IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0049 of 2018
[In the High Court at Suva Case No. HAC 95 of 2016]

BETWEEN	:	**SAIMONE TUCILA SNR** **EPELI TUCILA** **SAIMONE TUCILA JNR**
		Appellants
AND	:	**THE STATE**
		Respondent

Coram	:	**Prematilaka, ARJA**
Counsel	:	**Ms. S. Ratu for the 01st Appellant**
	:	**Ms. S. Nasedra for the 02nd Appellant**
	:	**Mr. S. Waqainabete for the 03rd Appellant**
	:	**Dr. A. Jack for the Respondent**
Date of Hearing	:	**30 August 2021**
Date of Ruling	:	**03 September 2021**

RULING

[1] The appellants (02nd, 03rd and 04th accused) had been indicted with another (01st accused) in the High Court at Suva with a single count of murder contrary to section 237 of the Crimes Act, 2009 committed on 17 February 2016 at Nasinu in the Central Division.

[2] The information read as follows:

FIRST COUNT

Statement of Offence

MURDER*: Contrary to section 237 of the Crimes Act No. 44 of 2009.*

Particulars of Offence

ALIPATE NAIMOSA, **SAIMONE TUCILA SNR**, **EPELI TUCILA, SAIMONE TUCILA JNR** *on the 17th day of February 2016 at Nasinu, in the Central Division, murdered* ***SITIVENI JAMIE QULI****.*

[3] After summing-up, the three assessors in unanimity had opined that all four accused including the appellants were not guilty of murder but guilty of manslaughter. The learned High Court judge had agreed with the assessors that the appellants were guilty of manslaughter but overturned their opinion on the 01st accused and convicted him only for Assault Causing Actual Bodily Harm (section 237 of the Crimes Act, 2009). The appellants were convicted of manslaughter and sentenced on 27 April 2018 to 07 years and 09 months with a non-parole period of 04 years and 09 months (01st appellant), 05 years and 09 months with a non-parole period of 03 years and 09 months (02nd appellant) and 05 years and 09 months with a non-parole period of 03 years and 09 months (03rd appellant).

[4] The 01st accused had not appealed. The appellants' appeals in person had been timely. The 01st and 02nd appellants had abandoned their sentence appeals by filing abandonment notices (25 June 2019 & 20 August 2020 respectively). The 03rd appellant never appealed against sentence. Subsequently, the Legal Aid Commission had filed amended grounds of appeal and written submissions on behalf of all three appellants. The state had filed two sets of written submissions.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC

14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] The prosecution had relied on the evidence of two eye witnesses, CCTV footage, police evidence and medical evidence. All three appellants charged as joint offenders had given evidence at the trial. Their criminal liability was imputed by the prosecution on the basis of joint enterprise under section 46 of the Crimes Act, 2009.

[7] Eye-witness Waisea Nasili had seen only the first part of the incident where the deceased and the 01st accused had exchanged blows on two occasions from 8.03.40 to 8.05.50 as captured on Camera 4. Waisea Nasili had seen the 01st accused (captured on the CCTV footage at 8.07.05) punching the deceased in the second part but he had not identified the three appellants.

[8] The second eye-witness Taniela Tadulala had witnesses both the first and second part of the episode (from 8.07.00 onwards as captured on Camera 5). In the first part Taniela had first witnessed the deceased throwing a punch at the 01st accused who had fought back punching the deceased. The deceased had fallen down but was seen getting up and moving around looking to continue the fight but the 01st accused had not responded. However, the deceased had gone and started punching the 01st accused and the deceased was seen falling down and the 01st accused was seen punching him but he had then left the scene leaving the deceased on the ground. The deceased was also seen getting up and leaving but he still seemed bent on settling scores.

[9] Thereafter in the second part, Taniela after a little while had seen the 01st appellant (father), 02nd and 03rd appellants (two sons) come running towards the deceased who was trying to flee but it was too late for him. With the first punch delivered by the 01st appellant the deceased had fallen to the ground but managed to sit down. The 02nd and 03rd appellants were seen punching and kicking the deceased's stomach, face and head about 3-4 times. The deceased had kept on swearing. The witness had clarified that the 03rd appellant actually stomped rather than kicking the deceased's head. At that time, the 01st appellant was seen trying to stop the 03rd and 04th appellants. The deceased was seen breathing slowly trying to catch his breath and bleeding from his

nose and mouth. The 01st appellant with others was seen helping the deceased to get up and the 02nd appellant punched him once on the chest. The deceased was weak and lied down. The appellants had become worried and they along with the witness and others helped to lift the deceased up and put him on the ground.

[10] During the melee Taniela had kicked the deceased on the thigh and his friend Inoke *alias* Ritava also had kicked the deceased's head twice.

[11] Doctor James Kalougivaki had found external injuries (bruises, swellings and abrasions) on the deceased's face, chest and shoulder. The corresponding internal injuries too had been found which according to the doctor would have been caused by multiple high energy blows including punches, stomps and kicks making the deceased losing consciousness and disoriented and him not being cognitive or cohesive. The primary cause of death had been severe traumatic brain injury and extensive internal haemorrhage. In addition, the cause of death had been attributed to severe traumatic head injury, multiple head injuries, blunt force trauma and assault. The doctor had also stated that a kick can be with higher energy than a punch and such kicks in repetition could cause the head injuries found on the deceased.

[12] All three appellants had given evidence. The first appellant's position was that he held the deceased to stop the fight between him and the 01st accused and to protect him from being attacked by others. The 02nd appellant had admitted punching and kicking the deceased on his shoulder, chest and ribs because the deceased had pinched his brother, the 03rd appellant earlier. The 03rd appellant also had admitted punching the deceased's rib and back of the shoulder as the deceased had punched him on his face earlier making him bleed. Clearly, the assessors and the trial judge had not believed the appellants' version of events.

[13] The trial judge had concluded that the injuries that substantially contributed to the death of the deceased would have occurred during the second part of the incident from 8.07.00 onwards though the 01st accused was seen delivering a punch. Thereafter, he had withdrawn or abandoned the joint enterprise. Therefore, the 01st accused had been held liable only for his individual acts.

[14] The judge had also decided that it was unlikely that the two kicks given by Inoke *alias* Rotova on the deceased's head could have substantially contributed to the injuries caused on the deceased's head because after receiving those kicks the deceased still stood up and walked away.

[15] The trial judge had finally concluded that the appellants' did not have the intention to cause the death of the deceased or they were reckless as to causing his death by their conduct and therefore agreed with the assessors' opinion that they were not guilty of murder. However, the trial judge had agreed with them on their decision to find them guilty of manslaughter.

[16] The trial judge had not considered the cautioned statements of the appellants though they were part of the prosecution case against the appellants.

[17] The 01st appellant's amended grounds are as follows:

> ***Ground 1***
>
> *THAT the Learned Trial Judge may have caused a miscarriage of justice in failing to fairly and objectively apply the principle of joint enterprise to convict the Appellant.*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge caused a grave miscarriage of justice by accepting the prosecution's evidence against the Appellant when there was insufficient evidence to prove beyond a reasonable doubt that Appellant engaged in a conduct that caused the death of the deceased and that the Appellant intended the conduct will cause serious harm to the deceased or was reckless as to the risk that the conduct will cause serious harm to the deceased.*

[18] The 02nd appellant's amended grounds are as follows:

> *'**Ground 1***
>
> *THAT the Learned Trial Judge erred in law and in fact when he failed to consider that PW4 – Taniela Tadulala is an accomplice and his evidence should have attracted a warning to the assessors given his evidence may have been tainted with improper motive.*

Ground 2

THAT the Learned Trial Judge erred in law and in fact when he held that the principle of joint enterprise had been made out when there was none or an insufficiency of evidence to satisfy the common intention or the principle of joint enterprise thus making the conviction on manslaughter unsupported.

[19] The 03rd appellant's amended grounds are as follows:

Ground 1

THAT the Learned Trial Judge may have caused a miscarriage of justice in failing to fairly and objectively apply the principle of joint enterprise to convict the Appellant.

Ground 2

THAT the Learned Trial Judge caused a grave miscarriage of justice by accepting the prosecution's evidence against the Appellant when there was insufficient evidence to prove beyond a reasonable doubt that Appellant engaged in a conduct that caused the death of the deceased and that the Appellant intended the conduct will cause serious harm to the deceased or was reckless as to the risk that the conduct will cause serious harm to the deceased.

Ground 3 (additional)

That the Learned Trial Judge erred in law and fact when he did not put all the evidence in a fair, objective and balanced manner.

[20] It appears that except the first ground of appeal raised on behalf of the 02nd appellant and additional ground raised by the 03rd appellant in person the rest of the grounds could be considered together.

[21] Under the first ground of appeal the counsel for the 02nd appellant contends that the trial judge had failed to consider that the main witness Taniela Tadulala was an accomplice and the judge should have given a warning to the assessors that his evidence may have been tainted with improper motive as he admits to have punched the deceased himself once.

[22] Taniela Tadulala had not been treated as an accomplice during the trial by the counsel for any of the appellants. None of them had sought a redirection on those lines either. An accomplice is a competent witness to give evidence for the prosecution against a defendant unless he is both indicted and tried with the defendant. It is a rule of practice, not of law, that an accomplice who has been jointly indicted with a defendant, or charged but not indicted, shall not give evidence for the prosecution except where (a) the accomplice is omitted from the indictment, or (b) pleads guilty on arraignment, or (c) no evidence is offered and he is acquitted, or (d) a *nolle prosequi* is entered [vide **R v Governor of Pentonville Prison, Ex parte Schneider** (1981) 73 Cr App R 200].

[23] Thus, it is clear that Taniela Tadulala could not be treated as an accomplice and no warning as prescribed in **Mudaliar v State** [2008] FJSC 25; CAV0001 of 2007 was needed to be given to the assessors as if he was an accomplice.

[24] This ground of appeal has no reasonable prospect of success.

[25] Having examined the summing-up, I am of the view that the additional ground raised by the 03rd appellant has no merits as the trial judge had delivered a well-balanced, fair and objective summing-up.

Other grounds of appeal

[26] The gist of the appellants' complaint is that the evidence was insufficient to (i) establish that they were part of a joint enterprise and (2) prove beyond a reasonable doubt that they engaged in a conduct that caused the death of the deceased and that they intended that conduct will cause serious harm to the deceased or were reckless as to the risk that the conduct will cause serious harm to the deceased.

[27] The Court of Appeal in **Rokete v State** [2019] FJCA 49; AAU0009 of 2014 (07 March 2019) considered in detail the principles relating to criminal liability under section 46 of the Crimes Act, 2009.

[28] Under the principle of joint enterprise in terms of section 46 of the Crimes Act, 2009 (earlier section 22 of the Penal Code), the first question is whether the appellants had formed a common intention to prosecute an unlawful purpose [see also **Vasuitoga v State** [2016] FJSC1; CAV001 of 2013 (29 January 2016)]. Common intention could be proved by inference from conduct alone without words but that inference should be sufficiently strong to satisfy the high degree of certainty which criminal law requires [vide **Henrich v State** [2019] FJCA 41; AAU0029 of 2017 (07 March 2019)].

[29] The trial judge had directed the assessors on this aspect correctly at paragraph 44-46 of the summing-up.

[30] The assessors and the trial judge appear to have concluded that the appellants' running towards the deceased at the same time and assaulted him even after he was felled to the ground with the 01st appellant's first punch was sufficient to prove that they were acting in furtherance of a common intention to carry out an unlawful purpose namely assaulting the deceased in this instance.

[31] The second limb of 'joint enterprise' is that there should be proof that in the prosecution of the unlawful purpose an offence has been committed which is of such a nature that its commission is a probable consequence of the prosecution of such purpose. Thus, to impute secondary liability for murder under the doctrine of joint enterprise, the fault element that the prosecution is required to prove is that the accused contemplated or foresaw death when they carried out their common intention to assault the deceased. To be guilty of manslaughter under the doctrine of joint enterprise, the fault element that the prosecution is required to prove is that the accused contemplated or foresaw serious harm when they carried out their common intention to assault the deceased (vide **Tapoge v State** [2017] FJCA 140; AAU121.2013 (30 November 2017 and see also **Vasuitoga v State** (supra).

[32] The trial judge had directed the assessors on this aspect correctly at paragraph 48 of the summing-up in relation to murder.

[33] Then the trial judge had addressed the assessors on the alternative verdict of manslaughter regarding both elements under section 46 of the Crimes Act, 2009 at paragraphs 53-70 of the summing-up.

[34] Given the nature of the attack on the deceased particularly on his vulnerable parts of the body by the appellants and the gravity of the injuries by the doctor the assessors and the trial judge cannot be faulted for drawing the conclusion that the appellants must have contemplated or foreseen serious harm to the appellant as opposed to his death when they carried out their common intention to assault the deceased. Their subsequent conduct probably demonstrates that the deceased's death was not in their contemplation when they attacked him. Hence the decision by assessors and the trial judge to convict them of manslaughter instead of murder.

[35] **Gillard v The Queen** [2003] HCA 64; 219 CLR 1; 78 ALJR 64; 202 ALR 202; 139 A Crim R 100 (2003) 219 also elaborates the operation of the doctrine of joint criminal enterprise as follows:

> *'110. In its simplest application, the doctrine of joint criminal enterprise means that, if a person reaches an understanding or arrangement amounting to an agreement with another or others that they will commit a crime, and one or other of the parties to the arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, all are equally guilty of the crime regardless of the part played by each in its commission[98].'*
>
> *111. The doctrine has further application. It is not confined in its operation to the specific crime which the parties to the agreement intended should be committed. "[E]ach of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose"[99]. The scope of the common purpose is to be determined subjectively: by what was contemplated by the parties sharing that purpose[100]. And "[w]hatever is comprehended by the understanding or arrangement, expressly or tacitly, is necessarily within the contemplation of the parties to the understanding or arrangement"[101].'*

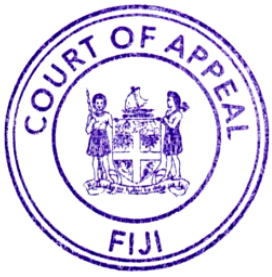
[36] However, I am mindful of Taniela's evidence that the 01st appellant had delivered only one punch and thereafter was seen trying to stop the fight and succeeded in doing

so at least temporarily. Secondly, the 01st accused's punch in the first part of the episode had felled the deceased to the ground though he got up and was seen walking. He had dealt another blow before allegedly withdrawing from the joint enterprise. Taniela too had delivered one blow on the deceased and his friend Inoke *alias* Ritova had kicked the deceased twice on the head. The doctor had said that it was highly likely that such kicks in repetition could cause head injuries. The fact that the deceased got up and started walking does not necessarily mean that the blows already received had not had an impact internally. During both parts of the episode the deceased too was seen behaving aggressively towards the 01st accused and the appellants. Whether the cause of death could be attributed substantially to the appellants' assault is another matter that could be looked at only with the help of the complete appeal record.

[37] In the circumstances, I think it would be in the interest of justice that the full court would consider the totality of trial proceedings to see whether it was open to the assessors and the trial judge to be satisfied and have found the appellants guilty of manslaughter within the doctrine of joint enterprise. However, on the material available at this stage, I cannot say that the assessors and the trial judge 'must', as opposed to 'might', have entertained a reasonable doubt about the appellant's guilt on manslaughter [see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493), **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].

Order

1. Leave to appeal against conviction is allowed.



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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL