

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, RJA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **20 January 2023**

Date of Ruling : **31 January 2023**

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] 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.

[3] 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.

- [4] 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 the appellant had joined the fight and thrown left and right hand punches at the deceased. The deceased was retreating and trying to save his life. All were drunk. 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 appellant and the 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.
- [5] 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 appellant and the 03rd accused among them. She had also seen the 01st accused coming in and joining the fight and throwing a straight left hand punch at the deceased's right jaw. The latter had fallen on to the concrete 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.
- [6] Moape Batigai (PW4), the husband of PW3 had more or less confirmed his wife's evidence.
- [7] 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.

[8] The appellant had given evidence and relied on the two witnesses called on behalf of the 01st accused. He had admitted pinching the deceased's brother while holding a beer glass and felt blood in his hand. He had denied attacking the deceased at all but stated that he was only interested in recovering his \$15 from the deceased and his brother.

[9] Upon a timely appeal against conviction and sentence, the single judge allowed leave to appeal on 07 July 2021 only against conviction on the first and second grounds of appeal only and stated:

[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.

[25] 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.

[10] The grounds of appeal on which leave was granted is as follows:

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.'

Bail pending appeal

- [11] The legal position is that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellant has to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, an appellant can even rely only on ‘exceptional circumstances’ including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004), **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].
- [12] Out of the three factors listed under section 17(3) of the Bail Act ‘likelihood of success’ would be considered first and if the appeal has a ‘very high likelihood of success’, then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.
- [13] If an appellant cannot reach the higher standard of ‘very high likelihood of success’ for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown

other exceptional circumstances to warrant bail pending appeal independent of the requirement of ‘very high likelihood of success’.

[14] The appellant was granted leave to appeal in order to allow the full court to examine the issue of joint enterprise based on real evidence available in the appeal records which are not available at this stage not because *prima facie* there appeared to be a reasonable prospect of success. Thus, I cannot conclude that the appellant has a ‘very high likelihood of success’ in his appeal.


[15] Though, it is now not technically required, I shall still consider the second and third limbs of section 17(3) of the Bail Act namely ‘(b) *the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard*’ together.

[16] The appellant has so far served 05 years and 10 months of imprisonment out of the life imprisonment with a minimum period of 15 years. If the Legal Aid Commission and the Registry act diligently and expeditiously to have the appeal records ready for the full court hearing there is a chance that his appeal will be heard by the full court without an undue delay as the full court is currently taking up appeals filed in 2017 as well.

Order of the Court:

1. Bail pending appeal is refused.




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Hon. Mr Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL