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

CRIMINAL APPEAL NO. AAU0097 OF 2005S
(High Court Criminal Case No. HAC 20 of 2005S)

BETWEEN: **THE STATE**

Appellant

A N D : **BRIJAN SINGH**
a.k.a. BRIAN SINGH

Respondent

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

Hearing: **11 June 2007**

Counsel: **D Goundar for appellant**
D Sharma and P Sharma for respondent

Date of Judgment: **Monday 25th June 2007**

JUDGMENT OF THE COURT

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[1] This is an appeal by the State against a verdict of not guilty entered by the learned trial judge following a submission of no case to answer.

[2] The respondent was the Permanent Secretary of the Ministry of Labour and was jointly charged, with one Shashi Shalendra Pal, the managing director of Hunts Travel Service (Hunts) in Suva, with three counts of false pretences contrary to section 309(a) of the Penal Code.

[3] At the outset, the judge allowed an application for separate trials and the hearing continued with this appellant alone. Mr Pal has yet to be tried.

[4] The facts were largely undisputed and may conveniently be taken from the appellant's submissions to this Court.

[5] The respondent was entitled to travel business class when travelling abroad by air on official duty. It was not disputed that he had travelled abroad on official duty as alleged in the three counts. Mr Pal's company was the travel agent which issued the air tickets on those occasions. To facilitate the respondent's trips, the Ministry's administrative staff made the necessary arrangements in accordance with the Government rules and regulations. After obtaining competitive quotations, Hunts was selected to provide the service. Government local purchase orders (LPOs) were processed by the ministry and issued to Hunts which, after issuing economy class tickets, invoiced the Ministry for business class tickets. Upon receiving the invoices, the accounts section of the Ministry made payments to Hunts. The Ministry staff making the arrangements and payments were not aware that the respondent travelled economy.

[6] Count one – The prosecution led evidence that, in April 2002, Cabinet approved Fiji's participation at an ILO Convention in Geneva and the Public Service Commission approved the respondent's attendance. A senior employee of the Ministry arranged the ticketing after consultation with the respondent on the quotations.

[7] On 24 May 2002, Hunts issued an itinerary and quotation for business class travel to the respondent. On the same day, an LPO in the sum of $8,739.00 was issued to Hunts for a business class ticket for the respondent. The LPO was authorised and signed by the respondent. On 28 May 2002 Hunts issued an economy ticket to the respondent on Mr Pal's instructions and the same day invoiced the Government for a business class ticket.

[8] On 10 June 2002, the Government paid Hunts on the strength of the LPO and invoice. On 28 June 2002, the difference in the airfare, $4127.30, was paid to the respondent by a cheque drawn on Hunts' account and, on 2 August 2002, the respondent deposited it into his personal bank account. The respondent travelled in economy class.

[9] Count two – The prosecution case was that, in February 2003, the Public Service Commission approved the respondent's attendance at an ILO workshop in Jakarta. The ILO was providing funds for an economy ticket and had arranged with Hunts to issue the ticket. Upon the request of the respondent, the principal assistant secretary of the Ministry informed Hunts to upgrade the respondent's ticket to business class.

[10] On 17 February 2003, Hunts issued an economy ticket to the respondent on which he travelled and, on 20 February, invoiced the Government for business class travel for the respondent. The Government paid Hunts on that invoice on 11 March 2003 and the difference, $3656.00, was paid to the respondent by cheque drawn on Hunts' account. It was deposited into the personal bank account by the respondent on 30 May 2003

[11] Count three – The prosecution evidence was that Cabinet approved Fiji's participation at an ILO convention in Geneva. Quotations were obtained and another travel agent underbid Hunts. The respondent told his staff that he would consult Hunts to obtain a cheaper quotation.

[12] On 1 April 2003, Hunts issued an itinerary for business class for the respondent. On 22 May 2003, an LPO for $9724.00 was issued to Hunts for the respondent's business class ticket. The LPO was authorised and signed by the respondent. The next day Hunts issued an economy ticket to the respondent and on the same day invoiced the Government for a business class ticket. The respondent travelled on the economy class ticket.

[13] On 20 June 2003, the Government paid Hunts on the business class invoice. On 17 July 2003, the difference of $5097.00 was paid to the respondent on a cheque drawn of Hunts' account and the respondent paid it into his bank account on 11 September 2003.

[14] After a Government audit investigation these procedures were discovered and the respondent, when asked, denied travelling economy. When further confronted with the actual tickets, he said that, at the eleventh hour, he could not get business class tickets. On 12 August 2004, he refunded the differences to the Government; a total of $12860.30.

[15] The State appeals on four grounds.

1. **Suggested bias.**

[16] The trial judge had just completed the trial of two others on similar charges and the present case had been listed to follow that case. That trial had also been for false pretences arising from the use of economy tickets when business class had been paid for and one of the accused was the same Mr Pal as in the present case. In that case, the learned judge had acquitted the accused following a submission of no case to answer.

[17] The prosecution applied for an adjournment of this case pending an appeal from the earlier decision. In the course of the application it is suggested that the judge demonstrated bias against the State's case which resulted in an application also to recuse himself. The suggested bias is illustrated by some of the passages in the judges ruling refusing both the adjournment and the recusal. Counsel has offered nine passages which he suggests would lead to a reasonable apprehension of bias.

[18] Counsel for the defence had suggested that the proper course for the State, if it wished to test the previous decision on appeal, would be to withdraw the charges and then, if necessary, to re-lay them.

[19] The first four passages are no more than the judge's repetition of counsel's submissions and cannot lead to any conclusion as to the judge's views. Later, he suggested;

> "In effect the State is submitting that any party receiving an adverse ruling in similar but unrelated proceedings should be entitled to an adjournment pending the outcome of an appeal. I accept [defence counsel's] submission that this is an extremely dangerous principle for the DPP to advance.
>
> If I were to grant this application, a prosecutor could then be faced with similar applications ... solely for the purpose of testing a judge's ruling by a higher court. I would have thought it was the duty of the prosecutor to oppose such a course and not promote such a tenuous precedent. The safer course in these circumstances is for the prosecution to withdraw the charges without prejudice to them being re-laid."

[20] Having referred to the lack of material from the State in support of the application to demonstrate the similarity between the two cases, he continued:

> "That leads me to the inference that this is not much more than a thinly disguised exercise in judge shopping. That the application is supported by an alternative argument for recusal supports such a view."

[21] He concluded:

> "The applications were unnecessary and poorly supported. It was always open to the DPP to withdraw these charges without prejudice to them being re-laid rather than adopt this more robust, unnecessary and inefficient course. The respondents have been put to the expense of arguing the matter they are entitled to costs which I reserve for further argument after completion of the trial."

[22] The suggestion of bias is, Mr Goundar suggests, further demonstrated by a later passage in the ruling of no case where the same apparent antipathy to the nature of the case is revealed:

> "In circumstances where a public servant had quibbled over his entitlements perhaps the sanction of the criminal law as it presently stands in Fiji is too inefficient and it may be prudent to pursue Public Service Discipline for such abuses rather than criminal charges."

[23] The judge has a discretion whether to allow an application for an adjournment. The respondent suggests this was simply a robust statement of the judge's view that the application for an adjournment was ill advised.

[24] That it was robust cannot be denied. However, some of the judge's comments were unwise when he was about to start the trial. The State's wish to try and seek a decision on appeal before pursuing a case which it suggested was very similar may set an unfortunate precedent but we cannot accept the judge's suggestion that it was dangerous, let alone extremely so.

[25] What was possibly dangerous was his repeated indication that the DPP should withdraw the charges. The judge had not heard the evidence in this case. Indeed the basis of his criticism of the prosecution was that he had not been given sufficient information about the suggested similarities between the pending case and the case he had just completed. Whilst the court may properly in an appropriate case given such an indication to the prosecution, he should be cautious that his comments do not appear to intrude on the unfettered discretion of the DPP.

[26] Similarly the suggestion of judge shopping was an unnecessary and unfortunate remark in such a case. Any judge faced with an application that he should disqualify himself from trying a particular case must be careful to avoid the possibility of judge shopping and not accede too readily to the application. However, it is only in the clearest case that the judge should suggest the application is a disguise for such an exercise. We do not consider the comment was justified in this case.

[27] The judge would have been wiser to have given a short ruling refusing the application bearing in mind that, if he refuses the application, he will be trying the case. It is never helpful to commence a trial with one side smarting from an apparent attack on counsel's integrity.

[28] However, our reservations about the infelicity of expression and over-stated suggestions about the desirability of pursuing charges about which he had heard no evidence fall short of finding that those remarks gave rise to an apprehension of bias in the trial.

[29] This ground fails.

2. Costs

[30] As can be seen in the passage above, the judge concluded his criticism of the prosecution by an award of costs to the defence.

[31] We can deal with this shortly. The power to order the prosecution to pay costs in a criminal trial is covered by section 158 (2) of the Criminal Procedure Code:

> "(2) It shall be lawful for a judge of the High Court or any magistrate who acquits or discharges a person accused of an offence, to order the prosecutor ... to pay the accused such reasonable costs as ... may seem fit;
> Provided that such an order shall not be made unless the judge or magistrate considers that the prosecutor either had no reasonable grounds for bringing the proceedings or has unreasonably prolonged the same."

[32] Clearly that power, even when the terms of the proviso apply, only arises where the defendant has been acquitted or discharged. In the present case, the order was made in response to an interlocutory application before the trial had commenced. Counsel for the respondent suggests the court has an inherent complementary power to award costs when it is equitable so to do to ensure effective

administration of justice. He offers no authority on the point and we do not consider there is support for such a contention.

[33] In the case of *Grahame Southwick v The State* [2004] App CAV 1/03, 21 May 2004, at paragraph 19, the Supreme Court emphasised the limits on section 158(2):

> "Section 158(2) of the Criminal Procedure Code confers upon a judge or magistrate a positive power to award costs to an accused person who is acquitted or discharged from criminal proceedings. The section creates an express power conditioned upon the existence of unreasonable conduct on the part of the prosecutor in bringing the prosecution or in prolonging it."

[34] The Court went on to consider whether the power was in any way extended by the provisions of the Constitution relating to the presumption of innocence. In rejecting that submission, the Court explained:

> "Given the juristic character of section 158(2) as a beneficial, albeit limited, power-creating provision, it cannot be open to constitutional attack upon the basis that it does not go far enough. What counsel ... seeks to do is to invoke section 28 of the Constitution to extend the application of the power as a matter of construction or to rewrite it by striking out the limitation upon its exercise. This submission does not invite the court to exercise its traditional judicial function of testing the validity of legislation against constitutional principles. Rather it invites the court to legislate. This would involve a clear transgression of the constitutional limits upon its function."

[35] The judge had no power under section 158(2) to order costs against the prosecution for the application to adjourn or recuse and the order must be quashed.

3. Severance

[36] As has been stated, the charges had been laid jointly against the respondent and Mr Pal. Prior to the date set for trial, application was made by the respondent and his co-accused for separate trials. The basis of the application was that Mr Pal had asserted in an informal statement and in his caution interview that he issued the

economy tickets and paid over the cash because the respondent told him to do so. His "prime defence", according to his counsel, would be that he believed he was entitled to do this.

[37] Counsel for the State pointed out that its case was that both accused were involved in a common plan to defraud the government and they should, therefore, be tried together. It was also contended that the expense and inconvenience of two trials was not warranted.

[38] It is trite law that a judge has a discretion to order separate trials of co-accused if the effect of a joint trial would be to prejudice or embarrass the defence of a co-accused to such an extent that a miscarriage is the likely result. However, it is a discretion which the courts should exercise with great care.

[39] In the case of *R v Grondkowski and Malinowski* [1946] KB 396 at 371, Goddard LCJ said;

> "Prima facie it appears to the court that where the essence of the case is that the prisoners were engaged on a common enterprise, it is obviously right and proper that they should be jointly indicted and jointly tried, and in some cases it would be as much in the interest of the accused as of the prosecution that they should be. Suppose, for instance, that the defence of one was that he or she was acting under the positive duress of the other. It would be obviously right that they should be tried by the same jury, who might see in one prisoner a harmless or nervous looking little man or woman, and in the other a savage brute whom they might deem capable of forcing his co-prisoner against his will into assisting in a crime."

[40] That passage was cited with approval in *Moghal v R* [1977] 65 Cr App R 56. However, Scarman LJ, at 62, added in respect of the judge's role:

> "...we think that only in very exceptional cases is it wise to order separate trials when two or more are jointly charged with participation in one criminal offence. ... The question is for the judge in the exercise of his discretion, and it is thus that the law has been stated ever since, that the appellate court will intervene only if satisfied that the judge's decision has caused a miscarriage of justice. ... Although not one of us,

> on the material presented to the judge, would have ordered separate trials, it is not possible to condemn his order as necessarily inimicable to the course of justice. ...The order created difficulties: but did not preclude the possibility of a fair trial."

[41] In the present case, the State contends that we should intervene because the judge exercised his discretion on an incorrect application of the law and consideration of the effect of the evidence of a co-accused.

[42] Counsel for the respondent suggested that a joint trial would unduly prejudice his client's case because the respondent might not be able to cross examine Mr Pal on the contents of the statements if the latter chose not to give evidence. We see no substance in that submission. It is well established law that statements under caution are only admissible against the maker of the statement. It is not uncommon for such statements to include passages blaming a co-accused and the courts require the judge to give a clear warning of that danger. Having done so, it can be assumed that the assessors will be aware of the danger.

[43] On the other hand, if the maker of the statement gives evidence and attempts to rely on his allegations against his co-accused, they become admissible and he can, and undoubtedly will be, cross examined on them. In all such cases the law requires the trial judge to give a clear and firm warning.

[44] The judge in this case accepted that separate trials should only be granted in very exceptional circumstances. He referred to the need for a direction but, first made what we consider was an unfortunate suggestion as to the State's motives:

> "I don't accept learned counsel's submission that the State does not rely on the statements of Mr Pal to secure a conviction against Mr Singh. The fact that Mr Singh is alleged to have told Mr Pal to change the class of tickets and give him the cash difference after the issue of the tender invoice, LPO and cash payments is a significant if inadmissible and highly prejudicial indicator of intent. Understandably the State want this played out in front of the assessors. A strong direction by the bench to ignore such a prejudicial and otherwise inadmissible statement by a co-accused may assist the assessors in laying the Pal statement to one side but that very much depends on the ultimate State case."

[45] The State's opposition to severance was soundly based on recognised legal principles and the suggestion that they were doing it for some motive of unfairness was uncalled for.

[46] It is also hard to understand the judge's reasoning about the State's possible use of Mr Pal's assertion. Its case was that he was a joint conspirator to defraud the Government and it did not accept Mr Pal's defence that he had only acted on the respondent's orders in the belief that he was entitled to do so. This was a simple case where a careful direction by the judge would cover the situation.

[47] However, the judge then further confused the issue:

> "If I do not sever and Mr Pal does not give evidence, he is not compellable. Mr Singh is unable to challenge the otherwise inadmissible statements he made about directions received to exchange and cash tickets. The evidence is vital to the Singh defence of lack of intent and cannot be properly challenged in my view without calling Mr Pal at the trial.
>
> Conversely, if I proceed to trial with both accused then I cannot expurgate the Pal statement to such an extent as to take out all of the offending passages as to do so would denude Mr Pal of his defence.
>
> If I grant the severance I do not see the State is prejudiced in presenting its best case against Mr Singh or Mr Pal. The State remains free in the separate Singh trial to make application to prove and emphasise the Pal statement upon the basis of the co-conspirator rule."

[48] We only comment that, if Mr Pal's statements needed to be answered by the respondent, there would be no question of the respondent calling him. Even if he had been compellable, calling him would deprive the respondent of the opportunity to challenge his evidence as there would be no question, as the judge appears to suggest earlier in his ruling, of being able to cross examine his own witness.

[49] The suggestion that the State might use the statements by Mr Pal in the separate trial of the respondent ignores both the fact that the State did not accept his exculpatory explanation and, more critically, that such statements made to the police after the offences were not made in furtherance of the conspiracy and could not be admissible under the co-conspirator rule.

[50] Those matters appear to have formed a central part of the judge's reasoning about the need to sever. We consider the judge misdirected himself and the order for severance must be quashed.

4. The finding of no case to answer

[51] This aspect of the case raises two separate issues. The first was the test the judge applied in his consideration of the evidence at the close of the prosecution case. He described the judge as having an unfettered discretion to discharge the accused and then based his decision on matters of credibility and weight of the prosecution evidence. He had used a similar form of words in the preceding case and, in fact, used his own judgment in that case as authority. The appeal in that case has been heard and the Court ruled that there was an error in the judge's approach.

[52] Counsel for the respondent accepts that the judge's approach in the present case was wrong for the same reasons as were stated in *The State v George Shiu Raj and Shashi Shalendra Pal,* Criminal Appeal AAU 81/05, 14 July 2006. We agree but, as in the earlier case, we do not consider that, taken alone, this would be sufficient to allow the appeal.

[53] The second matter is of more consequence. The judge first summarised the defence submission:

> "In this application the defence rely on an argument that the charges do not constitute an offence. The applicant points to the definition of a false pretence contained in section 308 of the Penal Code:
> 'Any representation made by words, writing or conduct, of a matter of fact, either **past or present**, which representation is false in fact, and

which the person making it knows to be false, or does not believe to be true is a false pretence.'

It is then submitted that the State have identified a false pretence with a future intention, i.e. that the accused 'intended to travel on a business class ticket'. It is submitted that no representation on the accused's behalf to do something in the future amounts to a false pretence.

As the offending representations described by the State in the particulars of offence are neither false in the past or present sense but may be false in the future, this is not sufficient it is submitted to constitute a false pretence. Accordingly, as the charges do not constitute an offence counsel submits it would not be fair to put the accused to his defence."

[54] Counsel for the respondent has made the same submission to this Court.

[55] The three charges were worded similarly and, after more than one amendment by the State, charged that the respondent:

> "...with intent to defraud, caused the Government of ... Fiji to pay the sum of $XX for the use or benefit of ... Brijan Singh and Hunts ... by falsely pretending that ...Brijan Singh intended to travel on a business class air ticket to YY which pretence ...Brijan Singh knew to be false or did not believe to be true."

[56] The judge gave a short disposition on the history of the offence of false pretences. He correctly pointed out that a false statement of a future intention cannot amount to this offence. He referred to the particulars of offence and concluded that the only false pretence particularised was the statement that the respondent intended to travel business class, a statement of a future fact. We consider that was not the correct approach. The purpose of the particulars of offence is to indicate to the person accused of the offence the nature of the case the State intends to present. It does not need to set out the whole evidence and it is sufficient if it indicates how the case will be presented. What is important is the evidence the prosecution adduces.

[57] The State's case was that the respondent's conduct was unlawful because he was obtaining the money from the government for a business class ticket when he well knew he had no intention of travelling in that class. The wording of the charges could have been better expressed, especially after the judge had shown considerable forbearance of the prosecution's repeated attempts to improve it by amendment. However, we consider it was adequate to forewarn the accused of the case he would be facing,

[58] As the judge pointed out, the law of false pretences has for a very long time excluded representations of future fact and the law has, in many jurisdictions, been modified to try and encompass such conduct. Unfortunately, Fiji has not done so as the wording of section 308 shows.

[59] The judge relied principally on the Australian case of *Greene v The King* [1949] 79 CLR 353, in which the High Court of Australia considered the position of false representations of future facts under a law similar to the present law in Fiji. In that case the alleged false pretence was a promise to carry out work and supply materials in the future against a present deposit of money on the strength of that promise.

[60] The judgments in *Greene's case* confirmed the law was that, in relation to the offence of false pretences, a representation of the existence of a present intention to perform a promise is not a representation of an existing fact (e.g. per Latham CJ at 358).

[61] In his judgment, Dixon J analysed a number of early cases from England and Australia and, in the passage relied upon by the judge in the present case, stated that from the earlier cases in England:

> "... the law has been that no representation, express or implied, as to the existence of an intention on the part of the prisoner to do something in the future amounts to a pretence for the purposes of the crime of false pretences. But a contract or promise as to a future act or future conduct may itself be based upon or accompanied by a false statement as to a

past fact or present state of things and if by means of the false statement the prisoner obtains the property it would form a foundation for a charge of false pretences notwithstanding the contract or promise. Some difficulty appears to have been felt about an inducement consisting partly of a false promise as to future conduct and partly of a false representation of past or present fact. But it was decided that a false representation of existing fact though united with a false promise would sustain an indictment for false pretences if money or property was thereby obtained. ...

But principle makes indispensable to the charge a representation, express or implied, which really relates to an existing state of fact whatever form the representation takes."

We accept that English authorities have generally agreed on that interpretation of the law.

[62] In the present case, the judge continued:

"... as demonstrated by analysis of the essential documents produced ... the State cannot prove the particulars on which they seek to rely. The phrase used to describe the false pretence is that Mr Singh 'intended to travel business class'. That can only mean that the false pretence is said to have crystallised at some point before the travel had been undertaken and that there was a link between that pretence and the payment of the monies. In terms of the dates supplied that cannot be so. In each case the money was paid after the travel had been taken."

[63] He then sets out the relevant dates and continues;

"Accordingly, at no time can the State bring the particulars of offence that Mr Singh falsely pretended he 'intended to travel on business class' up to proof as Hunts were paid after travel commenced and Mr Singh had completed the travel before Hunts was paid or he received his payment of the cash difference after the travel was completed.

The State may have been able to present a case saying that the false pretence was that the said Brijan Singh actually travelled in economy class when permitted to travel in business class and kept the difference. However, on their fifth amendment of the information, the State did not pursue their case in this way. I find the words used in the information are not reasonably capable of bearing the meaning now attributed to them by the prosecutor."

[64] By taking such a restrictive view of the evidence the judge misdirected himself on the case being presented by the prosecution.

[65] Despite the wording of the charge, this was not a case where the Government was induced to pay the money by a representation of future fact. The judge correctly stated that a false representation of a present intention to perform a future act is not sufficient under this section but the statement that the respondent intended to travel in business class was only part of the pretence in respect of the, then, present situation which induced the Government to pay the money on the evidence which was then before the court.

[66] The respondent signed LPOs which were to cover the cost of a business class ticket. The representation that induced the payment was that it was for the purchase of a business class ticket. It was then a matter for the assessors whether at that time it was a false representation of a present fact in that the respondent knew it was to be used for the purchase only of an economy ticket.

[67] The time of payment is not critical. The act which caused to Government to pay was the representation that it was paying for a business class ticket. Once that had been made, the payment by the Government was put in hand and was to be made whether or not it was paid after the travel had been completed.

[68] The judge recognised the importance of causation. He pointed out:

> "There must be a direct link between the use of a false pretence and the obtaining of the possession, ownership or benefit. Apart from my earlier conclusion that there is no direct link between the use of a 'crystallised' false pretence and the obtaining of the money the State faced yet another difficulty.
>
> For the State to prove this case there has to be some safe evidence that the false pretence caused the money to be paid. I find on the basis of the State's evidence at the close of the prosecution case that there is no safe evidence about causation.

> What caused this payment to be made was in fact an invitation from the ILO and approval by Cabinet, Mr Singh's permission to travel in business class on official duty as of right, the issue of a LPO, the presentation of an invoice and the payment of that money. Mr Singh was always permitted to travel in business class. So the State was always liable for that expense."

[69] We cannot accept that reasoning. The fact the State was liable to pay the sum ignores the fact that it relied on the truth of the implied statement in the signing of the LPO by the respondent that it was payment for an actual business class ticket. There was no ground for the suggestion that it would have paid if it realised the money would be used to purchase an economy ticket and the balance taken by the respondent.

[70] This case did not turn on what the judge described as a "quibble over entitlements". As this Court said in *Raj and Pal*, "if the finding is that the minister as a matter of law was entitled to obtain a business class reservation and then travel economy class but retain the difference in cost, we must with respect disagree".

[71] The judge stated, on the authority of *Goodman Rosenson v R* [1917] 12 Cr App R 236, (a case, we should add that is questionable in its apparent acceptance of the law on representations as to present fact) that whether the words of or conduct by the accused are reasonably capable of bearing the meaning attributed to them by the prosecutor is a question for the judge. That, with respect, is not the point decided in that case. Whilst the court did discuss whether the judge could take a matter from the jury, it was dealing with a case where the judge had strongly directed the jury on the interpretation of certain matters of evidence. The case emphasises that such matters should be left to the jury.

[72] In the present case, the question of whether the evidence established that the false pretence caused the money to be paid was a matter for the assessors and should have been left to them. In deciding that it should not go to them, the judge again fell into the same error with which we have already dealt, namely evaluating the

credibility of the evidence when he applied the test of "safe evidence" in the middle paragraph of the passage set out above.

[73] On a consideration of all these grounds, we are satisfied that the acquittal should be set aside and the case remitted to the High Court for trial de novo by another judge.

[74] That leaves one further issue. Clearly our decision that the trials of the two accused should not have been severed will have an effect on the trial of Mr Pal. He was not represented in the appeal hearing.

[75] What our decision does is to restore the case to the position it was in on the first day of the trial before the High Court. As the trial is to start afresh, it will again be on a joint charge and the parties will, of course, be able to make any application they wish before the trial court.

[76] The appeal is allowed.

Ward, President

FIJI COURT OF APPEAL

Ellis, JA

Penlington, JA

Solicitors:

Office of the Director of the Public Prosecutions, Suva for the Appellant
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