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

CRIMINAL APPEAL NO.AAU 005 of 2019
[In the High Court at Lautoka Case No. HAC 11 of 2013]

BETWEEN	:	**ULAIASI GLEN RADIKE** **KELEMEDI SEVURA**
		Appellants
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellants in person**
	:	**Ms. S. Shameem for the Respondent**
Date of Hearing	:	**06 October 2022**
Date of Ruling	:	**18 October 2022**

RULING

[1] The appellants with another (appellant in AAU 0039 of 2020) had been indicted in the High Court at Lautoka for murder of Josevata Naisali contrary to section 237 of the Crimes Act, 2009 committed on 29 November 2012 at Nadi in the Western Division.

[2] After full trial, the majority of assessors had expressed an opinion of not guilty against the appellants for murder but found them guilty of manslaughter. The learned High Court judge had disagreed with the assessors and convicted the appellants of murder. They were sentenced on 18 December 2018 to life imprisonment with a minimum serving period of 14 years.

[3] The appellants' appeal against conviction and sentence is timely. The 01st appellant indicated to court at the hearing that he would rely on amended grounds of appeal filed by the Legal Aid Commission on 17 November 2020 and supplemental grounds of appeal filed in person on 25 July 2022 along with a single ground of appeal based on incompetent advocacy of his trial lawyer and written submissions in support thereof. The 02nd appellant stated at the hearing that he would only rely on amended grounds of appeal filed on 18 September 2020 and written submissions in support thereof. These grounds of appeal do not involve sentence but only conviction.

[4] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, an appellant could appeal against conviction only with leave of court. The test in a timely appeal 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)].

[5] The grounds of appeal urged on behalf of the appellants at the leave hearing are as follows:

> ***"01st Appellant – amended grounds***
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> *'Ground 1*
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> *That the Learned Trial Judge erred in law and in fact in his inadequate direction on joint enterprise to the assessors and himself on how the appellant 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

That the Learned Trial Judge erred in law and in fact when he failed to direct his mind on the pre charge detention of more than 48 hours of the appellant.

Ground 4

That the Learned Trial Judge erred in law and in fact when he did not give any cogent reasons for differing from the majority opinion of the assessors who had found the appellant guilty for manslaughter.

Ground 5

That the Learned Trial Judge erred with his inadequate direction on the lobendhan principle in terms of admitting the copy of the caution interview and charge statement.

Ground 6

That the Learned Trial Judge erred in law and in fact when he convicted the appellant for Murder instead of the lesser offence of Manslaughter.

01st Appellant - supplementary grounds

Ground 7

THAT the Learned Trial Judge erred in fact and in law when at paragraph 25 of his judgment he accepted, "that all the accused persons were aware of the likelihood of death occurring by their conduct and yet they continue with their conduct regardless", and convicted the appellant for murder on this basis when the totality of the evidence did not support such a finding.

Ground 8

THAT the Learned Trial Judge erred in fact and in law when at paragraph 26 of his judgment, he overturned the majority opinion of the assessors and convicted the appellant of murder without providing cogent reasons for doing so.

Ground 9

THAT the Learned Trial Judge erred in fact and in law at paragraph 22 of his judgment when he rejected the contention that the appellants had acted under the influence of alcohol.

Ground 10

Incompetent advocacy of trial counsel

02nd Appellant – amended grounds

(1) That the Learned Trial Judge erred in law and in fact by allowing P43,Mereani Raikadroka to identify the appellant in dock during trial and not taking into account that this witness has not given any description or features of the appellant in her written statement to police. Therefore the procedure of allowing the dock identification, identifying the appellant in the accused box for the first time was unjustified and prejudicial in all aspects of the appellants' defence.

(2) That the Learned Trial Judge erred in law and in fact by not adequately directing himself and the assessors that PW3, Mereani Raikadroka did not identified the appellant in the identification parade held by the Police and on what basis and reason she is able to identify the appellant in the accused box after a lapse of sum of 6 years.

(3) That the Learned Trial Judge erred in law and in fact by not adequately directing himself and the assessors of the well-established Common Law guideline provided in Turnbull (supra) in respect of identification of the appellant which was in dispute. The trial judge should have directed to caution or need for special care or circumstance under which the identification was made.

(4) That the Learned Trial Judge erred in law and in fact by not directing himself and the assessors that the evidence of PW2, on which the Prosecution case stands or falls had inconsistencies both in their written statements to police and one in court. As such, it is dangerous to rely on their inconsistent evidence and convict the appellant as charged.

(5) That the guilty verdict is unreasonable and it cannot be supported with the evidence in this matter that which was adduced by the prosecution.

(6) That the Learned Trial Judge erred in law and in fact in his judgment by stating that the defense has not been able to create any reasonable doubt in the prosecution implying that the appellant has to prove his innocence.

(7) That the Learned Trial Judge erred in law and in fact by failing to give cogent reasons in his judgments whilst disagreeing with the majority opinion of the assessors.

(8) That the Learned Trial Judge erred in law and in fact by failing to direct himself in his judgment on the issue of Joint Enterprise Principle.

(9) That I was misrepresented by the Legal Counsel from the Legal Aid office Ms. Narara in this trial in which she filed admitted facts in the High Court

admitting that I was involved in the fight and assaulted the deceased on the night in question without informing me or taking my consent to do so."

[6] The trial in his judgment had summarized the case as follows:

'4. The prosecution called 16 witnesses while all the accused persons exercised their right to remain silent and did not call any witness.

5. At about 10.30 pm on 29th November, 2012, the deceased was assaulted by all the accused persons near the fence opposite the Deep Sea Night Club in Nadi Town. The accused persons had punched the deceased then kicked and stepped on his head and face wearing boots after he had fallen on the ground.

6. Mereani Raikadroka saw the deceased being assaulted by some people. She tried to stop them and in the process got punched. The deceased was punched and stepped on. Mereani knew two out of the three who were assaulting the deceased and was able to recognize the first accused Dike and the third accused Kele. The punching and stepping was on the head of the deceased who was lying down bleeding from his head.

7. In respect of the second accused Anare Mara, Emma Batiluva saw the fight at the back of Deep Sea Night Club she saw Tuks the second accused punching the deceased twice on the face.

8. Furthermore, the first and the second accused in their caution interviews and the charge statements admitted assaulting the deceased.

9. On 29 November, 2012 Cpl. Omendra Gupta had arrested the third accused near the crime scene the witness could smell liquor on the accused. Upon questioning the third accused, the witness was told by the third accused that he was accused of stealing a packet of cigarette, the deceased had punched him first and then he had retaliated with punches.

10. Dr. Mate recalled on 3rd December, 2012 she conducted the post mortem on the deceased. According to the doctor, the cause of death was extensive subarachnoid hemorrhage due to blunt force trauma.

11. The doctor said traumatic subarachnoid hemorrhage caused by force or impact applied to any part of the body by a blunt object or surface, falling from considerable heights and assault such as repeated punching, kicking or stepping on the face or head.

12. The injuries to the head of the deceased were extensive suggesting that he was punched, kicked, stomped or stepped on the head or face.

13. All the accused persons have denied committing the offence as alleged. They say they were not reckless with respect to causing the death of the deceased. They were not aware that death would occur by their conduct since they were

intoxicated at the time. They did not foresee or realize that death was a probable consequence or the likely result of their conduct.'

[7] The 01st appellant's grievances can be considered broadly under 'joint enterprise', pre charge detentions of over 48 hours, lack of cogent reasons in the judgment, failure to follow Lobendhan principles, conviction of murder instead of manslaughter, fault element of recklessness, intoxication and criticism of trial counsel/incompetent advocacy of trial counsel.

[8] As far as the 02nd appellant is concerned, his 01st to 03rd grounds of appeal deal with issues in identification while the appellant and he has argued the question of 'joint enterprise' under 05th and 08th grounds of appeal. The 04th ground of appeal is on inconsistency in the prosecution evidence. His grievance under the 06th ground of appeal is on shifting the burden of proof. Upon the 07th ground of appeal, the issue raised is on lack of cogent reasons in the judgment. The appellant's 09th ground of appeal involves criticism of trial counsel.

[9] Therefore, rather than dealing with each and every ground of appeal, I shall deal with common contentious issues taken up by the appellants.

01st appellant

Joint enterprise

[10] The appellant argues that the trial judge had not succinctly laid down in the summing-up how the 01st appellant had formed a common intention to prosecute the unlawful purpose leading to the death of the deceased. The detections are found at paragraphs 43 and 44. He relies on **Heinrich v State** [2019] FJCA 41; AAU0029 of 2017 (07 March 2019) and **Tapoge v State** [2017] FJCA 140; AAU121 of 2013 (30 November 2017) in support of his contention. It was held in ***Heinrich*** that the formation of a common intention to prosecute in conjunction an unlawful purpose and the prosecution in fact of that purpose and the commission of an offence which was a probable consequence of the prosecution of the purpose can, like all facts, be proved

by inference, provided always that the inference is sufficiently strong to satisfy the high degree of certainty which the criminal law requires.

[11] ***Tapoge*** has dealt with the required fault element for murder and manslaughter in the 'principle offender' and other accused. It was held that if recklessness is the fault element relied upon by the prosecution, then the trial judge is required to give clear direction that in the case of the principal offender, the prosecution was required to prove that the accused was aware of a substantial risk that death would occur by conduct and having regard to the circumstances known to him it was unjustifiable to take the risk. But 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. Similarly, for manslaughter, the prosecution is required to prove that the principal offender was reckless in the sense that he was aware of a substantial risk that serious harm would occur and having regard to the circumstances known to him, it was unjustifiable to take the risk. 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. In this case, however, there does not appear to a principle offender in that sense.

[12] It is difficult to consider the 01st appellant's argument without the full record, for whether there was a common intention to prosecute an unlawful purpose, the prosecution of that purpose and the commission of the offence of murder which was a probable consequence of the prosecution of the purpose are all matters to be determined on the totality of facts of the case including the appellant's cautioned statements. Similarly, to determine whether the fault element in the 'principle offender' and other accused for murder was present or whether what was established was only the fault element for manslaughter, one needs to scrutinise the trial transcripts.

[13] Although, I cannot determine the degree of success of this ground of appeal at this stage, I am inclined to grant leave to appeal on this aspect of 'joint enterprise' so that the full court may determine it in due course with the assistance of complete record.

Pre charge detentions of over 48 hours

[14] The appellant had challenged the admissibility of his cautioned interview being involuntary but not on this basis. If taken up, the prosecution would have had a chance to explain whether he was brought before court as soon as possible after 48 hours, if it was not reasonably possible to do so within 48 hours. Even if there had been a delay over 48 hours in bringing him to court after arrest, it is not a ground of appeal which has a reasonable prospect of success at this stage.

Lack of cogent reasons

[15] As to the complaint of the trial judge having not given cogent reasons, the Court of Appeal in **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021) summarized the law relating to 'cogent reasons' as follows:

> *"[24] When the trial judge disagrees with the majority of assessors he should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)]*
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> *[25] In my view, in either situation the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with*

the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.

*[26] This stance is consistent with the position of the trial judge at a trial with assessors i.e. in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)]."*

[16] Thus, when the summing-up and the judgment are taken together, the judge had given cogent reasons for overturning the majority opinion of the assessors. Any further independent analysis and evaluation of the evidence *per se* will have to be undertaken by the full court with the benefit of the trial transcripts which is not available at this stage.

Failure to follow Lobendhan principles

[17] It does not appear at all that the appellant had challenged his cautioned interview and charge statement on the basis that they were photocopies. Otherwise, there could have been a *voir dire* inquiry to determine whether photocopies should be admitted or notn as per *Lobendahn* rules formulated by Goudie J. in **Regina v Lobendahn** [1972] FijiLawRp 1; [1972] 18 FLR 1 (18 January 1972).

'Should have been convicted of manslaughter instead of murder'

[18] The appellant argues that his conduct has not substantially contributed to the death of the deceased and therefore he should have been convicted for manslaughter. He relies on **Vakaruru v State** [2018] FJCA 124; AAU94 of 2014 (17 August 2018).

[19] Considering the cause of death and the fact that the injuries appear to have been the result of punching, kicking or stepping on the face and head of the deceased, I do not think that this ground of appeal has a reasonable prospect of success. How many punches the appellant landed on the deceased is immaterial as all accused were held liable on the basis of 'joint enterprise'. Although the deceased had fallen on a hard surface that fall could not have caused all the fatal injuries which were actually the result of the attack.

Intoxication

[20] The Court of Appeal considered the concept of intoxication in **Livai Kaiviti Ratabua v Livai Kaiviti Ratabua v The State** (supra) the Court of Appeal also considered the concept of voluntary intoxication *vis-à-vis* the liability for murder. However, in this case there is not adequate evidence or a sufficient evidential basis for the plea of intoxication to be considered by the full court as far as this appellant is concerned.

Criticism of trial counsel/ incompetency of trail counsel

[21] The papers filed by him as Annex 1-3 to his affidavit dated 06 June 2022 relate to the proceedings initiated by a complaint No.064/19 before the Chief Registrar. I do not find any response by his trial counsel to Annex 4 and 5 supposedly sent to the trial counsel in April and May 2022. Whether they have in fact been served on the counsel is not clear. Further there is nothing to indicate that his affidavit dated 06 June 2022 also had been served on the trial counsel. Therefore, this ground of appeal cannot be considered at this stage in as much as the procedural requirement to raise a ground of this nature set out in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) have not been completed.

Recklessness

[22] The Court of Appeal in the recent past considered the concepts of recklessness in **Livai Kaiviti Ratabua v The State** AAU 129 of 2016 (29 September 2022).

[23] The prosecution had obviously not rest its case on intentional killing. The appellant argues that he did not foresee that death was a probable consequence of his conduct.

[24] The learned trial judge had correctly put to the assessors the fault element of recklessness in the summing-up. The majority of assessors probably had doubts of the fault element for murder though they were satisfied of the required fault element for manslaughter as explained to them by the trial judge. However, the trial judge had said as follows in the judgment showing that he was satisfied of the presence of the fault element of recklessness for murder.

> *'[19] I do not accept that all the accused persons were not reckless when they were assaulting the deceased because they were intoxicated. The accused persons knew that death was a probable consequence of their conduct and they decided to go ahead with the conduct, regardless of that consequence.*
>
> *[25] I also accept that all the accused persons were aware of the likelihood of death occurring by their conduct and yet they continued with their conduct regardless. In other words the accused persons were reckless with respect to causing the death of the deceased since they were aware of a substantial risk that death will occur due to their conduct and having regard to the circumstances known to them it was unjustifiable for them to take that risk.'*

[25] Even if the appellant's version of events might suggest that individually he may not have been reckless as to causing death of the deceased, the problem for him is that his was not an individual liability but the prosecution sought to cast criminal liability on him for murder on the basis of 'joint enterprise' which had been explained to the assessors in detail from paragraphs 41-44 of the summing-up.

[26] Thus, the majority of assessors may have found the appellant guilty for manslaughter either because they thought that he was reckless only as to causing serious harm to the deceased or he could only be said to have been part of a 'joint enterprise' with the other two accused who also were guilty of being reckless as to causing serious harm to the deceased thus leading to their opinion on manslaughter and not murder.

[27] Due to the paucity of material at this stage it is difficult to go into this aspect in detail. However, the full court would be in a position to consider both aspects namely 'fault element' and 'joint enterprise' with the assistance of full court records in so far as the verdict of murder is concerned.

[28] Although, I cannot determine the degree of success for obvious reasons at this stage, I am inclined to grant enlargement of time to appeal on these aspects so that the full court may determine them in due course.

02nd appellant's grounds of appeal

Identification of the appellant

[29] Witness Mereani Raikadroka had spoken to an argument between the deceased and some boys followed by four or five of them punching and kicking the deceased. They had stepped on his head when he fell on the ground. After the boys left the deceased was seen bleeding from his head, snoring and losing a lot of blood. The witness Raikadroka had seen a fight involving a lot of people and the deceased being beaten by some people on the dark sloppy area and two of them, whom she could identify, had punched and stepped on the deceased. She was able to recognize the first appellant Dike and the second appellant Kele. However, she had told the police that she could not identify the assailants but explained at the trial that she said so because she was drunk and felt sorry for them.

[30] The trial judge had stated in the judgment that in any event the first and the second appellants in their caution interviews and the charge statements admitted assaulting the deceased but what they had disputed was that they was not reckless in their conduct due to influence of alcohol.

[31] In the circumstances, there is no merits to the complaint regarding identification or inadequate directions on Turnbull guidelines on identification.

Joint enterprise

[32] The same discussion above on this ground in relation to the 01st appellant would suffice for the 02nd appellant as well. The full court may consider this aspect of the complaint at the hearing of this appeal.

'Inconsistent evidence'

[33] The alleged inconsistent evidence only related to the evidence of Mereani Raikadroka who was able to recognize the first appellant Dike and the second appellant Kele. However, she had told the police that she could not identify the assailants but explained at the trial that she said so because she was drunk and felt sorry for them. The trial judge has accepted that Mereani told the truth when she told the court that she was scared of the third appellant about what he had said to her before she gave her police statement and that the 01st and 02nd appellants might do something to her so she told the police she could not recognize them. Thus, according to the trial judge, the reliability and the credibility of Mereani was not affected by this inconsistency. The judge had no doubt in his mind that she told the truth in court and not shaken in cross examination.

Shifting the burden of proof

[34] The 02nd appellant has referred to the trial judge's statement in the judgment that the defence has not been able to create any reasonable doubt in the prosecution case as proof of the trial judge having shifted the burden.

[35] I do not agree. When the whole of the summing-up and the judgment is concerned, the judge had correctly put the burden of proof on the prosecution.

'Cogent reasons'

[36] As to the complaint of the trial judge having not given cogent reasons, the above discussion as regards the 01st appellant would apply to the 02nd appellant as well. This ground of appeal can be considered under 'recklessness' and 'joint enterprise'.

Criticism of trial counsel

[37] Procedural requirements to raise a ground of this nature set out in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) have not been complied with and therefore this ground of appeal cannot be entertained.

Order of the Court:

1. Leave to appeal against conviction is allowed only on the grounds of appeal relating 'recklessness' and 'joint enterprise' as discussed above.

COURT OF APPEAL FIJI

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