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

CRIMINAL APPEAL NO. AAU0012 OF 2002S

CRIMINAL APPEAL NO. AAU0005 OF 2002S

(High Court Criminal Action No. HAC009 of 2001S)

BETWEEN:

SEMESA ROKO — *First Appellant*

LEONE LAUTABUI — *Second Appellant*

JONASA TONAWAI — *Third Appellant*

AND:

THE STATE

Respondent

Coram: Sheppard, JA
Tompkins, JA
Ellis, JA

Hearing: Monday, 15th March 2004, Suva

Counsel: Mr. N. Vere, for the First Appellant
Ms. Narayan for the Second Appellant
Mr. Matebalavu for the Third Appellant
Mr. R. Ridgeway for the Respondent

Date of Judgment: 29th April 2004

JUDGMENT OF THE COURT

The three appellants were tried before a Judge and three assessors in the High Court on two charges of murder and two of attempted murder. Two assessors returned their opinions in favour of acquittal on all counts. The third was in favour of acquitting the appellants Roko and Lautabui on all the counts of murder, but convicting both on the two counts of attempted murder.

The trial Judge thereupon announced her verdict finding each accused guilty on all

Because of the nature of the appeal, a full account of the facts must be related. We shall start with the evidence of Taito Navualaba the key prosecution witness. He was one of 5 men directly involved in the shooting which resulted in the deaths of two soldiers and the wounding of two others. He turned prosecution witness after being granted immunity from prosecution. The history of events is not in contention except for the state of mind of the accused and some matters of detail.

The events occurred shortly after the Coup of 2000, the arrest of those involved in July, and the seizing of the Monasavu Dam by civilians. Taito Navualaba was in his village near the dam at the time it was taken by the villagers. The appellant Leone Lautabui was also at the village and Taito Navualaba's friend the appellant Jonasa Tonawai arrived and stayed with him for a while. They then left with others but the two decided to part company with them and ended up in Nadovu Village and stayed with Taito Navualaba's sister. They were at that time armed with guns. Taito Navualaba had a K2 and Jonasa Tonawai an M16. The next day the two went into the bush intending to escape. They came across an empty house where they stayed for a week. At the end of that week three other men arrived, the appellants Leone Lautabui and Semesa Roko and a man Alifereti Nimacere. Each of these was armed with an M16 rifle. In addition Alifereti Nimacere had a pistol. They all stayed there a day then left by walking down the road towards Monasavu and went to Taito Navualaba's sister's house at Nadovu. They stayed there for 2 hours.

It is convenient to refer to the 5 men by their family names.

Navualaba told the court that during these two hours the 5 planned to take the police/army check point at Sawani and take all the arms there to Monasavu. The reason was to avenge what had happened at Kalabu. Navualaba said "we did not want to take part". He himself wanted to separate from the others and left the house and went into the village to his sister's house (it seems another sister) where he stayed for an hour, but then returned to the others. By that time it was about 6 p.m. The others were still discussing the plan. Navualaba stayed and listened, still not wanting to take part. However they all left at about 7:30 p.m. and walked towards Sawani. Navualaba said Roko and he were in front followed by Nimacere with Lautabui and Tonawai behind. After walking for about 1-_ hours a 3-ton carrier truck appeared. They stopped the carrier and Nimacere told the driver they wanted the truck. However a second vehicle, a red 4-wheel drive, arrived. Nimacere stopped it and

held his pistol to the drivers head, emptied the passengers out and forced the driver to drive the 5 men towards Sawani where they met with a white vehicle which Nimacere also stopped at gunpoint. Nimacere forced the occupants of the white vehicle to take the red one and the 5 men proceeded in the white one. Initially Navualaba, who could not drive, was forced to take the wheel by Nimacere, then Lautabui took over. Roko said he knew someone in Navuso. By this time it was dark. They stayed there half an hour then went back together with Roko's acquaintance towards the junction of Monasavu and Sawani Roads and after travelling about 10 km they stopped by a house in Qiolevu Road. This area was the subject of several detailed plans and photographs produced by the prosecution. All got out of the white vehicle. The boy from Navuso went to meet his friend who lived in the house and returned with him. His name was Filipe. They were standing on the road. Filipe brought a plate of food which Nimacere alone ate. They talked about the Sawani situation and Filipe told Nimacere the situation and location of the soldiers.

While they were standing on the road beside the white vehicle an army vehicle and a police vehicle arrived. Nimacere told the others to run away and they ran up to the back of the house. Navualaba said he did so followed by Nimacere but he did not see the others. Navualaba said the next thing was he heard a gunshot 'on the road' and then continuous gunfire coming from beside the house. This lasted for about 10 minutes. Navualaba could not see the others and ran to the chicken house followed by Nimacere who fired more shots.

Navualaba ran up the hill away from the road and saw Roko, Tonawai and Nimacere following him. Navualaba then found his way back to the road by himself and heard Lautabui call out that there was someone in the truck which was a 2 tonne carrier police vehicle. He heard Nimacere tell Lautabui to pull the person out and Lautabui refuse to do so. He saw Nimacere go to the vehicle pull someone out, hit him on the head with his gun then drag him across the road and shot him in the head with his pistol. Shortly afterwards Navualaba, Nimacere, Roko, Lautabui and Tonawai got into the white carrier and drove to Monasavu. It is unnecessary to relate what happened after that.

Under cross-examination Navualaba said Nimacere threatened him and the others when they were in the vacant house. He was imprecise as to the nature of the threat. He said Nimacere was armed, a known dangerous criminal and put them in fear. There is no doubt

from all the witnesses that Nimacere was foul mouthed abusive and aggressive. He confirmed that Nimacere fired the first shots and many thereafter and that the fire was returned. He admitted he himself had fired 2 shots as Nimacere had compelled him to by threatening him with his pistol held at his chest under his arm. After much questioning he agreed that Nimacere's threats were that if they did not do as he asked they would be shot. He confirmed that the plan to take the post at Sawani was Nimacere's and the reason was to revenge earlier police and army action in Kalabu and to take the arms from the post to Monasavu. He also confirmed that Nimacere fired a shot when he was holding up one of the vehicles.

The account of events given by Navualaba must be compared with that given by each accused. Each gave evidence.

Lautabui said that Nimacere came and told him of his mission. He said he 'forced me to go with him'. In explanation of this he referred to bad language used and the fact that Nimacere was armed. He said he thought "something will happen to me" and he was scared of the guns. He confirmed that he was given a gun by Nimacere as they approached Nadovu Village. He described the night in the empty house and said Nimacere was guarding him the whole time. In the morning Nimacere pointed the gun at his head and swore at him to go down the main road. He said that from the time the two vehicles containing the soldiers and police arrived he stayed in the white vehicle trying to hide under the steering wheel and then drove off towards Sawani when Nimacere told him to. Again he said he would not have followed Nimacere if he was not threatened with the gun. He also said he had no ammunition for his gun nor did the others except Nimacere.

Tonawai had been a soldier for 16 years and a martial arts instructor. He described being with Navualaba and the arrival of Nimacere, Roko and Lautabui. He said Nimacere did the talking, holding the gun and swearing 'very harsh words'. He said he was frightened that Nimacere might a fire a gun accidentally and injure someone. He said Nimacere's actions were 'like forcing us' to take the Sawani Police Post and check point. He said he was really frightened and worried about his life. He said he wanted to escape but could not because his friend Navualaba was in front and also in danger. He related events from there confirming Nimacere swearing and pointing a gun at him. He confirmed that he himself was holding a gun. He also confirmed that Nimacere fired a gun when he held up one of the vehicles. He

confirmed he saw Navualaba, Nimacere and Roko run up the hill too and that Nimacere swore at them and said to shoot. He confirmed that after the shooting they left in the white vehicle.

Roko told of his meeting with Nimacere and of immediate threats at gun point, threats to kill and gross swearing, and how this continued for some days. He related the meeting with Lautabui who was also threatened with death and that Nimacere had given them each a gun 'because they were too heavy' and the one given to him was not working. He said he was weak from lack of food. He told of the meeting with Navualaba and Tonawai, and confirmed foul language and death threats to all. He said when he reached the house he fell asleep straight away from exhaustion. He told of getting help to locate the soldiers and of the confrontation shooting and escape. His account was of incessant swearing and death threats by Nimacere and of hiding during the firing.

Another significant witnesses was Filipe Taira the son of the owner of the chicken farm where the shooting took place. He said that just prior to the shooting Nimacere and Roko came to the house and he talked to Nimacere. He said the 3 others Lautabui, Tonawai and Navualaba were there, and talked among themselves. Nimacere swore at them. He thought they were all armed.

He described the arrival of the army and police vehicles and how he ran back into the house and hid under the bed. He said he heard guns firing outside the house. He heard people calling each other and numbers 1 to 5 being called out. He said the shooting lasted 8-10 minutes and the shooting was continuous. He was not too sure if more than one gun was being fired or whose voices he heard.

Evidence was given about the location and the number of empty cartridges and live rounds found, the bullet holes in the vehicle and the state of the guns held by Lautabui and Roko. These guns, a K2 and an M16 were not tested but had not been cleaned since firing. The semi automatic weapons carried a 30 round magazine.

The police and other witnesses described how they had been told of armed men in charge of a stolen vehicle and stopped to check the parked white vehicle sometime after midnight. As the vehicle was being checked they described 3 or 4 bursts of fire from 2 weapons from the hill where the house was.

Two further matters of importance to the trial were first that Nimacere had been killed in November 2000, and second that Navualaba had turned prosecution witness on being given immunity from prosecution.

In summing up the Judge summarized the evidence in some detail and gave full directions to the assessors.

Two of the assessors returned opinions of not guilty for all accused on all counts. The third assessor's opinion was that the second accused was not guilty on counts one and two, and that the first and third accused were guilty of attempted murder on counts three and four. The trial Judge, after a 15 minutes adjournment, delivered judgment, finding each of the three accused guilty of murder on each of the four counts. She said:

> *"Two of the Assessors have returned opinions that all accused are not guilty on all counts. One assessor has given his opinion that the 1st and 3rd accused are guilty on Counts 3 and 4 of Attempted Murder. However the facts relevant to the counts of Attempted Murder are the same as for the Murder, and because if the accused are guilty on the basis of a joint enterprise in respect of Counts 3 and 4, then it follows that the same joint enterprise existed in respect of the Murder Counts.*
>
> *Talking all the evidence into account and after directing myself in accordance with my summing up, I regret that I cannot concur with the Assessors' opinion.*
>
> *I disagree with them for the following reasons. There is compelling evidence that all 5 persons, including the 3 accused were part of a joint unlawful plan to take over the Sawani Police Post and checkpoint. The plan may have been Nimacere's plan, but I am of the opinion that the evidence of the long walk together, the evidence of a joint hijack of Ratu Sakiusa's vehicle, the evidence of numbers being called at the time of the shooting and the evidence that all 5 left together after the shooting gives rise to a compelling case of a joint unlawful enterprise. I am satisfied of that beyond reasonable doubt.*
>
> *I am further of the view that the shooting at Qiolevu Road was a probable consequence of the unlawful joint plan and that each accused by their reactions when the vehicles arrived, knew that. I am satisfied of that beyond reasonable doubt.*
>
> *I am further of the opinion that each accused participated in this unlawful enterprise voluntarily and not under duress. I am satisfied beyond reasonable doubt that Leone Lautabui, Jonasa Tonawai and Semesa Roko, had many opportunities to remove themselves from the plan prior to the Qiolevu shooting, and that Nimacere's threats, if they existed,*

were not of a continuing nature to instantly kill or injure the accused. I am satisfied of that beyond reasonable doubt."

The first appellant Roko challenged the verdict on 4 grounds:

1. *"Her Ladyship the trial judge erred in law and fact in not accepting the Appellant's defence of compulsion as provided for under section 16 of the Penal Code, cap.17.*

2. *Her Ladyship the trial judge erred in law and fact in ruling that there was an unlawful joint enterprise between other persons and the Appellant which resulted in the commission of the offences for which the Appellant was charged with.*

3. *Her Ladyship that trial judge erred in law and fact in convicting the Appellant when there were numerous reasonable doubts in the evidence of the prosecution's witnesses.*

4. *Her Ladyship the trial judge erred in law in convicting the Appellant when the prosecution could not prove all the essential elements of murder and attempted murder."*

Counsel submitted the Judge ignored the evidence of defence witness Josateki Cama, that there was overwhelming evidence of compulsion and of Roko's reasons for being unable to escape. He directed his submissions to the evidence bearing on Roko's state of mind and to the evidence that his gun was jammed. It is plain that much of counsel's submission related to matters of fact and accordingly we are prepared to accept that he applies for leave to do so.

The second appellant Lautabui challenges the verdict claiming that there is no evidence of his shooting anyone or that his gun had ammunition, or any evidence linking the spent shells and cartridges found at the scene with his gun. Counsel submitted the Judge erred in Law and fact departing from the Assessor's opinions. She submitted that the Judge had to have very good reasons to justify her verdict. She challenged the Judge's findings based on the number counting, the hijack of one of the vehicles, the long walk and the evidence that the 5 men left the scene together. Overall she submitted there was no "very good reason" to differ from the assessors.

The third appellant Tonawai challenged the Judge's finding of joint enterprise and submitted that Nimacere alone fired shots. He submitted compulsion was established on the

evidence and that the shooting, killing and wounding was not the probable consequence or in contemplation of the appellants. Counsel challenged the summing up as placing "undue confinement (sic) on the issue of: "imminent and irresistible threats to life." undue emphasis on the accused "personal characteristics" and omitted to refer to evidence regarding the continuous threats by Nimacere. He submitted the evidence was of continuous threats to life and that the prosecution had not negatived compulsion beyond reasonable doubt. He emphasized that cogent reasons need be given by the Judge to reject the Assessors' opinions. He submitted the evidence was his client disagreed with the plan, feared Nimacere, did not shoot and could not escape. He further submitted the Judge had failed in her direction to consider whether there was sufficient evidence to convict after the prosecution case, contrary to Section 293 of the Criminal Procedure Code. He next submitted the Judge was wrong in law to direct that Taira's and the appellants' evidence was capable of corroborating Navualaba's evidence. He claimed that sentence was excessive. Finally he claimed there was not a fair trial in breach of clause 29 of the Constitution. As to the last two submissions all that needs to be said is that life imprisonment is the mandatory sentence for murder: s.200 of the Penal Code and from what we will say there is no substance to the claim of an unfair trial.

Joint Enterprise

This is defined in s.22 of the Criminal Code

> "*When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.*"

The Judge directed the Assessors in the following words:

> *"As a matter of law, when an offence is committed the person who actually does the act which constitutes the offence, is not the only person who is deemed to have committed the offence. Anyone who does an act for the purpose of helping another person to commit the offence, is also deemed to be guilty of the offence. Therefore to give you an example, a person who stands at the door of a house which is broken into, to warn those who have gone in, of anyone who might disturb the burglars, is as guilty of burglary as those who broke in, even if the watchman remained outside, and never entered the house at all. He is guilty because he has aided and abetted the*

The law also says that where two or more persons form a common intention, to do something unlawful together, and while doing something to further that purpose, an offence is committed of such a nature that its commission was a probable consequence of that purpose, each of those who had formed the common intention and had furthered that intention, is deemed to have committed the offence.

Let me give you an example. When several men decide to break into a house armed with dangerous weaqpons, and they are disturbed by a policeman who is killed because one of the men uses his weapon, each of the accused is guilty of the murder of the policeman even if only one person used the weapon. This is because, when several people decide to commit burglary with dangerous weapons, the fact that the weapons might be used, and someone is killed as a result, is a probable consequence of the common intention to commit burglary with weapons. However, if the use of weaqpons was not contemplated by the others, and they did not know that the main offender was carrying a weapon, then there is no joint enterprise, and the secondary parties cannot be guilty of the murder.

The question of whether there was such a common intention in this case, shared by each of the accused, and whether the deaths of Pte. Weleilakeba and Cpl Raj Kumar and the injuries on Waisea Drodrolagi and Samuela Delai were a probable consequence of that common intention, is a matter for you to decide, on the basis of the evidence in this case."

The Judge's finding on this has already been set out above and she said she was satisfied beyond reasonable doubt.

Compulsion

This is defined by s.16 of the Code:

A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury do not excuse any offence."

The Judge directed the assessors:

In this case the accused persons are relying on the defence of compulsion or duress, that is that they participated in the offence not of their own free will. S.16 of the Penal Code says that a person is not criminally responsible for an

offence if it is committed by two or more offenders, and if the act is done only because during the whole of the time in which it is being done the person is compelled to do the act by threats on the part of the other offender instantly to kill him or do him grievous bodily harm if he refuses, but threats of future injury do not excuse any offence. In considering the defence of compulsion you must ask yourselves whether there was a threat or threats made to each of the accused by one of the offenders, in this case Alifereti Nimacere, whether that threat was to instantly kill or cause serious harm to each accused and whether that threat compelled the commission of the offences during the whole of the time that the offences were being committed. The essence of this defence is that the offence was only committed because of the threats made to one's life at the material time.

A condition of the defence of compulsion sufficient to exclude criminal responsibility is that there was an imminent and irresistible threat to life placing the accused in an inescapable dilemma. In other words the situation facing the accused must be such that the threats to his life were so immediate and real that no other possible line of action was available to him other than to comply with the threats to avoid being instantly killed. Once this defence is raised, it is for the prosecution to satisfy you by their evidence that such defence is not available and that the accused were not compelled. In considering this defence you are entitled to consider each accused's personal characteristics and to ask yourselves whether he could have resisted the threats, or escaped from them in order to avoid taking part in the offences.

And later

"Now the defence put forward by the accused is similar. They each admitted on oath being part of the group with Nimacere which travelled from Nadovu to Qiolevu Road. Their evidence in most material aspects corroborated the evidence of Taito Navualaba up to the arrival of the group at Qiolevu Road. Their defence is that they were not part of a joint unlawful plan to take over the checkpoint in Sawani, because they were being forced to follow Nimacere, who was implementing his own plan and using the three accused and Navualaba. The defence is that they were not willingly aiding and abetting in the murders and attempted murders because they were forced, before, at and after the shooting to stay with Nimacere. And finally, the defence is that none of them fired a single shot from the arms they were holding, at the time of the shooting. Leone Lautabui said in his evidence that he was hiding under the steering wheel of the twin cab during the shooting. He denied what Navualaba said he did, and that is refuse to open the door of the police van to pull Cpl. Raj Kumar out. Tonawai said in his evidence that he ran up the slope with Nimacere and Navualaba, but that he did not fire his gun at all."

Again her finding is set out above.

Corroboration

The Judge told the assessors Navualaba was an accomplice. Shesaid:

I must warn you that it is dangerous to convict the accused persons on Mr. Navualaba's evidence alone, and without corroboration from other sources. Before you consider whether there is corroboration of Taito Navualaba's evidence, you must first ask yourselves whether his evidence is credible, that is, whether it is capable of belief, and then whether you believe the evidence that he gave is such that you rely upon it, and accept as being the truth.

Corroboration is some independent evidence, which implicate the accused in the commission of the offence. In considering the evidence of Mr. Navualaba, you must look for corroboration of his evidence because it is dangerous to convict without such evidence. In the course of this summing up I will direct you as to what evidence is capable of corroborating Mr. Navualaba's evidence. It is a matter for you to decide whether you accept the evidence as being corroboration in fact, and whether, you accept the evidence of Mr. Navualaba as being credible and reliable."

And later

Now before I move on to the other evidence in this case, I must remind you again that Taito Navualaba is an accomplice because by his own admission he took part in an unlawful scheme to take over the Sawani checkpoint and seize the arms there, and because he was present at the shooting of the Army and police vehicles at Qiolevu Road which led to the deaths of Private Weleilakeba, Cpl. Raj and the injury of two other army officers. Further, Filipe Taira while he did not take part in the shooting itself, admitted that he was instructing Nimacere about the location of army personnel at the checkpoint, knowing that there was a plan to unlawfully attack it. He is therefore also an accomplice. I must warn you again that it is dangerous to rely on the evidence of an accomplice alone, and that you should look for some corroboration of the evidence of Taira and Navualaba. In law, two accomplices may corroborate each other, so that the evidence of Taira can corroborate the evidence of Navualaba, if you believe that both witnesses are credible witnesses, and gave evidence on which you can rely. In his evidence Taira said that Semesa Roko was with Nimacere when they discussed the plan to take over the checkpoint but did not identify the 1st and 2nd accused. Therefore Taira's evidence, if you accept it, provides corroboration of Navualaba's evidence in respect of the 3rd accused, and vice versa.

Further in this case, the defence seeks to rely on the evidence of Navualaba. They do not dispute that the 1st and 2nd accused were there at the shooting with the 3rd accused and Nimacere, and they say that they were compelled to take part in the offences. The evidence of the 3 accused in almost all respect is identical to the evidence of Taito Navualaba. As such in considering the

need for corroboration, you may consider that support for Navualaba's evidence as to all accused, comes from the evidence of the accused persons themselves. Indeed the accused persons rely on Navualaba's evidence to show that they all acted under compulsion or duress.

In the circumstances therefore, and this is a matter for you, you may think that there is ample evidence that the 1st, 2nd and 3rd accused were present during the shooting and were part of the group which planned to attack the checkpoint at Sawani, and that to this extent there is corroboration of Navualaba's evidence in respect of each accused."

The Judge does not refer to this in her decision but it is obvious that she accepted that there was corroboration of the material evidence of Navualaba and Tiara.

Josateki Cama's evidence

We have read the transcript of this witness's evidence from p.1094 to 1098. He told of words spoken by Nimacere to Roko on 17 July 2000 when Nimacere swore at him and threatened to kill him that day (1097) and that he had a gun. While this confirms the nature of Nimacere's conduct and threats, it also confirms Roko had many ways to disengage himself from Nimacere's company. We think there is no disadvantage to the appellants as a result of no express reference to his evidence by the Judge.

No case to answer

Counsel for the State accepted s.293 of the Code requires the Judge at theclose of the prosecution case to consider whether there is *"no evidence that the accused or any one of several accused committed the offence"* and to hear argument if necessary and decide whether or not to acquit the accused. It is more than obvious in this case that the Judge did not consider there was no such evidence. There is no substance to this submission.

The Judge's verdict

It is accepted by all counsel that in this case the Judge was obliged to give cogent reasons for deciding not to accept the opinion of the Assessors . S.299 of the Code provides:

"(1) When the case on both sides is closed, the judge shall sum up and shall then require each of the assessors to state his opinion orally, and shall record such opinion.

(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors:

Provided that, notwithstanding the provisions of subsection (1) of section 155, where the judge's summing up of the evidence under the provisions of subsection (1) is on record, it shall not be necessary for any judgment, other than the decision of the court which shall be written down, to be given, nor for any such judgment, if given, to be written down or to follow any of the procedure laid down in section 154 or to contain or include any of the matters prescribed by section 155, except that, when the judge does not agree with the majority opinion of the assessors, he shall give his reasons, which shall be written down and be pronounced in open court, for differing with such majority opinion and in every such case the judge's summing up and the decision of the court together with, where appropriate, the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for the purposes of this subsection and of section 157.

(3) If the accused person is convicted, the judge shall pass sentence on him according to law."

Counsel referred us to high authority: *Joseph v. The King* [1948] A.C. 215, *Ram Bali v. The Queen* P.C. Appeal 18 of 1961, both Privy Council cases, *Ram Dulare and Others v. R.* (1955-57) SFLR 7 and other decisions in this Court including *Setefano v. State* Cr. App. 14 of 1989 where this Court referred to the need for:

"*cogent reasons clearly stated that must also be capable of withstanding critical examination in the light of the whole of the evidence.*"

and later:

"The requirement in section 299 for a judge to give reasons clearly envisages the appeal court being able to consider them. It is plain from the same section that the written reasons form part of the judgment. As we have said, earlier cases establish that those reasons must be cogent, carefully reasoned and capable of withstanding critical examination in the light of the whole evidence....."

and further:

"It is the reasons for the decision not to accept the assessors' opinion that are to be considered. The yardstick against which they should be measured is whether they are cogent and supported by the evidence – a lower standard than deciding whether they are against the general weight of the evidence.

The reason the section requires the judge to give his reasons when he differs from the assessors but not when he agrees is plain. If he simply agrees with

the assessors, any challenge to the verdict will be based principally on impeaching the summing up. Where the judge reaches a different conclusion from the assessors, the summing-up will no longer provide a sufficient explanation of the way he reached his decision and reasons are necessary. As with the summing-up, those reasons are subject to scrutiny and, where necessary, to correction by an appellate court."

Conclusions:

We are satisfied that the Judge properly directed the Assessors, and so herself, on the subject of corroboration and accomplices. While the ability of one accomplice a co-accused to corroborate another has not in the past been without controversy, we adopt what is said in Cross on Evidence, 5th Australian Edition (1996) at para. 15110. In short in the circumstances of this case and the nature of the evidence given, one accomplice or co-accused can corroborate the evidence of another. Further there is significant corroboration from other witnesses and the forensic evidence of shots, cartridges, guns and bullet holes to be considered. We reject this criticism of the Judge's summing up.

As to the submissions relating to joint enterprise and compulsion we make the obvious comment that factually they are closely connected. The Judge closely followed the provisions of ss 16 and 17 of the Penal Code and gave apposite examples to guide the assessors. It has always been the case that the opportunity to escape or withdraw is a cogent if not determinative factor in deciding whether the extreme and continuous level of compulsion existed. Here Navualaba came and went at significant moments. The Judge concluded they all could have escaped from Nimacere. While she did not direct the Assessors that the State had to disprove compulsion beyond reasonable doubt, in her own decision she so found.

We are satisfied there was ample evidence upon which the Judge could base the finding that compulsion had been disproved. That being so the mental element, the formation of a common intention to take the post at Sawani is established as a matter of fact. Further, and on that basis, we are in no doubt that foreseeable consequences of traveling armed to see Filipe Taira and scattering on the arrival of the military and police vehicles were that shots would be fired and people injured and killed. The level of participation of each of the accused plainly varied and it is possible some, even all three, did not fire a shot. However they all knew what Nimacere wanted to do and they helped him by going with him and doing

Judge's finding of common purpose and appreciation of risk. On this basis the necessary elements of the crimes of murder and attempted murder are established, placing each accused as a party if not a principal.

As to her reference to an accused's "personal characteristics", in our view, this is if anything favourable to the accused. This ground for challenging the decision is without substance.

In Fiji it is trial by Judge, not assessors, whose function is to assist the Judge with their opinions. Turning to the requirements of section 299 of the Criminal Procedure Code we are satisfied that the succinct reasons given by the Judge for her disagreement with the assessors' opinions, coupled with her directions and assessments in her summing up, are an adequate compliance with the requirements of the section and the decisions which have addressed those requirements.

Having reached the conclusion that the judgment complied with the requirements of the section, we add further comments on this aspect. The authorities to which we have referred make it clear that the reasons for the Judge not agreeing with the majority opinion of the assessors must be cogent and in sufficient detail to enable this court critically to examine them in the light of the whole of the evidence and reach a conclusion on whether the decision to reject the majority opinion of the assessors is justified.

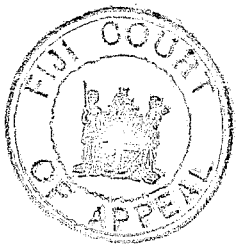
In the present case the reasons set out in the judgment were sparse. It would have been preferable for the Judge to have set out in more detail the reasons for finding "a compelling case of a joint unlawful enterprise", and, perhaps more importantly, the reasons for concluding that the appellants participated in the enterprise voluntarily and not under duress. It would have been helpful if she had given more detailed reasons for her conclusion that the three appellants had opportunities to remove themselves from the plan and that the threats to them, if they existed, were not of a continuing nature instantly to kill or injure the accused. We do not mean to suggest that the judgment should review the evidence in the detail that we have done in this judgment, but findings of credibility of important witnesses and inferences properly drawn from the evidence should be clearly but concisely stated.

If the requirements of the section to give clearly stated cogent reasons for departing from the opinions of the assessor are not adequately complied with, this Court may conclude

that the convictions should be quashed and a new trial directed.

Result

As it has been essential in this case to review the evidence carefully, we grant leave to appeal on matters of fact. The accused Roko is refused leave to appeal against sentence. All appeals are dismissed.



Sheppard, JA

Tompkins, JA

Ellis, JA

Solicitors:

N. Vere, Esq., Solicitor Suva, for the First Appellant
P. Narayan, Solicitor Suva, for the Second Appellant
Messrs. Esesimarm and Company Suva, for the Third Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent