IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL N0. AAU0026 OF 2003
(High Court Criminal Case N0. HAC0014 of 2001S)

BETWEEN:

ALBERTINO SHANKAR AND FRANCIS NARAYAN

Appellant

A N D:

T H E S T A T E

Respondent

Coram: **Ward, President**
Smellie, JA
Penlington, JA

Counsel: A K Singh for appellants
W Kurusiqila for respondent

Hearing: 16 and 17 November 2005

Date of Judgment: 25 November 2005

JUDGMENT OF THE COURT

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[1] The appellants were jointly charged with the murder, on 20 March 2001, of Tang Wen Jun. They both appeal against conviction.

[2] The victim in the case was a Chinese woman in her early thirties. She came to Fiji in 1999 and lived by herself in a flat close to her workplace. She worked as a machinist in a garment factory in Toorak and she was last seen on 20 March 2001

when she had attended her place of work. The police were alerted that something might be wrong by anxious workmates and friends and, on 27 March 2001, they obtained a key from the landlord and entered the flat.

[3] They found the deceased's naked body in one of the bedrooms in the flat. The hands had been tied with electric cord, the feet bound with tape and the face so completely bound with tape that it was almost totally obscured. The body was in a very advanced state of decomposition but the pathologist was able to identify ligature marks around the neck which led him to conclude that she had died of asphyxia due to violent strangulation by the use of a ligature around the neck. He was able to rule out suicide.

[4] The flat appeared to have been searched and later some items were listed by friends of the deceased as having been taken. Some of the items, including the deceased's mobile telephone, were recovered from the home of the first appellant. Other items were recovered from other people to whom they had been passed.

[5] The flat in which the deceased lived was part of a building owned by the first appellant's maternal grandfather. The first appellant sometimes stayed with his grandfather but mostly lived with his mother in a nearby street. He and the second appellant were friends and both frequented a billiard hall a short distance away from the deceased's flat in the same street.

[6] The appellants were arrested by the police in the morning of 31March 2001 and interviewed.

[7] The interviews contain full and detailed confessions to the killing. They both refer to having raped the victim and then strangling her with a length of rope they found in the flat. They killed her because she would have recognised the first appellant. Apart from the property stolen from the flat, the alleged admissions to the police are the only evidence linking the accused to the offence. They were vigorously challenged first on the voir dire and then before the assessors.

[8] Both appellants gave evidence in which they denied any connection with the offence. The first appellant explained where he was on 20 March and the subsequent days up to his arrest. He denied anything to do with the offence and gave very detailed evidence of the way he had been mistreated after his arrest. He denied the interviews and statements. He also told the court that he had been given the items from the flat by a Chinese friend of the deceased on 22 March 2001. He said he had previously bought things from the same man. That man was the witness called by the prosecution to identify those items as having belonged to the deceased. He denied the appellant's suggestion.

[9] The second appellant also denied any involvement. He could not recall what he was doing on 20 March except that he would have been at work during the day and probably went to the billiard hall in the evening. His evidence was a detailed account of the manner in which the police mistreated him and how the statement was fabricated by the police.

[10] The grounds of appeal are:

1. That the trial was a nullity or void in that the assessors were not gazetted as required under section 264 of the Criminal Procedure Code and/or were not from the list gazetted under section 264;
2. That the learned judge erred in law when he failed to adjourn on 20 May 2003 to allow the appellant to have counsel of his choice;
3. That the learned judge erred in law when he failed to exclude the confessions of the accused that were not voluntary or supported by any independent evidence;
4. That the learned judge erred in his direction to the assessors regarding the alleged confession of the two accused;
5. That the learned judge erred in law when he allowed the investigating officer to tender the medical reports of the two accused without following the proper procedures; and

6. That the learned judge erred in law regarding when he failed to put the defence case to the assessors.

Ground one

[11] Section 264 of the Criminal Procedure Code sets out a procedure by which lists of assessors are prepared. The following sections, 265 to 272, deal with the liability of members of the public to serve as assessors and the rules for summoning them, excusing them and punishing them for non-attendance.

[12] In dealing with this ground, Mr Singh, for the appellants, explained that no challenge was raised at the time because no one was aware of the failure to follow the procedures under section 264. It should be stated at the outset that we are in the same position. Whilst the first ground of appeal asserts that there had been a failure to gazette a list, no application has been made to adduce evidence of that fact or to obtain an admission from the respondent that it was, in fact, the case. That should exclude the Court from considering the point but we note that the respondent does not take issue with that assertion and seeks to defend the position on grounds which must proceed on the basis that they were not properly appointed.

[13] We are aware that the same point is asserted in other appeals before the Court in this session and consider, in the circumstances, that we should deal with the question briefly and generally on the basis of Mr Singh's suggestion of the situation from the bar table.

[14] On that basis, Mr Singh's contention is that the terms of section 264 are clear and mandatory. He cites authority for the proposition that the terms of the statute must be obeyed and that failure to do so may render the action void, in particular *Viliame Cavubati v The State*; AAU 22/03S, 14 November 2003.

[15] Sections 264 to 272 provide for the identification of suitable assessors and the rules whereby they may be obliged to undertake the obligation to attend and sit if

summoned. Clearly the procedures set out should be followed and, if they have not, the situation must be corrected. Failure to follow those procedures may well give an assessor a ground for refusing to be bound by a summons to attend. We do not consider, however, that once an assessor has attended and been sworn in for a trial, that a fault in the manner of his identification and appointment will make the trial void.

[16] Mr Kurusiqila for the respondent makes the point that once they have been sworn in without objection, they are properly part of the court and cannot subsequently be challenged on that ground. His reason is that, even if there is some defect in their initial appointment, once they have assumed the position of assessors and been sworn in properly, they are, in the absence of challenge during their tenure, de facto holders of that position.

[17] We accept that is the proper approach. Had the challenge been raised at the outset of the trial (and assuming it is correct that the proper procedures had not been followed), the court could have heard the objection. But where there has been no challenge to the lawfulness of the assessors' attendance and performance of their duties, their appointment was de facto valid and their subsequent performance of those duties is valid.

[18] This ground fails because there is no evidence to support counsel's contention that the proper procedures had not been followed. Had it been proved that the appointments were in breach of the statutory procedures under the Act, we would have dismissed the appeal on the basis we have stated.

Ground two

[19] This ground refers to an application for an adjournment to obtain counsel made, apparently, on 20 May 2003. There is no indication in the record that there was a hearing on that day. Once again, we are constrained to point out that Mr Singh should have seen the omission, if that is what it is, and either sought to have the record completed or evidence called to confirm that was the case.

[20] Once again it is not challenged by the respondent and so we shall deal with it on the basis of counsel's assertions. What is clear from the record is that the trial started on 22 May 2003 with the arraignment of the appellants and the swearing of the assessors. At that time and throughout the trial, both appellants were separately represented.

[21] Mr Singh tells the Court that, on 20 May 2003, the first appellant asked to have the trial adjourned so counsel of his choice, namely Mr Singh, could attend. Counsel was in Australia at the time and was asked by the first appellant's family to accept the case. He was told that the case was set to start on Tuesday, 20 May 2003. He told them that he could not attend until after the following weekend. He tells the Court that he told the family that he would accept the instructions but only if there was an adjournment of the hearing on 20 May. Presumably that was the basis of the application Mr Singh tells the Court the appellant made on that day.

[22] Mr Singh's account causes us considerable disquiet. When a date of trial has been fixed, no counsel should accept instructions if he knows that he is unable to attend on that date. Similarly it is equally wrong to accept subject to an adjournment being sought and granted. This Court has seen too many cases where the record shows that counsel has appeared on the date fixed for trial and sought an adjournment but, when it is refused, has sought leave to withdraw because he had accepted instructions only if the application for an adjournment was successful.

[23] The High Court gives notice of dates of trial so counsel can arrange their commitments accordingly. Inevitably there will be occasional clashes of fixtures because of the fixing of two trials in which counsel has already accepted instructions on the same date or caused by over-running of a previous trial. All lawyers are officers of the court and their duty is to ensure that they do not obstruct or hinder the efficient running of the courts. Whenever there is such a

clash, it is counsel's duty to ensure his client is represented by competent counsel by returning the case to another lawyer of suitable ability and experience. Seeking an adjournment on the basis that they will only represent the client if it is granted ignores that duty and is tantamount to unprofessional conduct.

[24] As we have stated, we only have Mr Singh's account of what occurred on 20 May 2003. If it is correct, it would appear that the court acceded to a two day adjournment until 22 May 2003. The court would have been acting quite properly to refuse the application and to proceed on 20 May but, if it felt that the appellant had been misled by counsel's advice and apparent acceptance of instructions, it was reasonable to allow a short adjournment.

[25] Whatever the situation, when the trial commenced on 22 May 2003, the record shows that both appellants were represented by counsel. Mr Singh boldly and somewhat immodestly prefaced his submission in Court with the statement that he was complaining about the incompetence of counsel who did appear and asserting that he would have conducted the case differently and more effectively. That was an unfortunate and ill-considered assertion.

[26] It may well be that he would have conducted the case differently but that does not mean it would have been better. Counsel is entitled and expected to conduct a case in the manner which he feels is most likely, within the rules of proper conduct, to advance the interests of his client. This Court will not question such professional decisions unless there is clear evidence that the conduct has not been proper. There is no such evidence before us. Indeed, the record shows that the defence counsel for both appellants conducted a vigorous and detailed challenge to, and examination of, the prosecution witnesses.

[27] The essence of Mr Singh's submissions on this ground of appeal is that the right to counsel of choice, preserved in section 28(1)(d) of the Constitution, means that the court is obliged to adjourn in such a situation. His first contention was that it was an absolute right to have counsel of choice whenever he is represented by a

lawyer at his own expense but he modified his argument to suggest that it is an absolute right if it is reasonable. He ventured the suggestion that, if the insistence on a particular counsel would need an adjournment of a "couple of months", it should be considered reasonable.

[28] We cannot accept this argument for two reasons. The first is that the right to counsel of choice is not an absolute right. The court will always consider an adjournment in such a case if the request is reasonable but it has been stated many times before that, in determining whether the request is reasonable, the court has to consider more than the interests solely of the accused.

[29] Counsel cites the authority of *Takeiveikata v The State*; AAU 30/04S, 16 July 2004, where an application for an adjournment on this ground was upheld. That case is clearly distinguishable because counsel had already been instructed and his difficulty was known to the court well in advance of the date fixed for the hearing.

[30] We have no doubt the result would have been different had the position been, as here, that the application was made on the actual day fixed for the trial to commence - which is the second reason. When the application to change counsel is made in circumstances where granting it would override the rights of others to trial on the date set, it will only be allowed if there are very strong reasons. Simply to try at the last moment to fit the case into a busy lawyer's schedule regardless of the rights of other parties or the convenience of witnesses should not be considered an acceptable reason

[31] This ground of appeal fails

Grounds three and four

[32] These two grounds can conveniently be dealt with together as they both relate to the admissibility of the confessions.

[33] Counsel refers to section 27 (3)(a) of the Constitution:

"(3) Every person who is arrested for a suspected offence has the right:

(a) to be informed promptly in a language that he or she understands that he or she has the right to refrain from making a statement; ..."

[34] The evidence of the arrest of the accused was that each was told of his right to remain silent and that they did not reply. That, counsel suggests, means that they had exercised and demonstrated their intention to exercise that right and so the police had no right to continue to interview them. That is clearly incorrect. The police are required before any questioning of a suspect to give a warning of the right to remain silent. If the suspect declines to say anything the police are entitled to continue to ask questions. If the suspect gives no replies, the interview will have no evidential value. If he answers some only, the whole interview is admissible subject to the trial judge's discretion to edit out denials which have no evidential value. It is not correct, that, once a suspect has declined to answer, the police are in some way thereafter precluded from any further questioning. On the other hand, prolonged and persistent questioning, where the right to silence has been clearly exercised, has been held in other jurisdictions to be oppressive.

[35] Counsel also raised the question of whether or not the appellants had been properly advised of their other rights under section 28 of the Constitution. He accepts that the evidence was that they were informed of some and not of others and suggests the learned judge should have reached a different conclusion on the allegations of the defence in deciding on the admissibility of the appellants' alleged confessions.

[36] This is a challenge to the learned judge's findings of fact and the remainder of counsel's submission on the third ground similarly amounted to arguments on, and challenges to, the learned trial judge's finding of fact following the trial within a trial. This Court will not interfere with such findings unless they were not supported by the evidence or could not reasonably have been made on the evidence available.

[37] In the light of counsel's criticism of the defence counsel at the trial, it should be pointed out that all these arguments were raised before the trial judge and were apparently put persuasively enough to require a detailed and lengthy ruling on the submissions. Having set out the evidence called on the voir dire the judge analysed it and reached his conclusions on that evidence. He clearly had ample evidence upon which to reach the conclusions he did and we do not interfere.

[38] As has been stated, the allegations against the police and the challenge to the statements alleged to have been made to the police were fully aired again before the assessors. The police witnesses were repeatedly challenged in cross examination and the appellants each gave evidence of the events. In his direction to the assessors on malice aforethought, the learned judge said:

> "In this case, on the accused's own confessions, if you accept them, the accused intended to kill Ms Tang."

[39] Later he explained:

> "The date in the charge is no doubt based on the accounts given by the accused in their statements. If you accept those accounts, then you will no doubt find the death occurred, as charged, on Wednesday 21 March 2001.
>
> What then is in issue in this case? It is the identity of the accused as the perpetrators of the crime, the third element the prosecution must prove. Both accused testified and said they were not responsible for the crime. They knew nothing about it. They never made any confessional statements to the police. Such statements were fabricated by the police themselves.
>
> Much of the focus in the trial in relation to the accused's police statements had been on the treatment meted out to the two accused while in custody. It had been suggested they were beaten, oppressed

and inhumanely treated in various ways. It is said that as the result of this treatment the two accused were forced to sign fabricated confession statements.

The first matter you will have to resolve is whether these interviews did take place, in the question and answer form, or whether the police did not conduct such interviews at all. Did they invent the two statements? Or was there a series of voluntary answers given to police questions which were then acknowledged by each accused by the signing of the documents at various stages of the interview process? Which account is true; bearing in mind it is for the prosecution to prove that the police did not fabricate the interviews and that the answers and signatures were willingly given?

The interviews are crucial pieces of evidence in this case, if accepted as true. It has rightly been said by defence counsel that there was no eye witness in this case. ... The prosecution case therefore rests on the confessions and on circumstantial evidence. A conviction can be founded on such evidence alone without the evidence of eye witnesses. Much depends upon the quality of the available evidence. You should consider the surrounding circumstances of the taking of the interviews and the testimony of all of the witnesses, and that includes the two accused, when considering the issue of the confessions. If you decide the confessions were invented by the police, you may well conclude that the remaining evidence, whilst raising suspicions, is insufficient for you to find that the case had been proved beyond reasonable doubt against either of the accused."

[40] Following an account of the main elements of the accused's accounts of the treatment by the police, the judge continued:

"If you find some support for the accused's account, you could conclude that the signing of the statements had been involuntary. But the defence case which you have to consider is whether the statements were made at all.

Next you should consider whether the interview statements were genuine, in the sense that they accurately record what was asked and what was said in answer. The defence argue that the police knew or made obvious guesses as to what had occurred and thus could compile two matching statements. The prosecution say that on 31 March various matters would only have been known by the perpetrators of the crimes, such as the rapes carried out on the deceased and exactly how she had died, that is by the nylon rope, rather than smothering with the bed sheet or the scotch tape.

You should resolve the matter by a careful analysis of the two statements, keeping in mind what the prosecution and defence witnesses have told you about what had happened in the Crime Office at Central Police Station on 31 March 2001."

[41] Counsel for the appellant suggests that the learned judge should have given a proper direction on the right of the accused under the Bill of Rights and the denial by the appellants of the alleged confessions. He continues, as he does in other grounds, to suggest the words the judge should, in his opinion, have used.

[42] We cannot accept that the lengthy direction set out above failed to give full and clear advice as to how the assessors should approach the topic. We certainly do not accept that counsel's suggested wording equals it.

[43] This ground also challenged the judge's direction on lies. Counsel suggested there was only one reference;

> " But proved or admitted lies, whether in evidence or in statements out of court, may assist you in assessing the accused's credibility"

[44] Again he suggests how the judge might have put it. Unfortunately counsel is not accurate. The direction on lies arose because of the second appellant's admission that, when he had been admitted to St Giles Psychiatric Hospital, he had lied to the doctors in order to be released. He had told the court, as the judge reminded the assessors, "I lied to Dr Chan because I wanted to get out of there". The judge continued:

> "The inference the prosecution ask you to draw is that he could lie easily and that he has lied to you in court for instance about his police interview having been fabricated. Often people tell silly lies and they mean nothing. Such lies do not always add something to the prosecution's case. A false denial of being at 178 Toorak Road does nothing to help prove that the accused was there and had committed the crime. It is only when a lie is told which is more consistent with guilt that with innocence, for instance an explanation proved to be or admitted to be a lie, that it can add anything to the case against an accused. If the positive evidence is lacking, one cannot make a chain of proof made up of lies.
>
> But proved or admitted lies, whether in evidence or in statements out of court, may assist you in assessing the accused's credibility. If you believe the accused has lied in his evidence in court this may assist you in deciding whether to prefer the evidence from the prosecution rather than that from the accused. You do not jump, however, to the conclusion that because an accused had lied therefore he is guilty. Of the admitted lies, you must ask yourself, were they deliberate, material, and do you find that he told the lies because of his realisation of guilt and his fear of the truth."

Taken in its entirety, we consider that was a fair and correct direction.

[45] Grounds three and four fail.

Ground five

[46] Counsel's complaint in ground five as stated in his written submissions is that the learned judge simply failed to give any direction on joint enterprise. In Court he accepted that there was, in fact, a brief reference. Having warned the assessors of the need to consider the evidence relating to each accused separately, the judge continues:

> "The accused are charged jointly. The prosecution says both accused agreed jointly to carry out this crime and whilst committing it, lent each other assistance to achieve their desired result. It was a joint enterprise. In coming to your opinions however, and in considering the evidence, it is open to you to reach an opinion that one of the accused is guilty and another innocent. You are not obliged to find either both guilty or both innocent. As I have said look at their case separately."

[47] Later he added;

> "Though there was an initial questioning of accused 1 by accused 2 on the need for the killing *[a reference to the alleged answers in the police interview]*, after accused 1's explanation, according to the confessional evidence, accused 2 joined in with that need by assisting in the killing. The evidence if accepted, is of a killing carried out by accused 1 and accused 2 acting together, hence the joint charge. In law they are both to be regarded as participants in the commission of the crime and equally liable to conviction for murder. Whether that is what happened are matters which you will have to consider carefully and to decide."

[48] Counsel for the appellants suggests that the court should have given a direction which followed the definition of joint enterprise in section 22 of the Penal Code. He cites the words used by Shameem J in the case of *Roko v State,* AAU 12/02S, 19 March 2004, in which the learned judge gave an accurate direction; carefully explained in relation to the case she was hearing.

[49] The judge's duty when directing the assessors on law is to give a clear and concise direction that clarifies the law and which is also tailored to fit the relevance to, and the circumstances of, the case they are considering. In the present case, the prosecution case was that this was a joint enterprise and the joint charge reflected that. On the other hand, the defence was a total denial of any involvement. In such a case, emphasis on the nature of joint enterprise might well have left the impression that the judge was overemphasising a firmly disputed aspect of the prosecution case. What was needed was a sufficient direction to ensure the assessors understood the nature of the joint charge and the right of each accused to be considered separately. That is what the judge said in the first passage set out above.

[50] Having said that, we consider the direction could have been more clearly put. In particular, we note the absence of any reference to the need of the assessors to consider the need for an accused to have knowledge of the probable consequences of the action in which he joined. Had the learned judge followed, as Mr Singh suggested, the words of section 22, there would have been little ground for criticism although an explanation of how it applied to the fact of this case would have made it clearer to the assessors.

[51] However, the opinions of the assessors in this case that the appellants were guilty must have been based on an acceptance by them of the contents of the statements to the police. The manner in which the actual killing is described to have taken place in those statements leaves no room for any doubt by the second accused as to the intention of the first accused when he tightened the rope around the victim's

neck throughout which operation the second accused assisted by restraining the victim's struggles.

[52] We find that the direction on joint enterprise was incomplete but, viewed against the circumstances of the case, we do not consider that any miscarriage of justice has occurred as a result and, under the proviso to section 23 of the Court of Appeal Act, dismiss the appeal on this ground.

Ground six

[53] In the course of the police investigations, the appellants were examined by a doctor. At the trial, the defence had cross-examined the witnesses on the alleged assaults and the injuries suffered by each appellant in consequence. It appears that each was examined by a doctor on 3 April 2001 but the doctor had left the country by the time of the trial. The prosecution sought to produce the doctor's report first in the trial within a trial as the doctor did not mention any injuries. Counsel for the prosecution stated that another doctor was to be called to produce the reports as a business record. However, that witness was not called and eventually the prosecution produced the reports through the investigating officer.

[54] The judge's note records the events:

> " Rabuka *[counsel for prosecution]*: I seek to call a witness from the CWM, Dr Charles Kumaran, to tender the medical report as a business record.
>
> Miss Nair *[counsel for accused one]*: We are challenging the medical report. We want the doctor to be present, Dr Devina Singh, for cross examination. ...
>
> Re: Medical reports

Miss Nair: It is generally unfair to the defence since we have no opportunity to challenge it. Prejudicial to Acc 1's case. Doctor should be called or be disallowed.

Miss Narayan *[counsel for accused two]*: Davendra Singh's case binds court I accept. Crayden. No evidence yet that Dr Devina Singh has refused to come back to give evidence. Cf: Davendra Singh's pathologist. If admitted unjust and unfair to Acc 2. He will say he was not properly examined by the doctor.

Rabuka: It is settled that these medical reports are business records. Only have to show witness is "beyond the seas'.

Nair (in reply): Prosecution could have obtained his witnesses as it did with Sgt Ravin from America.

Court: Following Davendra Singh the court is bound to find the doctor's report at the A&E dept of the CWM was a business record. If the prosecution can satisfy the other requirements for admissibility of section 4 of the Evidence Act the evidence will be admitted. I shall hear later how this evidence should be assessed."

[55] The court then adjourned and the next day:

"Rabuka: We have tried to trace the doctor who we require. Not been able to contact him. We will ask to recall the I.O.

Narayan: We are told the I.O. will tender the medical report. We are prejudiced in not having a medical witness to ask questions of.

Court: I allow the witness to return to the witness box."

[56] The police officer then tendered the report having given hearsay evidence of a conversation with another person that Dr Singh had left the country and could not be traced.

[57] Despite the reference by the learned judge to the requirements of section 4 of the Evidence Act, the evidence to establish the basis for the production of the medical reports was barely adequate.

[58] Later in the trial before the assessors, the prosecution applied to recall the I.O. and neither defence counsel objected. He then produced the medical reports.

[59] The ground of appeal is based on the prejudice suffered by the defence from the production of the report by an officer who could not answer any questions on its contents. That is not an uncommon situation with documents produced under section 4 but we accept, as the appellants suggest, that the manner in which they were produced in this case meant they could not ask the officer about the contents. However, no attempt appears to have been made by the defence to call its own doctor to answer such questions. Both in the trial on the voir dire and before the assessors, the next witness called was the pathologist who examined the body of the deceased. We note that defence counsel did not ask that witness anything about the medical reports yet this was just the type of witness they wanted to produce the report in the absence of the examining doctor.

[60] We do not consider that the manner of production of the reports prejudiced the appellants' defence and this ground of appeal fails.

Ground seven

[61] The suggestion that the learned judge did not put the defence to the assessors is simply not borne out by the record and this ground cannot succeed. However, we do consider that the objections raised by counsel for the appellants to the manner in which the case was summed up to the assessors is understandable.

[62] In any case where the prosecution case depends almost entirely on challenged confessions backed up by very little circumstantial evidence, the trial judge should be careful to ensure that the summing up fully explains the essential aspects of the law and the evidence with clear guidance on the manner in which

they should consider the evidence against each accused. We have found that the learned judge did cover the necessary topics but we feel that many might have been more fully explained. None of the challenges to the summing up can succeed but a better explained and better expressed summing up would have been more satisfactory.

Order:

Appeal against conviction by both appellants is dismissed.

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WARD, PRESIDENT

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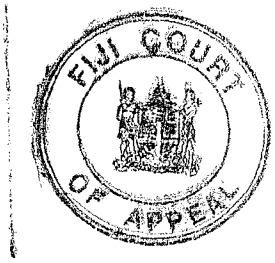
SMELLIE, JA



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PENLINGTON, JA

Solicitors

A.K. Singh Law, P.O. Box 1710, Nausori for the Appellant
Office of the Director of the Public Prosecutions, Suva for the Respondent