

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

CRIMINAL APPEAL NO. AAU0021 OF 2002S  
CRIMINAL APPEAL NO. AAU0058 OF 2002S  
(High Court Criminal Action HAC No 0004 of 2001S)

BETWEEN:

MOSESE SETAREKI  
PECELI MASIDOLE

*Appellants*

AND:

THE STATE

*Respondent*

Coram:

Eichelbaum, JA  
Tompkins, JA  
Penlington, JA

Hearing:

Wednesday, 20 August 2003, Suva

Counsel:

The Appellants in Person  
Mr P Ridgway for the Respondent  
Ms M. Waqavonovono for the Legal Aid Commission

Date of judgment: Tuesday 26 August, 2003

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INTERIM JUDGMENT OF THE COURT

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**Introduction**

[1] The appellants were jointly charged and convicted of murder on 5th April, 2000 by the High Court in Suva. For that trial they were each granted legal aid. Each appellant in person has appealed against the conviction and sentence.

[2] Each appellant applied for legal aid in respect of their appeals. They are eligible for legal aid. However, due to its limited resources, the Legal Aid Commission is unable to provide legal aid to enable their appeals to proceed at this time.

[3] The Legal Aid Commission, on 30th July, 2003, at a Court of Appeal call-over, requested the Chief Justice to assign counsel to the appellants pursuant to s 30 of the Court of Appeal Act ("the Act"). However, since s 30 refers to "the Court of Appeal", a single judge of the Court is not able to make the order sought. The application was accordingly listed for hearing by the Court at the current session.

[4] At the hearing of the application, each appellant appeared in person. Each said that he lacked the means to provide his own counsel, and that he wished to have counsel to prosecute the appeal on his behalf.

### **Relevant provisions of the Act and Constitution**

[5] Section 30 of the Act provides:

30. The Court of Appeal may at any time assign counsel to an appellant in any appeal or proceedings preliminary or incidental to an appeal in which, in the opinion of the Court, it appears desirable in the interest of justice that the appellant should have legal aid, and that he has not sufficient means to enable him to obtain that aid.

[6] Section 32 (2) relevantly provides:

32. (2) The expenses of counsel assigned to an appellant under this Part . . . shall be defrayed out of the Consolidated Fund up to an amount allowed by the Court but subject to any provision as to rates and scales of payment made by rules of Court.

[7] It is apparent from these provisions that, if this Court decides to exercise its discretion under the sections, its role is limited to assigning counsel to an appellant. That counsel, without further order of the court, is entitled under s 32 (2) to be paid out of the Consolidated Fund. The only other action this Court can take is, if it exercises its discretion to do so, to fix the amount allowed by the Court.

[8] Also relevant is clause 28 (1) (d) of the Constitution:

28 (1) Every person charged with an offence has the right:

(d) to defend himself or herself in person or to be represented, at his or her own expense, by a legal practitioner of his or her choice

or, if the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid.

### **Submissions**

[9] Ms Waqavonovono for the Legal Aid Commission submitted that the Commission should be able to obtain the benefit of these provisions by receiving funds directly from the Consolidated Fund in circumstances where, because of lack of sufficient resources, it is unable to provide either in-house or outside counsel to act for the appellants. She confirmed that the appellants qualified for legal aid, which would have been granted had the Commission the resources to do so.

[10] She accepted that s 30 of the Act was enacted before the Commission was in existence. She referred to later amendments to the Act made after the present legal aid structure was in place. It was therefore her submission that this Court has jurisdiction to make an order under s 30, despite the legal aid provisions contained in the Legal Aid Act 1996. She was not aware of any instance, since the enactment of the present Legal Aid Act, where this Court has appointed counsel under s 30.

[11] She submitted that this Court should make an appointment of counsel to represent each accused, with the consequence that their expenses would be defrayed from the Consolidated Fund.

[12] Mr Ridgway appeared for the State as prosecutor. He did not have instructions to appear on behalf of the Attorney-General in connection with the application to appoint counsel under s 30. He submitted that in its role as prosecutor, the State would not wish to resist the appointment now sought.

### **Decision**

[13] The decision on this application maybe relevant in other cases where the Legal Aid Commission is unable to process an application for legal aid on an appeal through lack of resources. Accordingly we consider it necessary that, before the Court determines the application, there should be filed in the Court a formal application for

appointment of counsel under s 30 of the Act with supporting affidavits. Ms Waqavonovono has indicated that the Legal Aid Office will be prepared to undertake this task on behalf of the appellants.

[14] The affidavits in support should depose to all matters relevant to the application, and in particular:

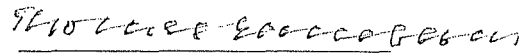
- [a] Relevant information relating to the means of the appellants.
- [b] That the appellants qualify for the grant of legal aid.
- [c] The reasons why the Legal Aid Commission is unable to provide to the appellants in-house counsel or outside counsel.
- [d] Details to support the submission that the Legal Aid Commission lacks the resources to pay counsel's costs.
- [e] Information concerning the Legal Aid Commission's financing, with an indication of when sufficient finance is likely to be available to enable counsel to be supplied to the appellants, in the event that the s 30 application is declined.
- [f] Whether, in the event of the Court assigning counsel under s 30, the Court should fix a maximum amount of expenses to be allowed to counsel and if so how much.

[15] The application and supporting affidavits shall be served on the Solicitor-General on behalf of the Attorney-General. At the hearing of the application, the Attorney-General may file submissions and be represented by counsel.

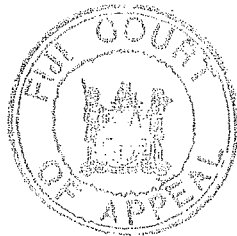
[16] To enable these steps to be taken, the application is adjourned to be heard during the November sittings of the Court.

**Result**

[17] The application for an order under s.30 of the Act for the appointment of counsel is adjourned to the November sittings of the Court of Appeal.

  
Eichelbaum JA

  
Tompkins JA



  
Penlington JA

**Solicitors:**

Appellants in Person  
Officer of the Director of Public Prosecutions, Suva for the Respondent  
Office of the Legal Aid Commission, Suva