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

CRIMINAL APPEAL NO.AAU 039 of 2020
[In the High Court at Lautoka Case No. HAC 11 of 2013]

BETWEEN : **ANARE MARA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Ms. S. Shameem for the Respondent**

Date of Hearing : **06 October 2022**

Date of Ruling : **18 October 2022**

RULING

[1] The appellant with two others (appellants in AAU 005 of 2019) 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 appellant who was tried in absentia for murder but found him guilty of manslaughter. The learned High Court judge had disagreed with the assessors and convicted the appellant of murder. He was sentenced on 18 December 2018 to life imprisonment with a minimum serving period of 14 years.

[3] The appellant's appeal against conviction and sentence is untimely being out of time by over 01 ½ years.

[4] The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced? (vide **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).

[5] These factors are not to be considered and evaluated in a mechanistic way as if they are on par with each other and carry equal importance relative to one another in every case. Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained. No party in breach of the relevant procedural rules and timelines has an entailment to an extension of time and it is only in deserving cases where it is necessary to enable substantial justice to be done that breach will be excused [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)]. In practice an unrepresented appellant would usually deserve more leniency in terms of the length of delay and the reasons for the delay compared to an appellant assisted by a legal practitioner.

[6] The delay of this appeal is very substantial. The appellant has offered no explanation for the inordinate delay. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[7] The grounds of appeal urged on behalf of the appellant from time to time are as follows:

> *"**Grounds of appeal***
>
> *Ground 1*
>
> *THAT the Learned Trial Judge erred in law and in fact when he gave weight to the inconsistent adduced during trial.*
>
> *Ground 2*
>
> *THAT the Learned Trial Judge erred in law and in fact when he did not properly guide and direct the assessors in respect of recklessness elements in manslaughter.*
>
> *Ground 3*
>
> *THAT the Learned Trial Judge erred in law when His Lordship did not direct the assessors in summing up and himself a judgment of the Turnbull Guidelines on identification.*
>
> *Ground 4*
>
> *THAT the Learned Trial Judge erred in law when His Lordship reasons for overturning the majority opinion of the assessors was not cogent and unsafe and not support by evidence.*
>
> ***Amended grounds of appeal***
>
> *Ground 5*
>
> *THAT the Learned Trial Judge erred in law and in fact when he failed to carefully evaluate that precise conduct of the appellant and its degree of direct contribution to the injuries sustained by the deceased leading to his death.*
>
> *Ground 6*
>
> *THAT the Learned Trial Judge erred in law and in fact when he failed to properly guide and direct the assessors in respect of recklessness elements which the appellant's specific conduct on the commission of the murder did not cause the death of the deceased as the medical specialist, Dr. Avikale Mate the Police Pathologist.*
>
> *Ground 7*
>
> *THAT the Learned Trial Judge erred in law and in fundamental principle when he failed to highlight for the assessors that the appellant did not foresee*

that death was a probable consequence of his conduct, as he was the last of the [3] accused person to arrive at the crime scene. Furthermore the Court under the guidance of the Learned Trial Judge failed to give due consideration to the facts of the appellants caution interview that he was called to the rescue of the [3 rd] accused person [Kelemedi Savura] by [PW4] Emma Batiluva. Upon arriving at the scene both first and third accused were already engaged in fist fight with the deceased.

Ground 8

THAT the Learned Trial Judge erred in law and in fact when he failed to properly guide and direct the assessors in elements of recklessness elements in the unintentional – killing of the deceased.

Ground 9

THAT the Learned Trial Judge erred in law and in fact by not adequately directing himself and the assessors in his summing up and as well as his judgment's case in reasonable doubt and any such doubt must be benefited to the appellant.

Ground 10

THAT the Learned Trial Judge erred in law and in fact by not directing himself and assessors that the evidence of the prosecution witnesses especially [PW4] in direct regards to the appellants conduct is not consistent with the findings of Dr. Mate in the post mortem report namely the nature of injuries found on the deceased, cannot be sustained from the two [2] punches thrown by the appellant.

Ground 11 - ***Sentence***

THAT the sentence imposed on the appellant is harsh and excessive in all circumstances, given the minimal conduct in which the appellant contributed in, despite being trial under joint enterprise

Supplementary grounds of appeal

Ground 12

THAT the Learned Trial Judge erred in law and in fact by not directing his mind in the judgment that the evidence of Mereani Raikadroka on which the Prosecution's case stands or falls had serious doubts in terms of the identification of the appellant (2nd accused).

Ground 13

THAT the Learned Trial Judge erred in law and in fact by not directing his mind in his judgment that the evidence of Mereani Raikadroka (PW3) upon

her cross examination by the 1st accused's' counsel, is consistent with her statement to police dated 30th November 2012 in which she had stated that she cannot recognise the itaukei boys were punching the deceased.

Ground 14

THAT the Learned Trial Judge erred in law and in fact by not directing his mind in his judgment that the evidence of Mereani Raikadroka (PW3) had reasonable doubt on the prosecution's case against the appellant, and as a result any such doubt should had inure in the favour or in the benefit of the appellant.

Ground 15

THAT the Learned Trial Judge erred in law and in fact by not directing his mind in his judgment that the evidence of Mereani Raikadroka had serious contradictious issues pertaining to the place the incident took place.

Ground 16

THAT the Learned Trial Judge erred in law and in fact by not directing his in his judgment that the evidence of Emma Batiluva, had serious doubts for reason being that there is no Mobil Station in the opposite bedside of Deep sea Night Club in Nadi Town as well as it is in the evidence of the Prosecution that the place of incident was slope and dark, therefore seeing whose punching who from 15-20 meters as per her evidence is impossible at night. Therefore, all these doubts should have been inured in the favour of the appellant.

Ground 17

THAT the Learned Trial Judge erred in law and in fact by not directing his mind in his judgment that the evidence of Dr. Avikali mate on the issue of cause of death was also possible due to blunt force trauma including a hard fall when highly intoxicated (para 136) could severe injury causing death of the deceased (paragraph 137 and 138 of the summing up).

Ground 18

THAT the Learned Trial Judge erred in law and in fact by not directing his mind in his judgment that the evidence of Emma Batiluva is not consistent with that of other prosecution witness as such. It had reasonable doubt that should have been inured in the favour of the appellant.

Ground 19

THAT the Learned Trial Judge erred in law and in fact by not directing his mind at the close of the prosecution's case that the evidence adduced by the prosecution against the appellant did not touch any part of the offence of

murder and as a result. The appellant ought to have been acquitted under section 231 of Criminal Procedure Act.

Ground 20

THAT the Learned Trial Judge erred in law and in fact by not directing his mind in the section 231 of the Criminal Procedure Act at the close of prosecution's case to consider the evidence adduced by the prosecution incriminating the appellant before proceeding to rely on the contents of the caution interview and charge statements of the appellants.

Ground 21

That the learned trial judge erred in law and fact by not directing his mind in the judgment that the evidence of Mereani Raidroka, on which the Prosecution case stands or falls, had serious doubts in terms of the identification of the appellant (2nd accused)."

[8] 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."*

[9] The grounds of appeal consists of allegations of inconsistent evidence, inadequate directions on Turnbull guidelines on identification and the element of recklessness in murder *vis-à-vis* manslaughter and lack of cogent reasons in overturning the majority opinion of the assessors.

[10] The amended grounds of appeal concentrate on the element of recklessness, the appellant's specific acts not having contributed to the death of the deceased and lack of direction on giving the benefit of doubt to the appellant.

[11] His supplementary grounds of appeal deal with identification of the appellant, cause of death of the deceased possibly being due to his hard fall on the ground and the trial judge's failure to acquit him at the close of the prosecution case.

[12] Therefore, rather than dealing with each and every ground of appeal, I shall deal with common areas of grievance urged by the appellant.

Identification of the appellant

[13] Emma Batiluva had seen the fight at the back of Deep Sea Night Club and the appellant known as Tuks punching the deceased twice on the face. The appellant (the

second accused at the trial) in his caution interview and the charge statements had admitted assaulting the deceased. Witness Naomi 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. Mereani 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. 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.

[14] The trial judge had stated in the judgment that in any event the appellant had not disputed that he was at the scene, had assaulted the deceased but what he had disputed was that he was not reckless in his conduct due to influence of alcohol.

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

'Inconsistent evidence'

[16] The alleged inconsistent evidence only related to the evidence of Mereani Raikadroka who in any event had not identified the appellant at the scene. No material inconsistencies appear to have emerged in the course of Emma Batiluva's evidence who testified to the identification of the appellant.

'Cogent reasons'

[17] 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)].*

[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)]."*

[18] 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. In any event, this grievance can be discussed under issues of fault element and joint enterprise.

Issue of recklessness

[19] This is in fact the main plank of the appellant's appeal. His submissions on the number of punches he delivered (02) and therefore, his degree of contribution to the death of the deceased *vis-à-vis* the injuries found on the deceased can be considered under the heading of the fault element of recklessness. 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).

[20] 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 as he was the last to arrive and dealt only two punches on the face of the deceased which could not have resulted in the injuries found on the deceased. Further, according to him his caution interview had revealed that he was called to the rescue of the 03rd accused by Emma Batiluva (PW4) explaining why he went to the scene.

[21] 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.'*

[22] Although 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.

[23] 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.

[24] However, the trial judge had not embarked in an analysis or evaluation of evidence or a determination with regard to the question of 'joint enterprise' in the judgment.

[25] Therefore, 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.

[26] 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.

[27] I do not think that there is any merit in the appellant's proposition that the cause of death of the deceased could possibly be due to his hard fall on the ground and therefore, there is no error in the trial judge's failure to acquit him at the close of the prosecution case. Similarly, the complaint that the trial judge had not directed the assessors to give the benefit of the doubt to the appellant does not merit any further consideration.

Intoxication

[28] 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 no adequate evidence or a sufficient evidential basis for the plea of intoxication to be considered by the assessors, trial judge or the full court as far as the appellant is concerned.

Sentence appeal

[29] As for the ground of appeal against sentence, the appellant argues that his minimal contribution to the demise of the deceased should have attracted a lesser serving period than 14 years.

[30] It was held in **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016) that there is no guidance as to what matters should be considered by the judge in deciding whether to set a minimum term and that there are no guidelines as to what matters should be considered when determining the length of the minimum term. The trial judge had not given any specific reasons why he decided to exercise his discretion to fix a minimum serving period but he had given reasons (*i.e.* aggravating and mitigating circumstances usually considered when arriving at the head sentence before determining what non-parole term should be imposed) as to why he was fixing the minimum serving period at 14 years. Whether the appellant's degree of involvement should have been considered in the decision to fix a minimum period and particularly in selecting 14 years as the minimum serving period could be considered as a question of law by the full court.

Orders of the Court:

1. Enlargement of time to appeal against conviction is allowed on the grounds of appeal relating to 'recklessness' and 'joint enterprise'.

2. Enlargement of time to appeal against sentence only in so far as the minimum serving period is concerned, is allowed.

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