Section 293 (1) (b) of the Penal Code).

10. As referred to earlier, the prosecution relied solely on the three caution interview statements in order to establish the charges.

(i) The statement of the Petitioner recorded on the 6th-March 2008 (In connection with the incident referred to in counts 3 & 4 of the Information)

(ii) The statement of the Petitioner recorded on the 10th February 2008 (in connection with the incident referred to in counts 1 and 2 of the Information)

(ii) The statement made by Uliano Waqa recorded on the 6th March 2008 (in connection with the incident referred to in counts 3 & 4 of the Information).

11. Both the Petitioner and Uliano Waqa challenged the admissibility of their alleged confessions at the '*Voir Dire*'.

12. While the learned trial judge by his ruling dated 29-11-2010, held that both the caution interview statements made by the Petitioner (on the 6th and 10th March respectively) were admissible in evidence, he nonetheless held that the caution interview statement made by Uliano Waqa made on 6th March 2008 was inadmissible, on the basis that the said statement was given *"involuntarily and not of his own free will"*.

13. On the 30th November -2008, the prosecution entered a *'nolle prosequi'* against Uliano Waqa and accordingly the court made an order terminating proceedings against Uliano Waqa. Consequently the prosecution moved to amend the Information, which was allowed.

14. On the 30th November 2008, an amended Information was filed against the present Petitioner, the charges being the same as in the original Information.

15. The trial against the Petitioner, however, could not be proceeded with, because the Petitioner was absconding. The trial recommenced after the Petitioner was re-arrested on 31st March 2014, which was more than four years after the ruling of the *Voir Dire*.

16. It is significant to note that the ruling given by the learned trial judge in relation to the two caution interview statements made by the Petitioner was carried over to the fresh trial and the trial against the Petitioner commenced on 31st March 2014.

17. At the conclusion of the trial, two of the assessors found the Petitioner not guilty on all counts and the remaining assessor found him not guilty on counts 1 and 4, but guilty of counts 2 and 3.

18. The learned trial judge by his judgement dated 4-4-2014 found the Petitioner guilty on all four counts and sentenced accordingly.

19. Aggrieved by the conviction and the sentence imposed, the Petitioner appealed to the Court of Appeal seeking to have the conviction quashed.

20. The Court of Appeal having gone into the matter, was of the opinion that the Court could not agree with the trial judge's decision to convict the Petitioner on counts 1 and 2. Their Lordships reasoned that the prosecution had failed to provide the evidence relating to the medical examination of the Petitioner that had taken place on 11-3-2008 which was the day after the second caution interview statement was recorded on which counts 1 and 2 were based. The Court of Appeal had observed that *"..the medical examination of the Appellant (the Petitioner) on 11-3-2008 which could have had a crucial bearing on the voluntariness of his second confession relating to counts 1 and 2 was not made available to the court and the Appellant (the Petitioner)"* [emphasis added]. I shall deal with the impact of the non-production of the said medical evidence later in this judgement.

21. Based on the aforesaid findings, the Court of Appeal having set aside the conviction on counts 1and 2, ordered a retrial on the said charges. The Court of Appeal, however, was of the view that the trial judge's findings on counts 3 and 4 were justified and the court saw no reason to disturb his findings. Their Lordships went on to hold that the decision of the learned trial judge to rely on the first confession made by the Petitioner (on 6th March 2008) and convicting the Petitioner based on the caution interview statement for the said counts was in order.

22. Aggrieved by the findings of the Court of Appeal referred to above, the Petitioner sought special leave to appeal on 9 grounds referred to in the amended grounds of appeal dated 28th February 2018.

23. The grounds of appeal, it appears, have been drafted in the layman's language. At the hearing of this application, in answer to court the Petitioner admitted that the grounds of appeal advanced, were drafted by him. The issues raised in the "grounds of appeal" relate to the alleged misdirections on the part of the Court of Appeal.

24. To appreciate the issues raised by the Petitioner before this court, the grounds advanced by him are reproduced verbatim.

1. *The prosecution failed to establish beyond reasonable doubt the nature of the swelling injury on the petitioner's cheek was not caused by police assault whilst being interviewed under duress resulting a confessional statement made and/or erred to emphasize that the only significant injury is the black eye assumed to be deformity.*

2. *The prosecution failed to negotiate the atmospheric authoritative of fear enhance in the mind of the petitioner whilst being interviewed that resultant oppressive circumstance.*

3. *The appeal court failed to ascertain the High Court Judge failure to apply the correct legal test in admitting the petitioner's confession in respect to the second aspect of the admissibility namely the general unfairness.*

4. *The appellate Court obsessively failed to overlook the proviso of Section 116 (1) (2) of the criminal procedure Act when disagreeing the trial Judge reasons to reject the medical report, namely that it was hearsay as the doctor was not summoned in the trial and thereby take into account the totality of the evidence to overrule the not guilty opinion of the Assessors.*

5. *The appellate court succinctly failed to properly analyse and give any weight to the prosecutions police witness credibility in terms of serious inconsistencies and contradiction in their evidence when interrogating the petitioner.*

6. *There was a grave, substantial miscarriage of justice by reason of the doctrine of Joint Enterprise whereupon the petitioner was jointly oppressed with his co-accused at Nabua Police Station yet the co-accused confession was ruled out.*

7. *The trial Judge misdirected himself when he failed to give direction in his summing up on the truth and weight as to how to evaluate question and answer 103 contained in the caution interview as the petitioner complained of pain on the lower left jaw to the interviewing officer which clearly shows that oppression was undertaken during the period of the interview.*

8. *The Court of Appeal erred to nullify the denial due process arising from the petitioner's complaint in view of the interviewing officer having not allowed the petitioner entitle to his constitutional right as per section 13 (1) (j) of the constitution of the Republic of Fiji before interview.*

9. *The doctor erred to affirmatively compiled and this accorded my deformity left eye with the swelling and bruises below left eye as exaggerated to be true by the trial Judge and the appellate Court to believe otherwise that the petitioner did not sustain a fresh injury thereof.*

25. At the hearing of this application, the Petitioner's submissions focused on the 6th ground of appeal referred to above. The Petitioner contended that both his and Uliano Waqa's caution interview statements were recorded under identical circumstances and the learned trial judge misdirected himself in treating the confessions differently by rejecting the caution interview statement of Uliano Waqa as involuntary, whilst holding that his caution interview statement was admissible in evidence.

26. It is to be noted that ground of appeal No.6 is a fresh ground that was not argued before the Court of Appeal.The respondent contended that the said ground of Appeal should not be entertained as its significance falls short of the special leave criteria. It was further contended that the Court of Appeal had in fact addressed this issue and drew the attention of the court to paragraph 16 of the judgement of the Court of Appeal.

27. The Respondent in their written submissions had taken up the position that the learned trial judge had considered the voluntariness of the caution interview statement made by the Petitioner and the other accused, Uliano Waqa separately and as such no prejudice was caused to the Petitioner (paragraph 15 of the written submissions of the Respondent).

28. The Petitioner's grievance appears to be that the learned trial judge considered the voluntariness of his caution interview statement in isolation without considering, *"atmospheric authoritative fear created in the mind" (ground of appeal 2).*

29. In considering this issue, it would in my opinion, be necessary to consider the circumstances under which the caution interview statements from the Petitioner and the co-accused Uliano Waqa were recorded.

30. According to witness Jolame Nabakele, ex-crime sergeant, on 6-03-2008, he was informed that two suspects were held at the Nabua police station and he had proceeded to Nabua, with three detective constables. Upon arrival, he had instructed two of the detective constables who accompanied him to interview the Petitioner and the other accused Uliano Waqa. Both of them had been interviewed at the crime office of the police station. This witness had said that he was in and out of the room where the

statements were being recorded, giving instructions to the police officers who were tasked to interview the Petitioner and the other suspect. He had also admitted that members of the strike back force were walking in and out of the interview room.

31. According to the evidence of witness Kelemedi Naidiri, he had commenced recording the caution interview statement of the Petitioner at 2.40 pm.

32. Witness Daurewa who happened to be the police prosecutor at Navua magistrate court, giving evidence at the *Vior Dire* had said that two suspects were produced before the magistrate in the morning of 9th March 2008 and one suspect was the Petitioner. Testifying further, he had said that the petitioner was injured and that he could neither walk nor sit properly. The Petitioner and the other suspect had complained to the magistrate that they had been assaulted while in police custody.

33. Both the petitioner and Uliano Waqa had been produced before medical officer Ravi Naidu on 07.03.2008 (the day after the caution statements were recorded) who had also given evidence at the *Voir Dire*. The Petitioner had been examined at 2.45 p.m. whereas Uliano Waqa had been examined at 3.20pm, roughly half an hour apart. The medical officer had observed injuries on both of them. According to the medical report (exhibit 12) the medical officer had observed a bruise under the left eye of the petitioner and his left cheek also had been swollen. In addition, he had noted that the petitioner complained of tenderness on the chest. No doubt these are marks of blunt trauma injuries.To the medical officer, both the Petitioner and Uliano Waqa had given a history of police assault.

34. From the foregoing, it is apparent that not only had the recording of the two caution statements of the Petitioner and Uliano Waqa been contemporaneous, but the circumstances under which those statements had been recorded appear to have been similar.

35. The learned trial judge, however, had rejected the caution statement of Uliano Waqa on the basis that it was an involuntary statement, but had thought it fit to hold the caution statement of the Petitioner was voluntary and admissible.

36. The only reason the learned trial judge had advanced for his contradictory findings was the evidence of the medical officer. He had stated that his findings do not correlate with the history given by the Petitioner. The medical officer stated in his evidence, as asserted if the Petitioner had been beaten for two days, he would have expected the Petitioner to have sustained severe injuries.

37. The issue is, did the learned trial judge misdirect himself in considering the medical evidence in isolation, without giving weight to the circumstances under which the caution interview statements had been recorded.

38. During the course of the hearing of this application,the Petitioner's position was that the impugned statement was obtained under oppression.

39. The fundamental condition in deciding the admissibility of a confession is that the statement made by the accused shall have been made voluntarily and in the sense that it has not been obtained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority or by oppression. As held in the case of **State v Mool Chand Lal** (1999 Labasa High Court) oppression is anything that tends to sap and has sapped that free will that must exist before a confession is recorded.

40. As regards the standard of proof, the prosecution must prove the voluntariness beyond reasonable doubt. As held in the case of **R v Sartiori** (1961 Crim. L. Rev.397), if the judge is in doubt as to whether the confession was made under the influence of any improper inducement he will reject the confession. This position has been reiterated in the case of **Ganga Ram and Shiv Charan v Regina** (Criminal Appeal 46 of 1983) where the Fiji Court of Appeal held that *"..it will be remembered that there are two matters each of which requires consideration in this area. First, it must be established affirmatively by the crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as use of force, threats or prejudice or inducement by the offer of some advantage..."*

41. What excludes evidence is a chain of causation, resulting from words or conduct on the part of the person in authority. In the instant case, as referred to earlier, the Petitioner asserted at the *Voir Dire* that he was beaten by the police. To some extent the medical

evidence corroborates that position. The prosecution had not offered any explanation as to how the Petitioner came about those injuries and as such the assertion of the Petitioner remains unassailed. The learned trial judge did not think it fit to admit the caution interview statement of the co-accused, whose statement was also recorded at the same time, at the same location, by the same team of police officers as that of the petitioner's. The co-accused Uliano Waqa also had sustained blunt trauma injuries.

42. It was the conduct of the police officers who were responsible for recording the caution interview statement of Uliano Waqa, that I believe, led the learned trial judge to form the view that his caution interview statement was not voluntary. I am of the view that these factors ought to have been applied in equal force in considering the voluntariness of the Petitioner's caution statement.

43. Lord Hailsham in the case of **DPP v Ping Lin** 1976 A.C 575 at 602 stated that "It is the chain of causation which has to be excluded by the prosecution and not the hypostatisation of any particular part of it".

44. I am firmly of the view that the learned trial judge ought to have considered the voluntariness of the petitioner's caution interview statement in the backdrop of all factors referred to earlier and not solely on the opinion of the medical officer considered in isolation. This failure on the part of the judge, in my view, is a clear misdirection.

45. I am mindful of the fact that this is a matter where the decision at the *Voir Dire* had turned on the credibility of witnesses whom the trial judge had the advantage of seeing and hearing and he had believed the evidence of the prosecution witnesses and disbelieved the Petitioner.

46. Although it would seem unusual for a court sitting in appeal to reverse the decision of a trial judge who held the *Voir Dire* on the admissibility of alleged confessions, it was held in the case of **Nirmal v. R** (1972) Cr L .Rev 226 P.C; that it is not necessarily wrong for an appellate court to do so having taken in to account the facts of the particular case. In the case of **D.P.P v.Ping Lin** (1975) 3 A.E.R175; their lordships expressed the view that the court should not interfere with the judge's ruling on the

admission in evidence of the statement unless satisfied that the judge had completely wrongly assessed the evidence or had failed to apply the correct principles.

47. Upon consideration of the facts and circumstances of the case before us, it would be reasonable to conclude that the learned High Court Judge was in error in assessing the evidence placed at the Voir Dire and I am of the view that if the evidence (referred to in this judgement) was evaluated in the correct perspective, the only possible conclusion would be, that the caution interview statement of the Petitioner was not one made voluntarily.

48. At this point I wish to refer to the statutory threshold for special leave in criminal cases as set out in Section 7(2) of the Supreme Court Act of 1988, which states thus:-

> "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 may otherwise occur.

49. I am mindful of the fact that the provision referred to above imposes a relatively high threshold to be satisfied before special leave is granted. Having considered the issues raised in the present application, I am of the view that substantial and grave injustice would be caused to the petitioner if special leave is not granted and I am also of the view that the Petitioner has met with the criteria for granting of special leave in terms of paragraph (c) of Section 7(2) of the Supreme Court Act in relation to the 6th ground of appeal.

50. I have already referred to the fact that ground of appeal No.6 is a fresh ground argued before this this court and which was not taken up before the Court of Appeal.

51. The Supreme Court observed in the case of **Dip Chand v The State** CAV0014/2012

> *"given that the criteria set out in section 7 (2) of the Supreme Court Act No.14 of 1998 are extremely stringent, and special leave to appeal is not granted as a matter of course, the fact that the majority of the grounds relied upon by the petitioner for special leave have not been raised in the Court of Appeal, makes the task of the petitioner of crossing the threshold requirements for special leave even more difficult".*

52. In the case referred to above the court further observed that:-

> *"the Supreme Court has been even more stringent in considering the application for special leave to appeal on the basis of grounds of appeal not taken up or argued in the court of appeal. In **Josateki Solinakoroi-v-The State**, Criminal Appeal CAV0005 of 2005 the Supreme Court of Fiji, in an exceptional case, took in to consideration the principles developed by (the)Privy Council in similar situations and in particular relied on the following observations in **Kawaku Mensah v The King** (1946) AC 83: 'where a substantial and grave injustice might otherwise occur the privy Council allowed a new point to be taken which had not been raised below even though not raised in the petitioner's printed case.'* (Paragraph 36 of the judgment).

53. Although ground No.6 is a fresh ground, I am of the view that the Petitioner had met the criteria referred to in the case of **Kawaku v The King** (supra) and the court should allow this new point to be taken up as substantial and grave injustice otherwise may occur to the Petitioner.

Other grounds urged by the Petitioner

54. I find matters raised in grounds of appeal Nos. 1, 2, 3, 5, and 9 are subsumed in the ground of appeal No.6 which I have dealt in this judgement. In fact, as referred to earlier in the judgement, matters raised under those grounds are merely factors that might impact on the voluntariness of the caution interview statement. As such I do not wish to address the said issues separately here.

55. Under the 4th ground of appeal, the petitioner had complained that the learned trial judge treating the medical reports as hearsay evidence is in violation of Section 116(1)

and (2) of the Criminal Procedure Act. In the course of the main trial the medical reports pertaining to the petitioner had been produced but the medical officer who prepared the report had not been summoned to testify. As such the learned trial judge had correctly treated the reports as hearsay evidence and I see no merit in this ground of appeal.

56. Under the ground of appeal No.7 the Petitioner had complained of the failure on the part of the trial judge to give necessary directions to the assessors in his summing up as to the evaluation of the caution interview statement. It is to be noted that all assessors found the Petitioner not guilty save for one assessor who found the Petitioner guilty only of counts 2 and 3. As such the misdirection alleged, had not impacted upon the Petitioner.

57. As the 8th ground of appeal the Petitioner complains of an infringement of a constitutional right the petitioner is entitled to enjoy in terms of Section 13(1) (j) of the Constitution of Fiji. The Petitioner in elaborating this ground in his written submissions asserts that every person who is arrested or detained has the right to conditions of detention that are consistent with human dignity, including at least the opportunity to exercise regularly and the provision at state expense of adequate accommodation and medical treatment.

58. The Petitioner had further asserted that he should have been afforded medical attention before the commencement of the recording of the caution interview statement. In the context of the case, I am of the view that this issue has no relevance to determine the matter before this court.

CONCLUSIONS

59. For the reasons set out in this judgement I grant special leave to appeal on the ground of appeal No.6. while special leave to appeal on grounds 4, 7 and 8 is refused. I do not wish to make a separate pronouncement with regard to other grounds of appeal for the reasons set out in paragraph 52 of this judgement. The only evidence led against the Petitioner in the case to link him to the incident is the alleged confession made by him and for the reasons stated above the confession cannot be considered as a voluntary

statement and for that reason would not be admissible against the Petitioner. In the absence of any other incriminating evidence, the conviction of the Petitioner cannot be sustained. Accordingly, the conviction of the Petitioner on counts 3 and 4 of the amended Information is hereby set aside.

60. The Court of Appeal by judgement set aside the conviction of the Petitioner on counts 1 and 2 preferred against him. The Court of Appeal made a further order directing that a new trial be held on the said counts. The Petitioner, however, did not challenge the said order in these proceedings. In the interest of justice, however, I wish to comment on the legal position in ordering a retrial.

61. The Court of Appeal disagreed with the trial Judge's decision to convict the Petitioner on counts 1 and 2 on the ground that the evidence relating to the second medical examination of the Petitioner on 11th March 2008 was not produced as evidence in the course of the trial. The Court observed that the medical evidence could have had a crucial bearing on the voluntariness of his second caution interview statement on which counts 1 and 2 were based.

62. The Court of Appeal further observed that it could not rule out the possibility that the learned trial judge might have rejected the second caution interview statement had the medical evidence been available for his consideration. The Court noted that the medical evidence was not made available both to the High Court as well as to the Petitioner. It was on the above premise that the Court of Appeal set aside the convictions of the Petitioner on counts 1 and 2.

63. The Court of Appeal reasoned that if the medical evidence relating to the second caution interview is available it has to be tested in a trial in order to determine the voluntariness of the caution interview statement. It also appears that, the Court of Appeal had thought it fit to order a retrial in order for the prosecution to place this evidence before the court.

64. With all due deference to their Lordships, I find this reasoning is in violation of accepted norms in ordering a retrial. The fundamental principle is that no retrial can be

ordered to "fill gaps in the prosecution case". In essence, the prosecution is afforded one opportunity, and is expected to produce all available evidence.

65. In the instant case the evidence of the Petitioner was to the effect that he was examined at a health centre at Valelevu on a court order. Thus the prosecution was alive to the fact that the Petitioner had been subject to a medical examination. At the main trial, the Petitioner had repeatedly requested that the medical report be produced and the response of the prosecution was that it could not be traced.

66. In the case of **Nirmal v R.** Crim. Law Rev.1972 226 the Privy Council observed that "*... The only object of a new trial would be to enable the prosecution to make a new case or to fill gaps in their evidence. The prosecution had no case without the confession and the confession could not be admitted in a second trial on the same evidence, It would be unfair to N if the prosecution were given a second attempt. Nemo debet bis vexari de una et eadem causa* (no individual should be sued more than once for the same cause). *The order for a new trial could not be upheld*". (Emphasis added)
For the reasons given above, I am of the view that grave injustice would be caused to the Petitioner if the order made by the Court of Appeal to have the Petitioner retried is sustained.

67. In terms of Section 98 of the Constitution of Fiji, the Supreme Court being the final court of appeal is empowered to review, vary, set aside or affirm decisions or orders of the Court of Appeal in the exercise of its appellate jurisdiction. I am of the view that this power to interfere with the orders of the Court of Appeal, in an exceptional case, extends to even matters that are not urged by the parties before the court but if left unattended, may cause substantial injustice.

68. Considering the above, I hereby set aside the order of the Court of Appeal to have the Petitioner retried on counts 1 and 2 of the amended Information and acquit the Petitioner of the said counts.

Orders of the Court

1. *The petition for special leave to appeal from the judgement of the Court of Appeal dated 14.09.2017 is allowed.*

2. *Conviction of the Petitioner on counts 3 and 4 of the amended Information is set aside.*

3. *Order made by the Court of Appeal in its judgement to have the Petitioner retried on counts 1 and 2 of the amended information is set aside.*

4. *The Petitioner is acquitted of all counts on the amended Information*

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Hon. Chief Justice Anthony Gates
President of the Supreme Court

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Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court

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Hon. Mr. Justice Buwaneka Aluwihare
Judge of the Supreme Court