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

CRIMINAL APPEAL NO.AAU 0059 of 2019
[In the High Court at Suva Case No. HAC 013 of 2017]

BETWEEN	**:**	**NIKO BALEIWAIRIKI** **ERONI RAIVANI**
		Appellants
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Mr. M. Fesaitu for the Appellants**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	**:**	**09 December 2021**
Date of Ruling	**:**	**10 December 2021**

RULING

[1] The appellants had been indicted with another in the High Court at Suva on one count of murder contrary to section 237 read with section 46 of the Crimes Act, 2009 and one count of aggravated robbery contrary to Section 311 (1) (a) of the Crimes Act 2009 committed on 01 January 2017 at Lokia, Rewa in the Central Division.

[2] The information read as follows:

*'**FIRST COUNT***

Statement of Offence

MURDER: *Contrary to Section 237 read with section 46 of the Crimes Act 2009.*

Particulars of Offence

> ***NIKO BALEIWAIRIKI*** *and* ***ERONI RAIVANI*** *on the 1st day of January, 2017 at Lokia, Rewa, in the Central Division, murdered* ***JAI PRASAD.***

SECOND COUNT

Statement of Offence

> ***AGGRAVATED ROBBERY:*** *Contrary to Section 311 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

> ***NIKO BALEIWAIRIKI*** *and* ***ERONI RAIVANI*** *on the 1st day of January, 2017 at Lokia, Rewa, in the Central Division, in the company of each other robbed* ***JAI PRASAD*** *of a 15 Horsepower Yamaha Outboard Engine valued at $5, 950.00.'*

[3] After the summing-up, the three assessors in unanimity had opined that both appellants were guilty of murder and aggregated robbery. The learned High Court judge had agreed with the assessors and convicted and sentenced them on 15 April 2019 to mandatory life imprisonment for murder with a minimum serving period of 22 years and 12 years imprisonment for aggravated robbery; both sentences to run concurrently.

[4] The appellants' appeal against conviction in person had been timely. Subsequently, the Legal Aid Commission had filed amended grounds of appeal and written submissions on behalf of both appellants (on 10 August 2021). The state had written submissions on 16 November 2021.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal against conviction 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 appellants' confessions, the evidence of Ulaiasi Tuikoro and the deceased's post-mortem report. The appellants' criminal liability was imputed by the prosecution on the basis of joint enterprise under section 46 of the Crimes Act, 2009. The 01st appellant had given evidence and the 02nd appellant had remained silent.

[7] The trial judge had summarised the prosecution evidence as follows in the judgment:

> 5. *The prosecution alleges in the information that Waisea Motonivalu, Niko Baleiwairiki and Eroni Raivani had formed a common intention to prosecute an unlawful act, which was to rob the outboard engine of Jay Prasad. They then went on to execute the said unlawful plan in the early hours of 1st of January 2017. While executing the said joint enterprise, Waisea Motonivalu had gone beyond as planed and assaulted Jay Prasad and killed him. Meanwhile, they managed to rob the outboard engine from Jay Prasad as well. Therefore, the prosecution alleges that Niko Baleiwairiki and Eroni Raivani are liable to the killing of Jay Prasad, even though Niko Baleiwairiki had only punched on the face of the deceased and Eroni Raivani had not taken part in any way in assaulting Jay Prasad. The prosecution alleges that the death of Jay Prasad is a probable consequence of the execution of the joint enterprise that was formed by the three accused in order to rob the outboard engine of Jay Prasad.*
>
> 6. *In order to prove the charges against the second and third accused, the prosecution mainly relies on the caution interviews and the charging statements of the two accused. The prosecution alleges that the two accused have made statements in those interviews, admitting their respective responsibilities in committing these crimes.*

[8] The first appellant had alleged in his evidence that he was assaulted, threatened and intimidated by the police officers after he was arrested at his home at Lokia village on the 04 January 2017. He had then been taken to Sawani, near Colo-i-suva instead of being taken directly to the Nausori Police Station. According to him, he was threatened, slapped and intimidated by the police officer, forcing him to admit the

offence. He had also said that he was afraid, feeling hungry and weak when the caution interview was recommenced on the 05 January 2017. His caution interview was admitted on 22 March 2019 after the *voir dire* inquiry.

[9] The second appellant *via* cross-examination of prosecution witnesses had contended that the answers in his caution interview were fabricated by the Interviewing Officer and that the time of the recommencement of the caution interview on the 5 January 2017 as recorded was not correct, as at that time he was attending to the medical examination at the Nausori Medical Centre.

[10] The grounds of appeal urged are as follows:

Conviction

(01st and 02nd appellants)

Ground 1

THAT the Learned Trial Judge erred in law and in facts having not adequately directed the assessors and himself on the fault element as to murder and the lesser charge of manslaughter in consideration of the secondary liability to the joint enterprise, when evaluating the evidence.

Ground 2

THAT the Learned Trial Judge had erred in law and in facts having not adequately directed the assessors and himself on how to approach the account in the appellants caution interview and that of his co-appellants.

(01st appellant only)

Ground 3

THAT the Learned Trial Judge erred in law and in facts having not directed the assessors to disregard the evidence of prosecution witness Ulaiasi Tuikoro who testified that Eroni Raivani had informed him that he with the appellant and Waisea Motonivalu had come for the deceased outboard engine and had left it in the bushes, which amounts to hearsay.

01st ground of appeal

[11] The appellant argues that it is not clear from the summing-up and the judgment as to the fault element relied on by the prosecution; whether it is intention or recklessness. While stating that the trial judge had directed the assessors on the fault element for them to consider whether the appellants foresaw or contemplated death as a probable consequence when carrying out the common intention to rob the deceased, the trial judge is alleged to have failed to direct the assessors as to the fault element for the lesser charge of manslaughter. The trial judge had in general directed the assessors as to how to approach the joint enterprise at paragraphs 53-55 of the summing-up.

[12] The trial judge had clearly set out the legal and factual basis on which the prosecution sought to make the appellants liable for murder at paragraph 52 of the summing-up.

> *'52. According to the prosecution case, Waisea Motonivalu, Niko Baleiwairiki and Eroni Raivani had formed a common intention to prosecute an unlawful act, which was to rob the outboard engine of Jay Prasad. In the execution of the said unlawful plan, Waisea Motonivalu had gone beyond as planned and assaulted Jay Prasad and killed him. Meanwhile, they managed to rob the outboard engine from Jay Prasad as well. Therefore, the prosecution alleges that Niko Baleiwairiki and Eroni Raivani are liable to the killing of Jay Prasad, even though Niko Baleiwairiki had only punched on the face of the deceased and Eroni Raivani had not taken part in any way of assaulting Jay Prasad.'*

[13] 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)].

[14] There is no doubt at all about the fact that all three offenders formed a common intention to rob the deceased's outboard engine (unlawful purpose). The only question is whether the death of Jay Prasad was a probable consequence of the prosecution of

the unlawful purpose. However, every death does not necessarily give rise to murder. Death can be the result of manslaughter as well. Death is only the end result.

[15] 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)].

[16] **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].'*

[17] In the case of a direct liability (as opposed to joint enterprise) what distinguishes murder from manslaughter is the fault element; intention to cause or recklessness as to causing the death in murder and intention to cause or recklessness as to causing serious harm in manslaughter.

[18] The issue is whether the same distinction is applicable where there is secondary liability based on joint enterprise under section 46 of the Crimes Act, 2009. In other words, whether the liability for murder or manslaughter could be decided based on the said fault elements when offenders are charged under joint enterprise. The answer seems to be in the negative.

[19] Therefore, contemplation or foreseeability of the probable consequence appears to be the fault element under section 46 of the Crimes Act, 2009 [**Rokete v State** [2019] FJCA 49; AAU0009 of 2014 (07 March 2019) and **Talala v State** [2019] FJCA 50; AAU 155 of 2015 (07 March 2019)]. If death was in contemplation or foreseeable the offenders would be liable for murder; If serious harm was in contemplation or foreseeable the offenders would be liable for manslaughter [see **Tapoge v State** [2017] FJCA 140; AAU1212 of 2013 (30 November 2013)].

[20] Given the facts revealed in the summing-up and the judgment this appears to be a case where the trial judge should have left the issue whether it was the death or the serious harm that was in contemplation or foreseeability of the appellants. In other words, whether the appellants could contemplate or foresee death of the deceased as a probable consequence to be liable for murder as opposed to contemplating or foreseeing serious harm as a probable consequence to be liable for manslaughter.

[21] At paragraph 54 of the summing-up, the trial judge had given an example of several men entering a house armed with dangerous weapons to commit burglary and in the course of it a policeman is killed by one of them, as a situation where other offenders become liable for murder because death was a probable consequence of carrying out the unlawful purpose. If, however, the use of the weapon was not contemplated by others as they did not know of one person carrying a weapon, others would not be guilty of murder.

[22] Applying this very example to the facts of this case *vis-à-vis* the principle of joint enterprise I think the trial judge should have directed the assessors on the lesser offence of manslaughter as well.

[23] I am mindful that the trial judge had himself considered this aspect at paragraphs 22 and 23 of the judgment and concluded that the appellants contemplated or foresaw the death of the deceased but the judge had not considered or not ruled out the alternative verdict of manslaughter as a probable consequence of carrying out the aggravated robbery.

[24] In the circumstances, this is a fit case, I think, for the full court to consider this issue with the benefit of the complete transcript. Therefore, I am inclined to grant leave to appeal on this ground of appeal.

<u>02nd ground of appeal</u>

[25] The appellant's argument under this ground of appeal is based on **<u>Nalave v State</u>** [2019] FJSC 27; CAV0001 of 2019 (01 November 2019) directions prescribed in regard to mutually inconsistent confessions.

[26] The appellants do not submit that the confessions of them are mutually inconsistent. Therefore, the general directions on confessions at paragraphs 68-72 are sufficient.

[27] There is no reasonable prospect of success in this ground of appeal.

<u>03rd ground of appeal</u>

[28] The 01st appellant submits that the trial judge had failed to direct the assessors to disregard the evidence of Ulaiasi Tuikoro who testified that the 02nd appellant had informed him that he along with the 01st appellant and the co-accused had come for the deceased's outboard engine and they had left it in the bushes, because such evidence was 'hearsay'.

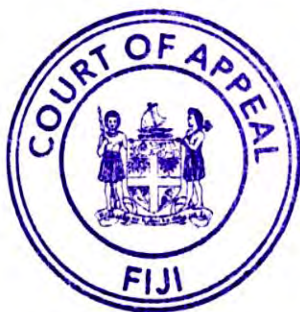
[29] I simply cannot fathom how Ulaiasi Tuikoro's above evidence could be categorised as hearsay evidence.

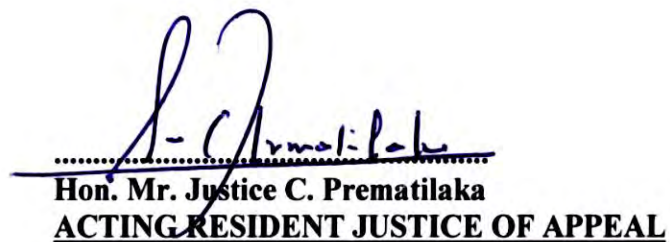
[30] There is no reasonable prospect of success in this ground of appeal.

[31] 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 beyond reasonable doubt and have found the appellants guilty of murder within the doctrine of joint enterprise [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 on the 01st ground of appeal.





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