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

CRIMINAL APPEAL NO.AAU 0070 of 2017
[In the High Court at Suva Case No. HAC 261 of 2015]

BETWEEN : **JOSAIA VUSUYA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Mr. Y. Prasad for the Respondent**

Date of Hearing : **02 July 2021**

Date of Ruling : **07 July 2021**

RULING

[1] The appellant (01st accused in the High Court) had been indicted with two others (appellants in AAU 73/2017 and AAU 12 /2018) in the High Court of Suva only on one count of murder contrary to section 237 of the Crimes Act, 2009. His co-accused, the appellant in AAU 73/2017 had been charged with one count of an 'act intended to cause grievous harm' (of the deceased's brother) contrary to section 255(a) of the Crimes Act, 2009. Both offences had been committed on 18 July 2015 at Nausori 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

JOSAIA VUSUYA , *KELEPI SAMUTA QAQA and TEVITA DAKUITURAGA on the 18th day of July 2015 at Nausori, in the Central Division, murdered* ***EPINERI WAQAWAI****.*

SECOND COUNT

Statement of Offence

ACT INTENDED TO CAUSE GRIEVOUS HARM: *Contrary to section 255(a) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

KELEPI SAMUTA QAQA *on the 18th day of July, 2015 at Nausori in the Central Division, with intent to cause grievous harm to* ***SAVENACA NAITABA*** *unlawfully wounded the said* ***SAVENACA NAITABA*** *by hitting his head with a beer glass.*

[3] After full trial, the assessors had expressed a divided opinion in that the majority opinion had been that the appellant was guilty of count 01 but the minority opinion had been that he was guilty only of manslaughter. The learned High Court judge had agreed with the majority opinion on count 01 and convicted him of the same. The appellant had been sentenced on 19 April 2017 to life imprisonment with a minimum serving period of 15 years.

[4] The appellant's appeal in person against conviction and sentence had been timely. Subsequently, the Legal Aid Commission had filed amended grounds of appeal and written submissions on behalf of the appellant. The state too had filed written submission.

[5] In terms of section 21(1)(b) and (c) 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] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011) and they are whether the sentencing judge had:

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii)Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

[7] The evidence of PW1 who was the deceased's brother is summarised by the learned trial judge in the sentencing order as follows:

> *2. The facts of the case were as follows. On 18 July 2015 at about 9pm, the deceased and his younger brother, Savenaca (PW1) were at the Bridge Nightclub, Nausori. They were consuming liquor and having a good time. Kelepi (Accused No. 2) and two friends joined Savenaca and the deceased. They started to consume liquor together. After a while Savenaca and the deceased decided to leave the nightclub and visit the Whishling Duck nightclub. When they went outside the Bridge Nightclub, Kelepi confronted the two over his alleged money. The brothers denied taking his money and the three parted ways.*

3. *While walking near RB Patel Supermarket, Kelepi suddenly re-appeared and punched Savenaca twice. While doing so, he injured Savenaca's head with a broken beer glass. Kelepi and Tevita (Accused No. 3) then attacked the deceased by repeatedly punching him. They fought a moving battle from Brown Lane to Ross Street Nausori to the back of Westpac Bank. Josaia later joined the two by felling the deceased with a straight left hand punch to his jaw. The deceased fell on the concrete ground. Josaia, Kelepi and Tevita then repeatedly stomped the deceased on the face, chest and body. Two days later the deceased died of massive brain injuries as a result of the above assaults. The accused were later charged for the deceased's murder. Kelepi was also charged with wounding Savenaca with a broken beer glass when he punched Save's head, while holding the same.*

5. *In this case, the violence used by the accused against the deceased and his brother, Savenaca, were totally unnecessary and uncalled for. The brothers visited the Bridge Nightclub to enjoy themselves. They were drinking liquor with others. Kelepi and his friends joined them. They consumed liquor together. Instead of making the evening an enjoyable one, Kelepi began to pick a fight with Savenaca and his brother, the deceased. Kelepi accused the brothers of taking his money.*

6. *An argument erupted. Kelepi punched Savenaca twice, and injured his head with a broken beer glass. Kelepi and Tevita then ganged up on Epineri and repeatedly assaulted him with several punches. Later Josaia joined the two and fell the deceased with a hard left punch. The deceased fell on the ground unconscious. Josaia, Kelepi and Tevita then repeatedly stomped him. The deceased died 2 days later as a result of the above assaults. This was a senseless killing that had caused Epineri's family heartache and sadness. They had lost a loved one. The accused must not complain when they lose their liberty to atone for their misdeed.*

[8] Pita Rabaka (PW2) had seen the appellant in AAU 0012/2018 (03rd accused) being the aggressor fighting the deceased who was defending and the two exchanging punches at each other. At one point they had run out of steam and rested for a while. Then, the 02nd appellant in AAU 0073/2017 (02nd accused) had joined the two and he too was seen throwing punches at the deceased who was retreating in order to save himself. PW2 had seen the deceased falling onto the ground but he had not seen as to whose punch had felled the deceased. However, he had seen the 02nd and 03rd accused and another stomping the deceased repeatedly on the chest and the front of the face while the latter lay unconscious on the ground.

[9] Alesi Ranadi (PW3) who was selling BBQ food nearby with her husband (PW4) had seen 04 boys fighting, punching and slapping each other. She had identified the 02nd and 03rd accused among them. She had also seen the appellant (01st accused) coming in and joining the fight and throwing a straight left hand punch at the deceased's right jaw. As a result of the blow, the latter had fallen on to the concreate ground while hitting his head on the iron post. Thereafter, PW3 had seen all three accused repeatedly stomping and punching the deceased's face and chest while swearing at him. According to PW3 the 03rd accused had hurt his knee as a result of his stomping the deceased and had to crawl away from the crime scene.

[10] Moape Batigai (PW4), the husband of PW3 had more or less confirmed his wife's evidence.

[11] Doctor James Kalougivaki had testified that the cause of death had been severe traumatic brain injuries and bleeding within the skull cavity as a result of blunt force trauma caused by a rounded solid object including a fist, feet and baseball bat. The brain injuries had been necessarily fatal in the sense that the deceased had little chance of survival even with surgical intervention.

[12] The appellant has given evidence and called his brother and a doctor as part of the defence case. His position appears to have been that he acted in self-defence when he punched the deceased on the jaw as the latter had attempted to attack him with a broken glass under the impression that it was the appellant who had attacked and injured his brother's head. He had denied any further attack on the deceased. After a while he had returned to his food stall to sell food.

[13] The appellant's amended grounds are as follows:

> ***Conviction***
>
> *'**Ground 1***
>
> *The Learned Trial Judge erred in law and in fact in the direction on joint enterprise to the assessors and himself inasmuch that;*

i) *An inadequate direction on the appellant's case, considering the circumstances of his involvement in the offending on whether he had formed a common intention with his co-defendants to assault the deceased; and*

ii) *The appellant's case is not summed up in a fair manner on whether he formed a common intention with his co-defendants to assault the deceased.*

Ground 2

The verdict is not supported by the totality of the evidence in terms of the joint enterprise.

Ground 3

The appellant has suffered a substantial miscarriage of justice by the Learned Trial Judge's directions to the assessors and himself on the defence of self-defence relied by the appellant in that;

i) *The direction is a misdirection in accordance to section 42(2)(a) of the Crimes Act; and*

ii) *That non-direction on the subjective element in accordance to section 42(2) of the Crimes Act.*

Ground 4

The Learned Trial Judge erred in law and in facts by not directing the assessors on the defence of provocation which are available on the evidence.

Ground 5

The appellant is prejudiced by the Learned Trial Judge's direction at [27] of the Summing Up that there is prima facia case found.

Sentence

Ground 1

The minimum term imposed on the appellant is harsh and excessive in the circumstances of the offending in that;

i) *The appellant's role is not proportionate to his two co-defendants in the entire offending against the deceased.*

01st ground of appeal

[14] The trial judge had addressed the assessors on the concept of 'joint enterprise' in terms of section 46 of the Crimes Act, 2009 upon which the prosecution sought to make all appellants liable for murder at paragraph 14, 15 and 16 of the summing-up. The appellant's complaint is that the trial judge had not adequately put his involvement in the offending in the light of 'joint enterprise' in that whether he had formed a common intention with the other two appellants to prosecute an unlawful purpose.

[15] The counsel for the appellant submits that the appellant had no involvement with the deceased, his brother and the other two appellants earlier in the day and in fact they were not known to him before. The appellant's explanation for his involvement is that the deceased attempted to attack him with a broken glass and he retaliated in self-defence. His version had not obviously been believed by the assessors and the judge, and most probably they did so in the light of the evidence that even after he knocked the deceased down with one blow he along with the other two continued to attack the deceased who lay motionless on the ground which the appellant, of course, had denied.

[16] However, none of the prosecution witnesses appears to have shed light as to how the appellant got involved in the fight or what made him attack the deceased in the first place. He appeared to have come into the scene at a later stage from nowhere. He does not appear to have by words demonstrated that he was acting in conjunction with the other appellants.

[17] In the circumstances, the first question is whether the appellant had formed a common intention with other appellants to prosecute an unlawful purpose (see **Vasuitoga v State** [2016] FJSC1; CAV001 of 2013 (29 January 2016). However, 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). The assessors and the trial judge appear to have concluded that the

appellant's continued assault on the deceased even after he knocked him down to the ground along with the other two accused was sufficient to prove that he was acting in furtherance of a common intention with the other two. The appellant's counsel submits that he was acting on his own and not sharing a common intention with the other two accused when he landed a punch on the deceased.

[18] The trial judge had asked the assessors to decide the issue of common intention from the conduct of the appellants (*i.e.* all three accused) at paragraph 16 of the summing-up but not referred to the conduct of each of the appellants separately in relation to common intention. In other words the trial judge had particularly not brought to their attention the conduct of the appellant in that context. To that extent there is substance in the counsel's argument.

[19] The State relies on **Rokete v State** [2019] FJCA 49; AAU0009 of 2014 (07 March 2019) and **Sean Patrick McAuliffe v The Queen** [1995] HCA 37; 183 CLR 108; 69 ALJR 621; 130 ALR 26 to justify the convictions on all three accused for murder including the appellant on the legal basis of the doctrine of common purpose upon which the High Court of Australia said:

> *'Per curiam. The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design. The liability which attaches to the traditional classifications of accessory before the fact and principal in the second degree may be enough to establish the guilt of a secondary party: in the case of an accessory before the fact where that party counsels or procures the commission of the crime and in the case of a principal in the second degree where that party, being present at the scene, aids or abets its commission. But the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others. Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The undertaking or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission. Further, each party is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose, the scope of that purpose*

being determined by what was contemplated by the parties sharing that common purpose.'

'A party is also guilty of a crime which falls outside the scope of the common purpose if that party contemplated as a possibility the commission of that offence by one of the other parties in the carrying out of the joint criminal enterprise and continued to participate in that enterprise with that knowledge.'

[20] Is *'an understanding or arrangement amounting to an agreement'* to commit a crime the same as 'forming a common intention' to prosecute an unlawful purpose in section 46? It appears that the scope in section 46 of the Crimes Act, 2009 may be wider in some respects and narrower in some other respects than what is contemplated in **Sean Patrick McAuliffe v The Queen** (supra). It is a matter for the full court to consider.

[21] However, the most important question is whether it was open to the assessors and the trial judge to infer a common intention on the part of the appellant which he had allegedly formed with the other two accused to prosecute an unlawful purpose such as inflicting grievous physical injuries on the deceased [vide **Henrich v State** (supra)]. This could be ascertained by the full court only upon examination of the appeal record which is not available at this stage.

[22] In the circumstances, I am inclined to grant leave to appeal on the first ground of appeal to enable the full court to examine the appellant's grievance more fully although I cannot determine at this stage whether this ground of appeal has a reasonable prospect of success.

02nd ground of appeal

[23] The second ground of appeal flows from or an extension of the first ground of appeal. The counsel for the appellant submits that the prosecution had not proved that the appellant was criminally liable for murder on the basis of 'joint enterprise'.

[24] 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 and in case of murder the prosecution is required to prove the subjective element *i.e.* that the secondary party contemplated and foresaw the probability of death or infliction of serious harm on the deceased in the execution of the planned unlawful purpose [see also **Vasuitoga v State** (supra)].

[25] To impute secondary liability for murder under the doctrine of joint enterprise, the fault element that the prosecution was required to prove was 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 was required to prove was 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)].

[26] The counsel for the appellant submits that each of the accused has been treated as principal offenders and argues that the appellant should have been tried separately suggesting that separate charges should have been preferred against the appellant and the co-accused as there was no evidence of a 'joint enterprise'.

[27] If the first limb in section 46 of the Crimes Act, 2009 is not satisfied, then the proof of second limb would obviously fail. The counsel for the appellant submits that there is insufficient evidence to infer shared common intention on the part of the appellant to assault the deceased and also that the appellant foresaw probability of death in the execution of that common intention.

[28] The State cites **Gillard v The Queen** 2003] HCA 64; 219 CLR 1; 78 ALJR 64; 202 ALR 202; 139 A Crim R 100 (2003) 219 in support of its defence of the conviction for murder on the basis of 'doctrine of joint criminal enterprise':

> *'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].'

[29] I think this aspect of the appeal also deserves to be examined by the full court with the help of trial proceedings and therefore leave to appeal on the second ground is granted. Once again I make no determination as to whether the second ground of appeal has a reasonable prospect of success due to want of all the material at this stage.

03rd ground of appeal

[30] The counsel for the appellant argues that the trial judge's direction on the defence of self-defence has caused a miscarriage of justice in that he had misdirected on section 42(2)(a) of the Crimes Act, 2009 and failed to direct on the subjective element thereof.

[31] When an accused relies on self-defence, the trial judge should direct the assessors to consider whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds [vide **Naitini v State** [2020] FJCA 20 AAU135 of 2014, AAU 145 of 2014)].

[32] The test is not wholly objective. It is the belief of the accused based on the circumstances as he or she perceives them to be, which has to be reasonable. The test

is not what a reasonable person in the accused's position would have believed. It follows that where self-defence is an issue, account must be taken of the personal characteristics of the accused which might affect his appreciation of the gravity of the threat which he faced and as to the reasonableness of his or her response to the threat (vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015).

[33] **Narayan v State** [2020] FJCA 189; AAU0610.2017 (6 October 2020), I had the occasion to remark:

> *'[14] In my view, in the case of a defense of self-defense the primary question similar to that of provocation is whether such a defence arises on the evidence – or to be more precise, whether there is "a credible narrative of events suggesting the presence of" such a defence [see the decision of the Privy Council in **Lee Chun Chuen v R*** [1963] AC 220 *and Fiji Supreme Court decision in **Naicker v State*** [2018] FJSC 24*; AAV0019.2018 (1 November 2018)]. If and when the factual matrix giving rise to ' self-defense ' is believed, the assessors have to then consider whether it could be said that the accused believed upon reasonable grounds that it was necessary in **self-defense** to do what he did. If the accused had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. **However, the test is not wholly objective and it is the subjective belief of the accused based on the circumstances, as perceived by him, that counts but that belief should be objectively reasonable in those circumstances that he was in immediate danger of death or serious injury and that to kill or inflict serious injury provided the only reasonable means of protection.** The fact that an appellant has taken up ' **self-defense** ' in his evidence does not necessarily make it a credible story and the assessors should always act upon it.*

[34] The counsel's first complaint is that the trial judge had used the word 'honestly' at paragraph 46 of the summing-up referring to the appellant's position on self-defence as 'honest' or 'honestly' is not part of section 42 of the Crimes Act, 2009. Having said that the assessors must ask themselves whether the appellant honestly believed that it was necessary to use force to defend himself the trial judge had proceeded to advise them further to decide whether the amount of force used was reasonable to defend himself. In that context, in my view the reference to an 'honest belief' did not add anything material to confuse the assessors.

[35] The counsel for the appellant also submits that the trial judge had failed to address the assessors on the subjective element of self-defence at paragraph 17 and 46 of the summing-up. However, the following at paragraph suggests that the trial judge had in fact been mindful and directed the assessors on the subjective considerations as well:

> *'But what if you think that the accused did honestly believe or may honestly have believed that it was necessary to use force to defend himself? <u>You must then decide whether the type and amount of force the accused used was reasonable. Obviously, a person who is under attack may react on the spur of the moment, and he cannot be expected to work out exactly how much force he needs to use to defend himself</u>. On the other hand, if he goes over the top and uses force out of all proportion to the [anticipated] attack on him, or more force than is really necessary to defend himself, the force used would not be reasonable. So you must take into account both the nature of the attack on the accused and what he then did. If you are sure that the force the accused used was unreasonable, then the accused cannot have been acting in lawful self-defence; but if you think that the force the accused used was or may have reasonable, he is entitled to be acquitted.*

[36] More importantly, the evidence of prosecution witnesses particularly PW2-PW4 who were independent of either party to the conflict had not seen the deceased rushing to stab the appellant with a cracked beer glass.

[37] The assessors including the one in the minority and the trial judge had not believed the appellant's version that he was acting in self-defence and it was open for the assessors and the trial judge to come to that conclusion on the evidence. They had thought that there was no credible narrative of self-defence before them.

[38] In the circumstances, I do not think that there is a reasonable prospect of success in the third ground of appeal.

<u>04th ground of appeal</u>

[39] The counsel admits that defence of provocation had not been raised by the appellant at the trial. However, he complains that the trial judge had not addressed the assessors or himself on provocation. The approach to be taken in respect of provocation is judicially set out as follows [see for example **<u>Tapoge v State</u>** (supra)]:

'1. The judge should ask himself/herself whether provocation should be left to the assessors on the most favourable view of the defence case.

2. There should be a credible narrative on the evidence of provocation words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship.

3. There should be credible narrative of a resulting loss of self-control by the accused.

4. There should be a credible narrative of an attack on the deceased by the accused which is proportionate to the provocative words or deeds.

5. The source of the provocation can be one incident or several. To what extent a past history of abuse and provocation is relevant to explain a sudden loss of self-control depends on the facts of each case. However accumulative provocation is in principle relevant and admissible.

6. There must be an evidential link between the provocation offered and the assault inflicted.'

[40] In **Naitini v State** [2020] FJCA 20; AAU135.2014, AAU145.2014 (27 February 2020) the Court of Appeal analyzed several previous decisions of the Court of Appeal and the Supreme Court on the issue of provocation and in my view, the appellant's case falls far short of the requirements laid down for a plea of provocation to be placed before the assessors and succeed.

[41] Even if one were to accept for the sake of argument that the deceased attempted to stab the appellant with a broken glass (*i.e*. provocative act) there is absolutely no evidence that he had lost self-control and in any event his response including a continuous assault on the deceased was totally disproportionate to the provocation. There is no credible narrative of any of the three main elements to be present for the consideration of the defense of provocation. The appellant cannot maintain 'provocation' simultaneously with 'self-defense' as in the former he is supposed to have lost self-control of himself but in the latter he was in full control of himself in defending himself.

[42] In **Devi v State** [2021] FJCA 4; AAU0070.2018 (12 January 2021) I dealt with the defence of provocation more fully referring to **Robert Smalling v. The Queen**

(Jamaica) [2001] UKPC 12 (20th March, 2001) and stated that the question of provocation does not arise if in the opinion of the judge, even on a view most favourable to the accused, there is insufficient material for assessors to find that it is a reasonable possibility that there was specific provoking conduct resulting in a loss of self-control and there is simply no issue of provocation to be considered by the assessors.

[43] In any event, the appellant's trial counsel had not sought redirections in respect of provocation as strongly commented upon in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018). Thus, any deliberate failure to do so would disentitle the appellant even to raise them in appeal with any credibility.

[44] Accordingly, there is no reasonable prospect of success in this ground of appeal and leave to appeal is refused.

05th ground of appeal

[45] The trial judge's statement that '*... prime facie case had been found against the appellant…'* in the summing-up, though not capable of vitiating a conviction by itself in appeal, was unwarranted and should be avoided by trial judges lest it might wrongly influence the assessors to think that the judge's view is sufficient indication that evidence is strong enough for a conviction. However, despite the single Judge's decision in **Degei v State** [2019] FJCA 262; AAU157.2015 (27 November 2019), in **Raqio v State** [2020] FJCA 6; AAU61.2015 (27 February 2020) Nawana J. for the full court with the other two judges agreeing said:

> *'[32] I, accordingly, hold that there is merit in the complaint made on behalf of the appellant in the first ground of appeal. Nevertheless, I subscribe to the view that, although the learned judge had made a general reference as to the existence of a prima facie case, he had not referred to any specific contested issue in a conclusive manner as found in Smith's case (supra). Hence, I am of opinion that no perceivable prejudice could have caused to the appellant affecting the legitimacy of the trial.'*

[46] Accordingly, there is no reasonable prospect of success in this ground of appeal and leave to appeal is refused.

01st ground of appeal (sentence)

[47] The appellant complains that the minimum serving period of 15 years is disproportionately high considering his role in the offending.

[48] I do not think so. In **Balekivuya v State** [2016] FJCA 16; AAU0081 of 2011 (26 February 2016) the court reduced the minimum serving period from 19 years to 15 years for an appellant who was 19 years at the time of committing the offence though the minimum period of serving the sentence was still a matter of discretion on the part of the trial judge in terms of section 237 of the Criminal Procedure Act, 2009. In the instant case, the evidence reveals that it was the appellant's single forceful blow that knocked the deceased down who until then was in the midst of the brawl with the other two. Even thereafter, the appellant had been seen to be attacking continuously the deceased who lay motionless on the ground.

[49] There is no sentencing error or a reasonable prospect of success in the appeal ground against the minimum serving period of 15 years. Leave to appeal against sentence is refused.

Orders

1. Leave to appeal against conviction is allowed.
2. Leave to appeal against sentence is refused.

COURT OF APPEAL FIJI

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