IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL PETITION NOS: CAV 022 of 2017 and CAV 023 of 2017
[On Appeal from the Court of Appeal No. AAU 0121 of 2013]

BETWEEN : **PURATAKE TAPOGE**
KITIONE VESIKULA
FILOMENA ULUIVITI

Petitioners

AND : **THE STATE**

Respondent

Coram : **The Hon. Mr. Justice Suresh Chandra**
Judge of the Supreme Court

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

The Hon. Mr. Justice Kankani Chitrasiri
Judge of the Supreme Court

Counsel : **Mr. M. Fesaitu for the 1st Petitioner**
Mr. K. Maisamoa for the 2nd and 3rd Petitioners
Mr. L. Fotofili for the Respondent

Date of Hearing : **16 April 2018**

Date of Judgment : **26 April 2018**

JUDGMENT

Chandra J

[1] The Petitioners seek special leave to appeal against the judgment of the Court of Appeal dated 30th November 2017 by which their appeal against the judgment of the High Court was dismissed.

[2] The 1st Petitioner in his appeal to the Court of Appeal relied on the following grounds of appeal against his conviction and sentence:

> "*Against conviction*:
>
> i) The learned Trial Judge erred in law and in fact when he did not give any directions on provocation and intoxication although there was evidence which required such a direction to be given to the assessors.
>
> ii) The learned Trial Judge erred in law and in fact when he did not properly guide and direct the assessors on how to approach the evidence contained in the statement given by the second Appellant to the Police.
>
> iii) The learned Trial Judge erred in law and in fact when he did not properly direct the assessors in respect of the reckless elements of manslaughter.
>
> iv) The learned Trial Judge erred in law and in fact when he did not properly direct the assessors in respect of the reckless elements of murder.
>
> v) The appellants were prejudiced due to lack of legal representations.
>
> vi) The learned Trial Judge erred in law and in fact when he misdirected the assessors in respect of the standard of proof by using the phrase 'fanciful doubt' resulting in substantial miscarriage of justice."

Against sentence

i) The learned Trial Judge erred in law in imposing a minimum term to be served which is in conflict with the penalty provision of Section 237 of the Crimes Decree.

ii) The learned Trial Judge erred in principle in imposing non parole period which was excessive and also erred in failing to take into account the following relevant considerations when arriving at the minimum term for all the Appellants:
   i) The period spent in remand by all the Appellants;
   ii) It was not a premeditated or calculated murder;
   iii) The victim was equally to be blamed;
   iv) The first and second Appellants were intoxicated and not the initial aggressors;
   v) The personal circumstances of all the Appellants such as their family ties, young age etc."

[3] The 1st Petitioner relies on the same grounds in seeking special leave to appeal but pursued only grounds i), iii), iv) and v) against conviction and the two grounds against sentence which are set out above.

[4] The 2nd and 3rd Petitioners in their appeal to the Court of Appeal relied on the following grounds which they urged before this Court in their application for special leave to appeal:

"Against Conviction

Ground 1

The learned Trial Judge erred in law and in fact when he did not give any directions on provocation and intoxication although there was evidence which required such a direction to be given to the assessors.

Ground 2

The learned Trial Judge erred in law and fact when he did not properly guide and direct the assessors on how to approach the evidence contained in the statement given by the second appellant to the police.

Ground 3

The learned Trial Judge erred in law and in fact when he did not properly direct the assessors in respect of the recklessness elements of manslaughter.

Ground 4
The learned Trial Judge erred in law and in fact when he did not properly direct the assessors in respect of the assessors in respect of the reckless elements of murder.

Ground 5
The Appellant was prejudiced due to lack of legal representation.

Ground 6
The learned Trial Judge erred in law and in fact when he misdirected the assessors in respect of the standard of proof by using the phrase "fanciful doubt" resulting in substantial miscarriage of justice.

Against Sentence

Ground 7

The learned Trial Judge erred in law in imposing a minimum term to be served which is in conflict with penalty provision of Section 237 of the Crimes Decree 2009.

Ground 8

The learned Trial Judge erred in principle in imposing non-parole period which was excessive and also erred in failing to take into account the following relevant considerations when arriving at the minimum term for all the Appellants:

- The period spent in remand by the Appellants
- It was not a premeditated or calculated murder
- The victim was equally to be blamed
- The first and second Appellants were intoxicated and not the initial aggressors
- The personal circumstances of all the appellants such as their family ties, young age, etc."

Factual Background

[5] The Petitioners were tried and convicted of murder contrary to section 237 of the Crimes Act, 2009 by the High Court of Labasa. They were sentenced as follows:

1st Petitioner - Life imprisonment with a minimum term of 18 years.

2nd Petitioner - Life imprisonment with a minimum term of 19 years.

3rd Petitioner - Life imprisonment with a minimum term of 15 years.

[6] The incident which led to the killing of the victim, Iowane Petuna, a male aged 32 years, took place in Taveuni on 28 July 2011. The 1st Petitioner is the husband of the 3rd Petitioner and the 2nd Petitioner is the brother of the 3rd Petitioner.

[7] The deceased who had been drunk had been seen in the vicinity of the Petitioners' home in the company of two other men. The prosecution led the evidence of 11 witnesses out of whom three witnesses gave eye witness accounts of the incident.

[8] The main witness who implicated all three witnesses to the incident was Iliavu Suka who was the Petitioners' neighbour. He had witnessed the incident from a distance of about 10 meters. According to him when the brawl started, two other men who were in the company of the deceased had fled the scene. He had seen the 2nd Petitioner (Vesikula), Uluiviti (3rd Petitioner) and Tima (2nd Petitioner's sister) confronting the deceased. Tima had been holding a stone. Vesikula had punched the deceased in the face, as a result of which the deceased had fallen, and thereafter had grabbed a stick and struck the deceased twice on the shoulder. By this time, Tapoge (1st Petitioner) had arrived at the scene and had been standing beside Vesikula. While the deceased remained on the ground, Uluiviti had rushed inside her house and returned with a cane knife which she had handed to Tapoge. Tapoge had then struck the deceased in the head with the cane knife. According to Iliavu Suka, Vesikula had stood beside Tapoge when the deceased was struck with the cane knife. According to witness Ale Vasuinadi, who had also witnessed the incident had stated in his evidence that the 2nd Petitioner had struck the deceased on the head with a stick while he had fallen.

[9] The victim had died within minutes after he was taken to hospital. The post mortem examination revealed a 11 cm deep cut on the head on the top right, which exposed the bone. A fracture of the temporal bone and parietal bone was found on the left side of the upper part of the head. There had been extensive brain hemorrhage. Death had been due to multiple injuries. The cut injury could have been caused by a sharp cutting instrument, while the fracture of the temporal and parietal bone could have been caused as a result of blow with a blunt object according to Dr. Goundar who gave evidence.

[10] Vesikula's caution interview was led in evidence after a *voir dire*. He had said that he punched and used a timber twice to hit the deceased, but he could not remember which part of the body he hit. While the deceased was on the ground, he had challenged the other men who were in the deceased's company for a fight, but they had fled the scene. When he returned to the deceased he had seen the deceased was wounded and bleeding from the head.

[11] Vesikula chose to give evidence and gave a slightly different version. He said that on that day he was at home having consumed a significant amount of alcohol during the day. On hearing a commotion he had come out of the house and seen the deceased throwing a punch at Tima and then at him. They had punched each other until the deceased had fallen down. He had then gone after the other boys and came back when he saw the deceased still lying on the roadside. He said that he used the timber just to get them off his back as they were pestering hm.

[12] The 1st Petitioner (Tapoge) also chose to give evidence and he stated that in the afternoon of that day, he was at home having consumed alcohol during the day. He had come to know about Tavuki boys swearing and relieving themselves in public outside his home. He had not left the house and later in the evening had come to know that the deceased had been injured by someone. He denied striking the deceased with a cane knife.

[13] The 3rd Petitioner (Uluiviti) also gave evidence and stated that she did not even know that the Tavuki boys were outside her home on that day. She had got to know later that one of them had got injured. She denied taking the cane knife from her home and handing it to Tapoge.

[14] Tima gave evidence for the defence and said that she heard the deceased swearing and unzipped his pants and relieved himself in front of her. When she confronted the deceased, he had grabbed her by the collar and punched her chest. Vesikula had come at

that stage and fought with the deceased. When the deceased fell down, Vesikula had run after the other boys. She had not seen Vesikula with the timber. She had not seen Uluiviti coming out of the house and that Tapoge was not there.

Application for Special Leave

[15] In terms of Section 7(2) of the Supreme Court Act 1998 in relation to a criminal mater, 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.

[16] The threshold for granting special by the Supreme Court is very high as set out in *Livia Lila Matalulu and Anor v The Director of Public Prosecutions* [2003] FJSC 2; (17 April 2003):

> "The Supreme Court of Fiji is not a court in which decisions of the Court of Appeal will be routinely reviewed. The requirement for special leave is to be taken seriously. It will not be granted lightly. Too low a standard for its grant undermines the authority of the Court of Appeal and distract this court from its role as the final appellate body by burdening it with appeals that do not raise matters of general importance or principles or in the criminal jurisdiction, substantial and grave injustice."

[17] The burden is on the Petitioner to satisfy court that his application meets with the criteria outlined under S.7(2) of the Supreme Court Act, 1998.

The present Applications of the Petitioners
Grounds urged against Conviction

[18] The 1st Petitioner filed a separate application as set out at the beginning hereof and was relying on grounds i, iii, iv and v in his application. The 2nd and 3rd Petitioners together

filed a separate application containing 6 grounds of appeal. These grounds were argued before the Court of Appeal which dismissed their appeal. Except for ground 1 in relation to the 1st Petitioner and the 2nd Petitioner, and grounds 2 and 6 of the 2nd Petitioner, the other grounds would be dealt with together as they are the same.

Ground (i) regarding 1st Petitioner

[19] Ground (i) is on the basis that the learned trial Judge had failed to direct the Assessors in his summing up regarding provocation and intoxication. The Court of Appeal dealt with this ground of appeal in detail from paragraph [15] to [24] and arrived at the conclusion that there was no error shown in the learned trial judge's decision in not directing the assessors in regard to provocation and intoxication.

[20] Counsel for the 1st Petitioner relied on the following passage in the judgment of *Praveen Ram v State* (2012) FJSC 12; CAV0001.2011 (9 May 2012) :

> "This authority recognizes the acute practical dilemma facing a defendant who may have an arguable defence of provocation, giving possible ground to support a conviction of manslaughter instead of murder, but who chooses to deny the participation in the killing altogether. Justice requires that consideration be given to a possible defence disclosed by the evidence even if, for reasons good or bad, the defendant chooses not to advance it. Before the judge can properly invite the jury to consider a defence of provocation, there must be evidence fit for the jury's consideration that the defendant was provoked to lose self control and act as he did." (emphasis added)

[21] The prosecution evidence was overwhelming that the 1st Petitioner was present near the deceased who lay fallen when his wife the 3rd Petitioner handed him the cane knife with which he had struck the deceased on the head. The 1st Petitioner in his evidence denied his involvement in the killing and said that he was at home as he had consumed a large quantity of alcohol and got to know about the incident later.

[22] It was the submission of Counsel that though the Petitioner denied participation in the attack, nonetheless the Trial Judge did not believe his evidence and consequently would it be in the interest of justice, should the trial judge direct the assessors on provocation

although there is no evidence to substantiate on the issue of provocation in the that the Petitioner may have a possible defence available but chose not to pursue it.

[23] Such a proposition would be farfetched as it delves into the realm of speculation on the part of a trial Judge to consider the nature of the defence that would be taken up by an accused in a trial specially when there is no evidence to substantiate the consideration of such a defence.

[24] In the light of this position there was no evidence at all which necessitated the learned trial judge from giving a direction on provocation and therefore this ground fails.

[25] A similar argument was advanced by Counsel for the petitioner in relation to the issue of intoxication. It was the Petitioner's evidence that he had consumed alcohol on that day. His evidence as shown above was a complete denial of participation in the incident. There is no way in which it could be stated that his admission of being intoxicated should have been considered by the trial Judge to be brought before the Assessors for their consideration when there was a complete denial by him of participation in the killing of the deceased.

Ground 1 of the 2nd and 3rd Petitioners

[26] The issues of provocation and intoxication do not arise in relation to the 3rd Petitioner and arises only in relation the 2nd Petitioner.

[27] It was argued strenuously by Counsel for the 2nd Petitioner that the trial Judge erred in failing to direct the Assessors on provocation and intoxication.

[28] The evidence of the prosecution did not show any altercation between the deceased and the sister of the 2nd Petitioner except for the fact that they were seen at the scene of the incident. It is the evidence of the 2nd Petitioner's sister (Tima) which sets out the sequence of events preceding the killing of the deceased.

[29] It was the evidence of Tima, the 4th defence witness, that while she was sitting on the steps of the house, she saw the deceased swearing and calling their father's name, that he unzipped his pants and relieved himself. She had then approached him and asked as to why he was swearing at which the deceased had grabbed her collar and punched her on the chest. At that stage the 2nd Petitioner had come and they had been punching each other. The deceased had fallen on the ground and the 2nd Petitioner had run off after the others.

[30] The 2nd Petitioner in his evidence stated that he was at home and that he had consumed alcohol. He had seen the deceased punching his sister at which time he had gone there and when the deceased threw a punch at him he had responded and thereafter the deceased had fallen when he punched him. He had then gone after the others who had been with the deceased.

[31] It was argued by Counsel for the 2nd Petitioner that this evidence necessitated a direction on provocation and intoxication which the Trial Judge failed to do in his summing up to the Assessors.

[32] This ground was argued before the Court of Appeal and the Court of Appeal stated :

> "[20] The wrongful act or insult relied upon by counsel for the appellants are the assault on Tima by the deceased. There is no credible narrative of evidence that Tima was assaulted in the presence of Tapoge and Uluiviti. Tima was the elder sister of Vesikula and Uluiviti. Tima's evidence suggests that Vesikula may have witnessed the assault for him to get into a fight with the deceased, but her evidence did not suggest that Vesikula lost his self control as a result of the assault on Tima and used deadly force in that fight. The independent witnesses gave an account of the violence inflicted on the deceased by Vesikula, but they did not know the reason for the use of violence. Vesikula in his caution interview and in his evidence did not claim to have lost his self control and reacted in the heat of passion to inflict the deadly injury on the deceased. There was no evidential link between the assault on Tima and the infliction of the deadly injury... "

[33] According to the decision in *Isoa Codrokadroka* the judicial approach that should be taken regarding provocation was laid down as follows:

> "1. The Judge should ask himself/herself whether provocation should be left to the assessors on the most favourable view of the defence case.
>
> 2. There should be a credible narrative on the evidence of provocation words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship.
>
> 3. There should be a credible narrative of a resulting loss of self control by the accused.
>
> 4. There should be a credible narrative of an attack on the deceased by the accused which is proportionate to the provocative words or deeds.
>
> 5. The source of the provocation can be one incident or several. To what extent a past history of abuse and provocation is relevant to explain a sudden loss of self-control depends on the facts of each case. However accumulative provocation is in principle relevant and admissible.
>
> 6. There must be an evidential link between the provocation offered and the assault inflicted."

[34] In view of the paucity of evidence regarding provocation and the consideration of the criteria necessary to consider whether there was provocation as set out in *Isoa's* case, as decided by the Court of Appeal in their judgment there is no error shown in the trial judge's decision in not directing the assessors on the defence of provocation.

Grounds 3 and 4

[35] Grounds (iii) and (iv) of the 1st Petitioner and Grounds 3 and 4 of the 2nd Petitioner are in relation to the element of reckless in manslaughter and murder.

[36] The Court of Appeal in its judgment dealt with these two grounds of appeal from paragraphs [28] to [39]. The Court of Appeal went onto set out the elements in Section 237 - Murder and Section 239 - Manslaughter as defined in the Crimes Act and discussed

the distinction between them together with the definition of recklessness as in Section 21 of Crimes Act 2009.

[37] Though as pointed out by Counsel for the Petitioner that the Court of Appeal observed at paragraph 39 of the judgment that some of the aspects of the learned trial judge's direction were confusing, it was the view of the Court of Appeal that on reading the direction as a whole there has been no miscarriage of justice in that the Petitioners had been denied a reasonable prospect of an acquittal or a verdict for a lesser offence.

[38] There were eye witness accounts of the incident in this case which led to the killing of the deceased. The complicity of the three Petitioners according to the evidence was very clear. The 1st Petitioner dealt a fatal blow on the deceased's head with a cane knife, which was handed over to him by the 3rd Petitioner. The evidence against the 2nd Petitioner was that he had first punched the deceased, dealt some blows with a stick on the deceased's shoulders and thereafter after the 1st Petitioner had struck the deceased with the cane knife dealt a blow on the head of the fallen deceased with a stick. The medical evidence accorded with the actions of the 1st and 3rd Petitioners as death was due to multiple injuries caused to the deceased as a result of a blow on the head with a sharp cutting instrument which injury was very deep and the skull had been fractured as a result of a blow with a blunt weapon. We do not see any error in the reasoning of the Court of Appeal regarding these two grounds as what is necessary is to consider whether on reading the direction by a trial Judge to the Assessors as a whole whether there has been any miscarriage of justice.

Ground 5

[39] Ground (v) of the 1st Petitioner and ground 5 is in relation to the lack of legal representation which was also canvassed before the Court of Appeal.

[40] The Court of Appeal in its judgment from paragraphs [41] to 42] set out in detail the sequence of events that had taken place when the Petitioners first appeared in the

Magistrate's Court on 2 August 2011 after being charged with murder up to the time that the trial was taken up, and stated:

> "[43] There is no question that the appellants were ignorant of their right to counsel. They declined to engage counsel who was available to represent them for the trial despite being warned about the seriousness of the charge and need to engage counsel when the trial date was fixed. The fact that the appellant had to conduct their case without counsel was their own making. They have no basis for complaint that their right to counsel was infringed.
>
> [44] Counsel for the appellants submits that the appellants were prejudiced by lack of legal representation in that they were not able to carry out an effective cross examination of the prosecution witnesses and raise their defence properly. Any accused facing a serious charge like murder will no doubt suffer some prejudice due to lack of counsel. The question is whether the trial miscarried as a result of the accused being unrepresented. Procedural guarantees where accorded to the appellants. The strength of the evidence that was led at the trial against the appellants is also an important factor in making an assessment whether the trial miscarried due to the appellants being unrepresented. In that regard, prosecution witness, Suka gave credible and reliable evidence implicating all three appellants to a common intention to assault the deceased to death. The trial did not miscarry due to the appellants being unrepresented."

[41] The same submissions as were made before the Court of Appeal were made before this Court regarding this ground.

[42] Considering the sequence of events as detailed by the Court of Appeal which was borne by the record, we see no error in the reasoning of the Court of Appeal in rejecting this ground.

<u>Ground 2 of the 2nd Petitioner</u>

[43] The second ground of appeal urged on behalf of the 2nd Petitioner is that the learned Trial Judge failed to properly guide and direct the assessors on how to approach the evidence contained in the statement given by the second appellant to the police.

[44] Counsel in his submissions has stated that the only *voir dire* that was recorded in the trial proceeding was done only to the 1st accused. The Ruling on *voir dire* was in relation to the 1st accused only and not the 2nd Petitioner as claimed by the Court of Appeal.

[45] The assertion of Counsel for the 2nd Petitioner that the Court of Appeal referred to a *voir dire* Ruling regarding the 2nd Petitioner is incorrect as there is no such reference in the judgment of the Court of Appeal.

[46] On the other hand the Court of Appeal dealt with the caution statement of the 2nd Petitioner as follows:

> *"Direction on the caution statements*
>
> [25] Vesikula made incriminating admissions in his caution statements. At paragraph [23] of the summing up, the learned trial judge told the assessors 'if you think that the answers that Kitione gave in that interview are true, then they become evidence for you to accept or reject in the normal way.' At paragraph [24] the assessors were told that the caution statements were evidence against the maker only and not against his c-accused.
>
> [26] Vesikula's first complaint is that the learned trial judge did not direct the assessors to consider whether the accused had made the alleged confession and whether the confession true, citing Burns v The Queen [1975] 132 CLR 258 as authority. Vesikula's second complaint is that the learned trial judge should have also left the issue of voluntariness of the confession to the assessors.
>
> [27] Vesikula's evidence was that he told the police he had used the timber, just go get them off his back because they were pestering him. He admitted making the admission but claimed the admission was not true. Clearly, voluntariness of the admission was never an issue at the trial. The truth of the admission was. The learned trial judge correctly let the truth of the admission for the assessors to decide. There is no error shown in that regard."

[47] As against the evidence of the 2nd Petitioner in his caution statements, there was evidence of direct evidence of eye witnesses, especially Iliavi Suka (PW5) who gave evidence to the effect that he saw the 2nd Petitioner striking the deceased with a stick when the deceased lay fallen, and witness Ale Vasuinadi (PW1) who had seen the 2nd Petitioner striking the deceased on the head with a stick.

[48] The Court of Appeal did not find the directions of the learned trial Judge on this aspect to be inadequate. The truth of the evidence in the 2nd Petitioner's caution statement had to be considered in the light of the evidence of the eye witnesses which evidence was heavily weighted against him.

[49] This second ground of appeal therefore lacks merit and in any event does not meet the threshold required for special leave.

Ground 6 of the 2nd Petitioner

[50] This ground which related to the use of the phrase "fanciful doubt" by the learned trial Judge in directing the Assessors regarding the standard of proof was abandoned by Counsel for the 2nd Petitioner in his written submissions.

Appeal against Sentence

[51] The appeal against sentence of the three Petitioners is on the minimum terms imposed on them. Their complaint is that the learned trial Judge failed to take into account relevant factors.

[52] The Court of Appeal in dealing with this ground stated:

> "[49] There is no merit in the complaints of the Appellant against their minimum terms. The minimum term is not an additional sentence. The sentence is life imprisonment. The minimum term is fixed to make the offender remain in prison before any possibility for a pardon can be considered by the President on

> the recommendation of the Mercy Commission under section 119 of the Constitution. In other words, the offender must serve the minimum term and cannot be pardoned or released before the expiration of the minimum term. The minimum term affects the eligibility timeframe for the possibility of a pardon or release. The minimum term by no means guarantees a pardon or a release. An offender may not be pardoned or released and may spend life in prison even after the completion of the minimum term.
>
> [50] In the present case, the learned trial judge justified the minimum terms he imposed on the appellant by giving reasons. ...
>
> [51] ... ... The minimum terms that the learned trial judge imposed are within the acceptable range for killing using violence. There is no error shown in the learned trial judge's exercise of discretion to fix minimum terms."

[53] The same arguments that were placed before the Court of Appeal were placed before this Court. We do not see any error in the Court of Appeal judgment regarding the grounds of appeal against sentence as the learned Trial Judge had not erred in exercising his discretion in imposing the minimum terms, and in any event they do not satisfy the threshold required for granting of special leave.

[54] For the above reasons the applications for special leave to appeal of the three Petitioners is refused and the convictions and sentence is affirmed.

Aluwihare J

[55] I have read the judgment in draft and I am in agreement with the findings and the conclusions.

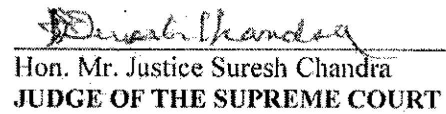
Chitrasiri J

[56] I read the judgment of Justice Chandra in draft and I agree with the conclusions and reasons therein.

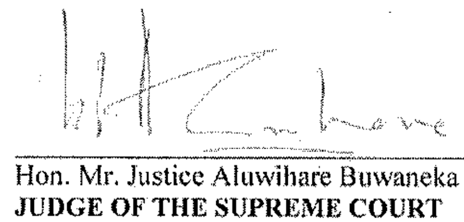
Orders of Court

1. *The applications of the 1st, 2nd and 3rd Petitioners for Special Leave is refused.*

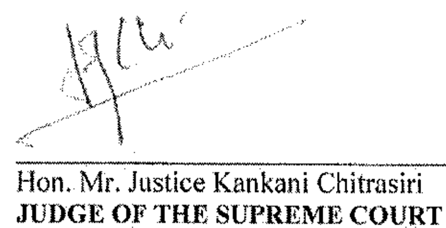
2. *The conviction and sentence of the 1st, 2nd and 3rd Petitioners are affirmed.*



Hon. Mr. Justice Suresh Chandra
JUDGE OF THE SUPREME COURT



Hon. Mr. Justice Aluwihare Buwaneka
JUDGE OF THE SUPREME COURT



Hon. Mr. Justice Kankani Chitrasiri
JUDGE OF THE SUPREME COURT