IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 106 OF 2011
(High Court HAC 10 of 2010)

BETWEEN	**:**	**JOVECI NAIKA**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Calanchini AP**
Counsel	**:**	**Appellant in person.** **Mr M. Maitava for the Respondent.**
Date of Hearing	**:**	**21 June 2013**
Date of Decision	**:**	**14 August 2013**

DECISION

[1] This is an application for leave to appeal against conviction and sentence.

[2] The Appellant and one other (Eparama Niume) were convicted by the High Court on two counts of murder following the unanimous guilty opinions of the assessors. The learned trial Judge convicted the Appellant on the basis that the Appellant acted in joint enterprise with Niume to commit the two murders. The Appellant was sentenced on 6 October 2011 to the mandatory sentence of life imprisonment with a non-parole

term of 14 years in respect of each murder conviction. Niume was sentenced to life imprisonment with a non-parole term of 25 years.

[3] Pursuant to section 21 (1) (b) and (c) of the Court of Appeal Act Cap 12 (the Act) a person convicted of an offence after a trial in the High Court may appeal, with the leave of the Court of Appeal, to the Court of Appeal against (i) his conviction on any ground of appeal involving a question of fact alone or a question of mixed law and fact and (ii) against sentence passed on his conviction unless the sentence is one fixed by law. Pursuant to section 35 (1) of the Act the jurisdiction of the Court of Appeal to grant leave to appeal may be exercised by a single judge of the Court.

[4] The Appellant's 11 grounds of appeal against conviction and 2 grounds of appeal against sentence are set out in his Notice of Appeal dated 28 October 2011 and filed within time on 1 November 2011 as follows:

> *"(a) That the investigation carried out by police was procedurally flawed and prejudiced to the extent that it deprived me of a fair advantage in the circumstances of the hearing of my case.*
>
> *(b) That the trial judge erred in law when he wrongly made assumptions of fact especially where I had pleaded with the 1st accused not to harm Mohini (Judgment, P3, Para 7, lines 10,11 and 12).*
>
> *(c) That the trial judge was wrong in law when he made erroneous assumptions of fact of my state of mind (Para 7 of judgment, Page 30 in relation to an iron rod which had fallen off my hand because of my fear of all that I was witnessing and also because of my fear of the 1st accused. (Para 6 of judgment, page 2).*
>
> *(d) That the trial judge erred in law when he failed to form an investigative opinion to the fact that the collation of evidence of witnesses had been calculated to give unfair advantage to the appellant in favour of the prosecution.*
>
> *(e) That the trial judge erred in law and fact when he made wrong assumptions of my state of mind to justify common intention in a joint enterprise.*
>
> *(f) That the trial judge was wrong in law with regards to the principles of joint enterprise.*

(g) That the trial was procedurally flawed in that the trial judge while in his summing up he had warned the assessors on the dangers of accepting accomplice evidence he failed to do so during the trial and further failed to warn himself on the same danger of accomplice evidence thereby making the conviction unsafe.

(h) That the trial judge erred in law when he convicted me on the basis of accomplice evidence which was evidence of bad character there making the conviction unsafe.

(i) That the evidence of the accomplice was tainted with improper motive which made it unsafe for the trial court to convict.

(j) That the trial court may have shown bias with the officiation of a former police officer, lady assessor, whose classmates and former colleagues gave evidence at the trial.

(k) That the trial judge erred in law when he failed to direct accordingly a lady assessor who was sleeping during the trial.

(l) That the sentence ordered by the trial court was too harsh and severely excessive.

(m) That a grave miscarriage of justice has been occasioned to me arising from the above grounds for the court to consider."

[5] It is necessary to consider briefly each of these grounds. Ground (a) can only be a reference to the evidence given by the police witnesses called by the Respondent at the trial. The Appellant was represented by Counsel who had the opportunity to cross-examine those witnesses concerning the allegations, of flawed procedures and prejudice. The evidence given by those witnesses was summarised by the learned trial Judge in his Summing up. The weight to be attached to that evidence was a matter for the assessors. The Appellant has not raised an arguable point with this ground.

[6] In relation to grounds (b) (c) and (d) it must be remembered that pursuant to section 237(5) of the Criminal Procedure Decree 2009 the judge's summing up and his decision shall collectively be deemed to be the judgement of the Court. The issues

raised by the Appellant in these 3 grounds were set out in detail in the learned Judge's Summing-up. In the event that the Judge had mistaken any of the facts it was incumbent on Counsel for the Appellant to bring those matters to the attention of the Judge as soon as he had completed his Summing-up. This was not done and in my judgment it is now not appropriate to consider such matters as grounds of appeal. Furthermore, once the assessors have returned their guilty opinions, the learned trial Judge may refer to and rely on the evidence adduced by the prosecution in support of his decision to convict the Appellant.

[7] Grounds (e) and (f) raise the issue of joint enterprise and homicide. The learned trial Judge explained in some detail the law and principles of joint enterprise, with examples, in paragraphs 24 to 28. Later in his Summing up the learned trial Judge summarised the evidence given by an accomplice who had been granted immunity and the evidence given by the Appellant. The evidence given by these two witnesses differed in many respects and it was a matter for the assessors as to what evidence should be accepted. However the gist of the Appellant's evidence was that he had sought to disengage himself from any harm that his co-accused may have inflicted on the victims. The issue of withdrawal by the Appellant, not from the agreed purpose of stealing cash from the safe in the factory, but from the actions of the co-accused, who stabbed the two victims, was not expressly addressed by the learned trial Judge in his Summing-up. Whether the evidence given by the Appellant, if accepted by the assessors, was sufficient to amount to withdrawal was also a matter for the assessors having been properly directed on the law by the learned trial Judge. To that extent the Appellant has raised an arguable ground. In addition, it should also be noted that there was evidence before the assessors that the co-accused had gone to the factory with the knife that he used to murder the victims. However it would appear that the co-accused had arrived at the factory after the Appellant and it was not established whether or when the Appellant became aware that the co-accused had brought a knife with him to the factory. It is possible that the Appellant was not initially aware that the co-accused had brought a knife with him.

[8] Grounds (g) (h) and (i) relate to the directions given by the learned trial Judge concerning accomplice evidence. In my judgment the directions given in paragraphs

29 to 33 were adequate and proper. There is no arguable point in any of these 3 grounds of appeal.

[9] Grounds (j) and (k) relate to matters that ought to have been raised at the trial with the trial Judge by Counsel appearing for the Appellant. It is simply too late for this Court to consider such matters.

[10] In relation to sentence, the Appellant claims that the sentence of life imprisonment was harsh and excessive. Under section 21 (1) (c) of the Act, a person convicted in the High Court can seek leave to appeal against sentence, unless the sentence is one fixed by law. The sentence for a person convicted of murder is fixed by law and is life imprisonment. Even if the fixing of a non-parole term is appealable, it is clear from the sentencing judgment that the learned trial judge has exercised his discretion according to sentencing principles. There is no error of law and the application for leave to appeal against sentence is dismissed pursuant to section 35 (2) of the Act.

[11] I order:

1. *The Appellant is granted leave to appeal against conviction on the grounds relating to joint enterprise..*

2. *The Appellant's application for leave to appeal against conviction on all his remaining grounds is refused under section 35(3) of the Act.*

3. *The Appellant's appeal against sentence is dismissed under section 35(2) of the Act.*

HON. MR JUSTICE W.D. CALANCHINI
ACTING PRESIDENT