

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 59 OF 2013

STATE

V

- 1. RAHUL RAJAN NAIDU**
- 2. AVENAI R. DANFORD**
- 3. RIMAKSHNI RANIGAL**

Counsel:	Mr Alvin Singh	for State
	Mr Mark Anthony	for 1st Accused
	Ms Keli Vulimainadave	for 2nd Accused
	Mr Iqbal Khan, Ms S Khan &	
	Mr Ronil Kumar	for 3rd Accused

Date of Judgment : 4 September, 2018
Date of Sentence : 18 September, 2018

SENTENCE

1. All Accused were charged with Money Laundering and tried before three assessors. The Information on which the Accused were charged read as follows:

COUNT 1

Statement of Offence

MONEY LAUNDERING: Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act, 1997 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.

Particulars of Offence

RAHUL RAJAN NAIDU, between the 14th day of July, 2011 and the 21st day of July, 2011 at Lautoka in the Western Division, engaged directly or indirectly in transactions involving \$12,000.00 FJD that were the proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of criminal activity.

COUNT 2

Statement of Offence

MONEY LAUNDERING: Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act, 1997 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.

Particulars of Offence

RAHUL RAJAN NAIDU, on the 1st day of August, 2011 at Lautoka in the Western Division, engaged directly or indirectly in transactions involving \$890.00 FJD that were the proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of criminal activity.

COUNT 3

Statement of Offence

MONEY LAUNDERING: Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act, 1997 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.

Particulars of Offence

RAHUL RAJAN NAIDU, on the 1st day of August, 2011 at Lautoka in the Western Division, engaged directly or indirectly in transactions involving \$500.00 FJD that were the proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of criminal activity.

COUNT 4

Statement of Offence

MONEY LAUNDERING: Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act, 1997 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.

Particulars of Offence

RAHUL RAJAN NAIDU, on the 1st day of August, 2011 at Lautoka in the Western Division, engaged directly or indirectly in transactions involving \$145.00 FJD that were the proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of criminal activity.

COUNT 5

Statement of Offence

MONEY LAUNDERING: Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act, 1997 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.

Particulars of Offence

AVENAI RANAMALO DANFORD, between the 14th day of July, 2011 and the 21st day of August, 2011 at Lautoka in the Western Division, engaged directly or indirectly in transactions involving \$12,000.00 FJD that were the proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of criminal activity.

COUNT 6

Statement of Offence

MONEY LAUNDERING: Contrary to Section 69 (2) (a) and (3) (a) of the Proceeds of Crime Act, 1997 as amended by Proceeds of Crime (Amendment) Act 7 of 2005 and Proceeds of Crime (Amendment) Decree 61 of 2012.

Particulars of Offence

RIMAKSHNI RANIGAL, between the 14th day of July, 2011 and the 1st day of August, 2011 at Lautoka in the Western Division, engaged directly or indirectly in transactions involving \$6,500.00 FJD that were the proceeds of crime knowing or ought to have reasonably known that the money is derived from some form of criminal activity.

2. The assessors unanimously found the 1st Accused guilty on the first four counts of Money Laundering as charged. In their majority opinion, assessors also found the 3rd Accused guilty on sixth count of Money Laundering as charged. Assessors in their majority opinion found the 2nd Accused not guilty on the fifth count.

3. The Court found that all the accused were engaged directly or indirectly in transactions involving stolen money, knowing or ought reasonably to have known, that the said money had been derived or realized, directly or indirectly, from some form of unlawful activity and found them guilty of Money Laundering as charged and convicted them accordingly.
4. This case is a case where the three persons were involved in a sophisticated online scam having international consequences. Laurel Vaurasi the principal of Shekinah Law and two others namely Sailasa and Alvish, the victims in this case, maintained their bank accounts with Westpac Bank. All accounts had online banking facility. After hacking into their electronic banking facility, unauthorized money transfers were made online to two separate Westpac Bank accounts. The transferred stolen money had come into the account of the 2nd Accused, Avenai Danford and that of another person by the name of Avitesh Chand. The money deposited into those two accounts was withdrawn on the instructions of the 1st Accused Rahul Rajan Naidu. Avenai Danford, the 2nd Accused, having withdrawn the stolen money from his account gave it to the 1st Accused. 1st Accused, with the assistance of the third Accused, Rimakshni, a teller at the Western Union, then transferred the stolen money out of the country through Western Union, breaching protocols and procedures of Western Union. The 1st Accused coordinated all illegal transaction as the main culprit or money mule.
5. The maximum sentence for Money Laundering is 20 years' imprisonment or fine not exceeding \$ 120,000.00, or both if the offender is a natural person. Prescribed maximum sentence indicates that Money Laundering is a serious offence.
6. It appears from a review of decided cases and current sentencing practice, the tariff for the offence of Money Laundering is not well settled in our jurisdiction. It has to be appreciated that it is not feasible to lay down guidelines for sentence of Money Laundering offences given the wide range of culpability factors that may involve in each individual case.
7. Therefore it is apposite at this stage to examine the cases decided in Fiji to identify the range of sentences before deciding the appropriate sentence in this case in terms of culpability and personal circumstances of each Accused.
8. This offence was relatively new to this jurisdiction, when the Court of Appeal was called upon to review a sentence passed by the Magistrates Court in O'Keefe

v State [2007] FJCA 34; AAU0029.2007 [25 June 2007]. The Fiji Court of Appeal stated:

"When sentencing in individual cases, the court must strike a balance between the seriousness of the offence as reflected in the maximum sentence available under the law and the seriousness of the actual acts of the person who is to be sentenced. Money laundering is clearly potentially a very serious offence. It can be, and is, used to disguise the true nature of money derived from criminal activity and so make it available for legitimate use. It is essential for large criminal organizations if they are to be able to maximize the proceeds of their unlawful activities. Of necessity, it is an international problem and undoubtedly smaller jurisdictions may be seen as useful and unsuspecting conduits. That is why Parliament imposed the heavy penalties under the Proceeds of Crime Act".

9. In *O'Keefe* (supra), the appellant had entered a plea of guilty in the Magistrates Court to several counts of forgery and false pretenses for which he was sentenced to concurrent terms of 2 years and then also one offence of Money Laundering for which he was sentenced to five years' imprisonment. Quashing the sentence of five years' imprisonment on Money Laundering, the Court of Appeal substituted a sentence of 3 ½ years' imprisonment. In that case, value of proceeds of crime was \$ 90,930.78 and out of which only \$ 1500.00 had been recovered.

10. At paragraph 16, the Court said:

"However, where, as here, the court is also sentencing for the associated criminal offences which produced the money to be laundered, it must base its sentence on the relative seriousness of the individual offences."

11. The guiding principles of *O'Keefe* were cited in *State v Sinha* [2010] FJHC 480 (29 October 2010) where Goundar J picked a starting point of 4 years. In that case, offender had withdrawn \$187,333.57 out of proceeds of crime amounting to \$272,291.57. Having given a discount of 2 years for the period the accused was in remand, the court imposed a sentence of 4 years' imprisonment with a non-parole period of 18 months.

12. In State v Stephen HAC 088 Of 2010 (12 April 2012) Madigan J cited HKSAR v Javid Kamran (CACC 400/2004), a decision of Hong Kong Court of Appeal where it was observed:

"Money laundering is a very serious offence as it is an attempt to legitimize proceeds from criminal activities. Serious criminal offences are very often motivated by financial gains and those who assist criminals in laundering money indirectly encourage them in their criminal activities. Successful deterrents against money laundering could be effective measures against crime".

"It is not feasible to lay down guidelines for sentence of money laundering offences, as there is a very wide range of culpability factors arising include the nature of the offence that generated the laundered money, the extent to which the offence assisted the crime or hindered its detection, the degree of sophistication of the offence and perhaps the accused's participation including the length of time the offence lasted and the benefit he derived from the offence."

13. In State v Stephen (supra) the accused was sentenced to 7 years' imprisonment to be served concurrently for 2 counts of Money Laundering. Madigan J having cited two case authorities from Hong Kong jurisdiction criticized O' Keefe v State (supra) and stated that:

"It was said by the HK Court of Appeal in Xu Xia-Li (CACC 395/2003):

"By the nature of the offence itself, in our judgment, the nature of the indictable offence from which the money was derived should be of no particular significance in sentencing, save that if the defendant knew that the money was derived from very serious crimes, it would be an aggravating feature to be taken into account in sentencing".

This must be correct: the offence is money laundering and not being a party to a crime and the amount of money laundered is of paramount importance over and above the nature of the crime generating the funds laundered.

This principle of money laundering standing apart from the crimes producing the monies unfortunately does not sit squarely with the

decision of the Fiji Court of Appeal in O'Keefe AAU 0029 [2007] where the Court decided that sentences for money laundering if charged in conjunction with the generating offence(s) must be subordinate to those ancillary criminal offences. In light of authority from other jurisdictions that the generating crimes are irrelevant to the crime of money laundering, then it may be time now for the Court of Appeal to revisit its decision in O'Keefe.

This view is reinforced by the provisions of Section 69(4) of the Proceeds of Crime Act, which was enacted by an amendment to the principal Act in 2004 and which may not have been brought to the attention of the Fiji Court of Appeal in 2007. Section 69(4) reads:

"The offence of money laundering is not predicated on proof of the commission of a serious offence or foreign serious offence."

... "where the offence to be charged alone, that is without being charged in conjunction with other offences that generate the money sought to be laundered, it is probable that the offence could attract sentences in the range of eight to twelve years", however this Court is bound by the decision of the Fiji Court of Appeal in O'Keefe v State (2007) AAU 0029.2007".

14. Unlike in O'Keefe v State (supra), the Accused in this case were charged only with Money Laundering and not in conjunction with other offence from which the money was generated. Since the offence of Money Laundering is not predicated on proof of the commission of a serious offence, the nature of the offence from which the money was derived is of no particular significance in sentencing for the offence of Money Laundering. Therefore, even if it were assumed that O'Keefe v State (supra) states the correct position of law as regards the sentencing approach, that particular judgment is not applicable to the present case.

15. In State v Shyam [2013] FJHC 529; HAC146.2010 (14 October 2013) the court identified the tariff as being between 5 to 12 years' imprisonment. Madigan J said:

"In the very few cases that have come before the Courts in Fiji, a tariff for imprisonment in the range of five to twelve years has been

set. (see *Monika Aurora* HAC 125 of 2007 and *Johnny Albert Stephen* HAC 88 of 2010). In the *Stephen* case, this Court said that a sentence at the lower end of the band would be passed for unsophisticated domestic money laundering on a small scale with little benefit to the accused"

16. In *Anand Kumar Prasad* HAC 24 of 2010 Ltk a sentences of two and four years were passed for Money Laundering. Madigan J observed:

"There was no real precedent in Fiji for the offence of Money Laundering, despite it carrying a maximum penalty of 20 years imprisonment".

17. His Lordship recommended a tariff between 8 and 12 years imprisonment and noted as follows:

"Given the seriousness in which Parliament regards "Money Laundering" offences in the Proceeds of Crimes Act 1997 by giving it a maximum penalty of 20 years of imprisonment, money laundering in Fiji should be a sentence between 8 to 12 years imprisonment. This tariff gives effect to Parliament's intention of treating "money laundering" as a serious offence. A lighter tariff would be counterproductive to Parliaments intention as enshrined on the Proceeds of Crimes Act 1977. Of cause, the final sentence will depend on the aggravating and mitigating factors"

18. In *Shyam* Madigan J distinguished *Prasad* because the court was restricted in that case by the decision of the Court of Appeal in *O'Keefe* to pass a sentence commensurate with the offence generating the funds. There is no such restriction in this case.

19. In *State v Singh* [2015] FJHC 865; HAC28.2012 (12 November 2015) this court sentenced the offender to 4 years' imprisonment with a non-parole period of one year. The leniency in relation to the non-parole period was afforded to account for special circumstances of that case. In that case, the accused was charged for obtaining money from a FIRCA cheque in the sum of \$ 47,734.58.

However, early stop payment order prevented him from withdrawing any money from the account and the attempt to defraud tax payer's money was thwarted. Accused had not benefitted from the crime. That case had come up for sentence nearly 10 years after the offence hence the factual scenario is considerably different from this case.

20. In *State v Sinha* [2010] FJHC 480 (29 October 2010) Goundar J picked a starting point of 4 years where the offender had withdrawn \$187,333.57 illegally from FIRCA accounts. A sum of \$85,000.00 was restored. A sentence of 5 years' imprisonment with a non-parole period of 18 months was reduced to 2 years imprisonment to reflect the remand period.
21. This court in *State v Lata* [2017] FJHC 927; HAC118.2014 (7 December 2017) sentenced the accused for 5 years with a non-parole period of 2 years. In that case a sum of \$285,000.00 was stolen by the accused's ex-husband who was responsible for FSC payments. He had used accused's bank accounts to launder the money and had left the country leaving the accused behind. The accused had later returned \$169,640.00 to the FSC.
22. After a review of case law in Fiji, I conclude that the tariff for Money Laundering should range from 5 years to 12 years imprisonment. As in any other case, the final sentence will depend on the aggravating and the mitigating circumstances of each individual case and the appropriate sentence may well fall below or above the set tariff depending on culpability and harm factors.
23. The case at hand is very much different from most of the cases cited above. [The *modus operandi* used in the commission of the offence closely resembles that of *Shyam* (supra)]. Although the money laundered was not actually generated by the Accused themselves, each one of them knowingly participated and benefitted from the sophisticated scam having international consequences. The victims of the crime were innocent bank account holders and the Westpac Bank itself. A considerable number of innocent people were duped in the process of sending laundered money abroad violating exchange control regulations.

24. Having identified the applicable tariff for Money Laundering in Fiji, I now move on to determine the appropriate sentence for each accused.

Sentence for Mr. Rahul Rajan Naidu (1st Accused)

25. Mr. Rahul Rajan Naidu, you stand convicted of 4 counts of Money Laundering. You are the main culprit in this case. You coordinated the entire criminal enterprise in Fiji on the instructions of clandestine foreign employers. Your culpability of the offending is comparatively high. A higher starting point is desirable for an offence committed with a considerable degree of pre-planning. The scam had international consequences that would necessarily have a negative impact on nation's banking probity and country's economy. The harm caused to innocent victims is considerably high. Having considered the objective seriousness of the offence, I pick a starting point of six years from the lower range of the tariff.
26. There are several major factors of aggravation in your offending that warrant upward adjustments of the starting point within the range. The laundered money was sent abroad violating exchange control regulations. The method used was highly sophisticated and designed not to be detected. You involved others, most of them are innocent people, to commit this crime. Identities of number of innocent people including your mother and wife were used without their knowledge putting them at the risk of prosecution. You failed to respond to the warnings when the offence was first detected by the bank and continued to use your cousin's bank account to commit the offence. You displayed a total lack of remorse throughout these proceedings.
27. Having considered the aggravating features mentioned above, I increase your sentence by 3 years to arrive at a sentence of 9 years' imprisonment for each count.
28. Your Counsel refers to number of cases in which relatively lenient sentences were passed for Money Laundering. However, as I have already observed, none of them would come closer to the factual scenario presented in this case. Your Counsel in his mitigation submission has pleaded that you should be punished leniently for you to be rehabilitated yourself. I have considered all

mitigating circumstances submitted by your Counsel although they are not very compelling.

29. You are a 28 year-old young offender married with one child, 6 years of age. You cooperated with police during investigations. You seek forgiveness of court and promise not to reoffend. The charges were hanging over your head for a considerable time (approximately four years).
30. Your Counsel in his oral submission submitted that you have no previous convictions. However the State Counsel in his amended submission informs this Court that you were convicted in a case of similar nature by the Magistrates Court at Lautoka. I can't understand how and why this information was suppressed to court in the first place. When the previous conviction came to light, your Counsel had to "eat humble pie" to admit that you have a previous conviction. Your Counsel to my surprise further admits that he is the counsel who defended you in that case. While a good Defence Counsel should be determined as well as persuasive in his submissions in mitigation, he does not serve his client well if he misleads the court in quite disregard of his professional obligation to court.
31. At the sentencing hearing your Counsel indicated that you are willing to restitute \$14000/-, the loss suffered by the Westpac Bank in paying victimized customers. You have tendered evidence to show that you have already paid \$ 2000/- to the bank. However, I would not consider this payment and your willingness to restitute as a genuine gesture of remorse.
32. Section 4 (2) (h) of the Sentencing and Penalties Act makes it mandatory for a sentencing court to consider restitution. The relevant section is as follows:-

"(2) In sentencing offenders a court must have regard to -

(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this [Act]."

33. The Supreme Court of in Khera v State [2016] FJSC 2; CAV0003.2016 (1 April 2016) Gates CJ said:

"... Restitution if made genuinely in a spirit of remorse can reduce the harshness otherwise due in final sentences..."

34. In State v Jocelyn Deo, Criminal Appeal No. HAA 0008 of 2005, Shameem J said:

"... The issue is not just restitution. The issue is true and sincere remorse, an early guilty plea and confession and restitution to the victim as evidence of such remorse and apology"

35. In this case, I am not convinced that there was any such remorse, expressed at the earliest opportunity. You never admitted the offence either to police or in Court. You benefitted from the crime, and did not indicate your willingness to retribute until the sentencing hearing. You failed to hand over the money left in your hand to police after the final withdrawal from your cousin's account. You have maintained the not guilty plea for the past 4 years. Your willingness to retribute suggests no remorse, but an attempt to avoid a custodial sentence. It appears that upon your previous conviction you have made a successful similar application before the Magistrate Court (In Lautoka Crim. Case No. 284 /14) to buy yourself out of trouble. I am not convinced that you are up to the challenge of rehabilitation.

36. Although I do not consider the recovery of money at this stage as a genuine indication of remorse, by the payment of \$ 2000 to the bank, you have engaged in a damage control exercise. You have given up part of ill- gotten gains and lessened the loss caused to the victims. I will take that aspect into consideration when deciding your final sentence.

37. For all mitigating features mentioned above, I reduce your sentence by 2 years to arrive at a sentence of 7 years' imprisonment. You have spent nearly 3 months in remand. I will further deduct 3 months to reflect the remand period. Now your sentence for each count is 6 years and 9 months' imprisonment. To give effect to totality principle, I order that you serve your sentence concurrently.

38. You are a young offender although your criminality does not match your age. I still believe you have a potential to rehabilitate. To facilitate your chances of rehabilitation, I impose a non-parole period of 5 years.

39. Having considered your ability and willingness to compensate the Westpac Bank by way of restitution, I order that you pay \$ 12,000/- to the Westpac Bank within one year from the date of this sentence in 2 installments, default of which a term of imprisonment of 6 months in addition to the imprisonment term imposed.

Sentence for Mr. Avenai Danford (2nd Accused)

40. Mr. Danford, you stand convicted of 1 counts of Money Laundering. I would consider you as a scapegoat of a well-orchestrated scam. Your level of culpability is comparatively low. At the outset, you joined the criminal enterprise as an innocent participant and allowed your bank account to be used in the belief that it would be used for a legitimate purpose. However, you soon realized that it was being used for a criminal activity. After the very first transaction, you realized that Rahul had lied to you as to the real purpose for which your bank account was being used. When your bank account is frequented with funds from an unknown source, you out of suspicion even inquired from the bank about the nature of transfers and realized that the narration for transactions is not consistent with the purpose for which it was supposed to be used. Still you continued to follow the instructions given by Rahul to receive commissions.

41. Having considered your level of culpability, I select a starting point of 5 years. There are no aggravating features in your offending.

42. Your Counsel has submitted compelling mitigating circumstances. You are 29 years of age, married and a father of two children. You are a first offender. You have cooperated with police during investigations. You are still pursuing your tertiary education and you seek mercy of this court to become a good citizen. You have gained very little from this criminal enterprise. I deduct one year to arrive at a sentence of 3 years' imprisonment. Having considered your chances of rehabilitation as a first and young offender I impose a non-parole period of 2 years.

Sentence for Ms. Rimakshni Ranigal

43. Ms Ranigal, you stand convicted of one count of Money Laundering. Your culpability level is high albeit not to the level of Rahul's. You assisted Rahul to transfer stolen money to off show accounts through Western Union. As an experienced teller of Western Union you knew very well that Rahul was sending money overseas violating exchange control regulation of the RBF that only \$ 500 could be sent by a single person within a period of one year. You facilitated third party transactions without verifying customer identities, having violated anti money laundering legal regime-introduced by Financial Transactions Reporting Act 2004, that is well known to any teller in a financial institution and failed observe due diligence expected of a teller. You received benefits from your former workmate Rahul and facilitated those transfers when you ought to have known that the money you were sending had been realized from an illegal activity. Having considered the degree of your culpability, I start with a starting point of 6 years' imprisonment.
44. Your offending has an aggravating feature. You breached the trust of the employer when you failed to follow the guidelines and protocols of Western Union. I increase your sentence by 6 months to arrive at a sentence of 6 and half years (6 1/2) imprisonment.
45. I have considered the mitigating circumstances submitted by your Counsel. You are a 30-year old young and first offender. You are married and planning to start a new life in Australia with your husband. You have performed well in your employment and have received awards. However, your clean record is of little mitigating value when it comes to sentencing for Money Laundering because criminals will inevitably search out and use people of good character to launder their ill-gotten funds in the hope that such agents will be beyond suspicion. [See: Stephen (supra)] You have cooperated with police. You have not been remorseful as your counsel has submitted. Although you were interviewed in 2012, you were charged in 2014. Any way, you have suffered for the last 4 years because of the charge that was hanging on your head. I reduce one and half years to arrive at a final sentence of 5 years' imprisonment.
46. You are a young and first offender having chances of rehabilitation. Therefore, imposition of a non-parole period of 3 years is appropriate to balance deterrence against rehabilitation.

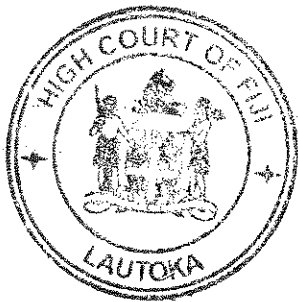
47. The Counsel have urged for a suspended sentence. However, I do not think this is a fit case to act with such leniency given the nature of the offence having international implications and the *modus operandi* used to commit the crime. A profound deterrent sentence is warranted to reflect the seriousness of the offence and to give a strong warning to would be offenders that the courts will come down harsh on such offences. I also bear in mind that a harsher punishment could be a successful deterrent and effective measure in combating money laundering. Therefore, an immediate custodial sentence is warranted in this case.

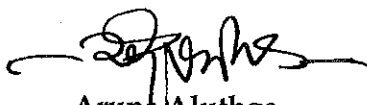
48. Summary

Now the final sentences are as follows:

- Rahul Rajan Naidu (1st Accused) - 6 years and 9 months' imprisonment for each count to be served concurrently with a non-parole period of 5 years. A sum of \$ 12,000/- to be restituted to the Westpac Bank within one year from today, default of which 6 months' imprisonment in addition to the imprisonment term.
- Avenai Danford (2nd Accused) – 3 years' imprisonment with a non-parole period of 2 years.
- Rimakshni Ranigal (3rd Accused) 5 years' imprisonment with a non-parole period of 3 years.

49. 30 days to appeal to the Court of Appeal.




Aruna Aluthge
Judge

At Lautoka

18th September, 2018

Counsel:

- Office of the Director of Public Prosecution for State**
- Legal Aid Commission for 2^{ns} Accused**
- Iqbal Khan Associates for 3rd Accused**