

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

CRIMINAL APPEAL NO. AAU 004 OF 2025
[Suva High Court: HAC 313 of 2020]

BETWEEN : **ISIKELI NAISARANI TAWAKE LAGIBALAVU**
Appellant

AND : **THE STATE**
Respondent

Coram : Qetaki, RJA

Counsel : Mr. K. Singh for the Appellant
Mr. E. Samisoni for the Respondent

Date of Hearing : 30 July, 2025

Date of Ruling : 08 August, 2025

RULING

(A). Background

- [1] The Appellant was jointly charged with Mikaele Lawaniyavi and Josateki Rabula with Manslaughter contrary to section 239 (a) (b) and (c) (ii) of the Crimes Act 2009.
- [2] The Appellant denied the charge and the matter proceeded to trial on the 4th to 6th December 2024. He was found guilty and on 20th December 2024, was sentenced to 7 years imprisonment with a non-parole period of 4 years.
- [3] The appeal was lodged after the appeal period of 30 days, and is out of time by approximately 16 days. On 3rd February 2025, the Appellant lodged an application for leave to appeal out of time against conviction and sentence.

(B). Agreed Facts

[4] The Agreed facts:

1. The deceased in this matter is Subhas Chand, 56-year-old bus driver of Naduru, Nausori.
2. The Accused was a 20-year-old kitchen hand on 3rd of October, 2020.
3. On 3rd October, 2020 the Accused was present at Nausori bus stand together with his friend Josateki Rabula (3rd Accused).
4. The pair was watching the Vodafone arm wrestling competition.
5. The Accused was watching the competition when the deceased hit him with the bus he was driving. Specifically, the side mirror of the bus hit the Accused's head causing him to fall over.
6. The Accused was arrested at the Nausori Bus Station shortly after the incident.
7. The deceased was rushed to the Nausori Health Centre.
8. The Accused was caution interviewed by D/IP Ilaitia Ratu Ramaya on the 16th October 2020 at the Nausori Police Station.
9. On the 9th October 2020 the deceased died.
10. The Post Mortem Examination on the deceased was carried out by Doctor Daniella John.

(C). Grounds of Appeal

[5] The Appellant urged seventeen (17) grounds of appeal against conviction and sentence as follows:

- i. That the learned trial judge erred in law and fact by misinterpreting the evidence regarding alleged punches thrown by the 2nd Accused.
- ii. That the learned trial judge erred in law by failing to consider the absence of a weapon used by the 2nd Accused in causing harm to the deceased.
- iii. That the learned trial judge erred in law by failing to properly apply principles of joint enterprise in relation to the three Accused persons,

particularly given that the Appellant does not know the 1st Accused and there was no common plan linking their actions.

- iv. That the learned trial judge erred in law by failing to direct himself adequately on the standard of proof required in establishing joint enterprise liability.
- v. That the learned trial judge erred in law by not taking into account material facts such as the cause of death as per the medical examination and the fact that the umbrella was the “final blow” that caused the death of the accused.
- vi. That the learned trial judge erred in law by not properly addressing the issue of medical negligence in relation to the prolonged hospitalization and lack of medical documentation.
- vii. That the learned trial judge erred in law by failing to properly consider the excessive delay of over 12 months in delivering judgment when sentencing the Appellant, impacting the fairness of trial.
- viii. That the learned trial judge erred in law by failing to properly consider the lack of direct evidence linking the 2nd Accused’s actions to the fatal injury on the deceased. The 2nd Accused consistently maintained throughout the trial that they did not assault the victim at all, a position that was not sufficiently addressed or refuted with direct evidence. Further, in sentencing the trial judge concluded that there was “overwhelming evidence” that the Accused were the aggressors, and that the assault on the victim was an act of aggression. Hence the learned trial judge failed to disregard the absence of specific, credible evidence demonstrating that the 2nd Accused’s actions directly caused the or significantly contributed to the fatal injuries, particularly in the context of conflicting testimonies, and the actions of the 1st Accused which were more proximate to the cause of death and the absence of the medical report and the lack of substantive autopsy report which would have determined the cause of death for the deceased. The lack of attribution undermines the fairness and reliability of the conviction against the 2nd Accused.
- ix. That the learned trial judge erred in law by posing a harsh and excessive sentence of 7 years imprisonment on the Appellant given the mitigating factors and the context of the circumstances which the Appellant found himself in.

- x. That the learned trial judge erred in law by failing to adequately consider all of the Appellant’s mitigating factors in this case when determining the starting point of his sentence.
- xi. That the learned trial judge erred in law and in fact by taking irrelevant matters into consideration when sentencing the Appellant, including assertions that the Appellant with the other two Accused “walked away from the scene pretending nothing had happened”, and further asserting in the sentence that the Appellant’s falling down after being hit was an exaggeration to justify his response, and other unrelated observations such as “unbeknown to the victim the side mirror of his bus...”.
- xii. That the learned trial judge erred in law by failing to consider alternative verdicts consistent with the evidence presented including the probability that the 2nd Accused could have been charged with a lesser charge of assault or his culpability to that of the 1st Accused.
- xiii. That the learned trial judge erred in law by failing to address the doctrine of overwhelming supervening acts in relation to the 1st Accused use of the umbrella.
- xiv. That the learned judge erred in law by failing to properly assess the proportionality of the sentence imposed on the Appellant in light of comparative case law.
- xv. That the learned trial judge erred in law by failing to adequality whether the prosecution discharged its burden of proof.
- xvi. That the learned trial judge erred in law by failing to give proper weight to the principle of individual culpability in a joint enterprise case.
- xvii. That the learned trial Judge erred in law by failing to address the potential prejudicial impact of conflating the actions of all Accused persons.

(D). High Court Judgment Dated 5 December 2024 (per Groundar J)

[6] The learned trial Judge discussed the elements of the offence subject of the charge in paragraphs 1 to 12 of judgment.

Section 46 Crimes Act 2009 and common intention

[7] The learned judge stated that the prosecution relies on section 46 of the Crimes Act to impute criminal responsibility on the three accused. He referred to the Prosecution's submission on "common intention" as follows:

"[13] The Prosecution relies on section 46 of the Crimes Act to impute criminal responsibility on the three accused. Section 46 states:

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

[14] In his closing address, counsel for the Prosecution has pitched the common intention of each Accused as follows:

Para 42 - 43

42. The State submits that based on the facts of this case there was clear intent by all three Accused to assault and hurt the deceased at the time of the incident. They are all equally liable as their actions all contributed to the death of the deceased.

43. The blows which were struck on the deceased were all aimed at his head which resulted in severe traumatic injuries which led to his death. This based on the assault was a probable consequence of the Accused persons.

44. For the three Accused to be guilty of manslaughter under the principle of joint enterprise, the Prosecution must prove:

1. That each of the three Accused had formed a common intention to assault the deceased in the manner alleged by the prosecution.

2. And that each Accused realized the possibility of causing serious harm to the deceased when they assaulted the deceased in pursuit of their common intention to assault."

Medical Evidence

[8] The Medical Evidence of the Prosecution was considered in Paragraphs [35] – [43] of the judgment. Four doctors were involved. Dr Chand attended to the deceased when he was brought to the Nausori Health Center after 1pm on 3rd October 2020. His evidence was that the deceased:

- i. had a decreased level of consciousness and was not responding;
- ii. his eyes was closed and had no verbal or motor response like movements;
- iii. he had visible facial injuries-hematoma on the lower eye lid, laceration on the right nostril area and fresh nose bleed;
- iv. his oxygen level was decreasing and had a high heart rate;
- v. the deceased's Glasgow Comma Scale (GCS) level was 8/15 indicating a severe brain injury.

[9] Doctor Chand tried to stabilize the deceased by giving him tetanus injection to prevent infections and put on IVF and oxygen to assist with breathing. The deceased was suspected to have suffered a nasal fracture and was immediately transferred to the CWM Hospital in an ambulance. An injury near the nasal could have been caused by the sharp edge of an umbrella and the blunt force injuries on the head could be caused by several punches to the head.

[10] Dr Nakabea, a Radiologist with 40 years of experience signed off the CT scan report of the deceased after it was conducted on 3 October 2020 at CWM Hospital. The CT scan revealed comminuted fractures on the right side of the sphenoid bone, which in his opinion were more likely to have been caused by punches to the face using considerable force.

[11] Dr Daniella John conducted the Post-Mortem. He found a hearing linear laceration over the right cheek on to the right side of the deceased's nostril and a contusive abrasion on the lower lip. The cut was not serious to contribute in any way to other head injuries found on the deceased. An internal examination of the deceased's skull revealed evidence of bony injury with fractures in the sphenoid bone. There was evidence of a subarachnoid hemorrhage at the base of the deceased's brain around the brainstem. Section of the brainstem revealed linear hemorrhages. Blood clots were found in the cerebral vessels and the deceased's brain was swollen. Dr John concluded that the direct result of the deceased's death was the right cerebral infarction and the antecedent causes were right anterior and middle cerebral artery thromboembolic, immobilization and severe traumatic head injury. In other words, the head injuries led to a stroke in the brain and death of the deceased.

[12] The Medical Officer of CWM Hospital, Dr Nasedra was also called. He explained that after the hospital lost the medical folder of the deceased, they reconstructed a temporary folder by printing clinical notes of the patient that were kept into the hospital's information system. He said that he did not find anything abnormal in the treatment that was accorded to the patient while he was admitted at the CWM hospital. Nobody complained to him that his doctors were negligent in treating the patient while he was in hospital.

Appellant's (Second Accused's) Evidence

[13] The evidence of the Appellant was discussed in Paragraphs [46] to [54] of the judgment. He stated that at around 3 October 2020 at 12 noon to 1pm he was standing with his friend Josateki when he was hit by the side mirror of a bus that came to the parking bay. He went and confronted the driver after the passengers have disembarked. He climbed up the steps and asked the driver why he was hit. Driver was sitting and said that he should not be there. He asked the driver to accompany him to the police station but driver started arguing and swearing. The Third Accused was standing right behind the driver's seat at this time, implying that Third Accused got in the bus before him. When the driver refused to go to the police station the Appellant grabbed the driver by the collar with his right hand, and he held to the railing with his left hand. The driver was facing him. The driver then leaned sideways to get something from the floor and picked up a rod about 60cm in length and swung at Appellant moved backwards and released the driver's collar at the same time. The driver swung the rod again but 2nd Accused leaned back.

[14] The Appellant saw the driver poked twice with an umbrella from the right side of the bus window. The first poke landed on the right side of the driver's abdomen and the second landed on the driver's face. The Appellant saw the driver started to bleed. The driver covered his face and leaned forward on the steering wheel. This is when the Appellant got off the bus. On 15 October 2020, the Appellant had medical examination. His medical report showed no injuries to his knuckles or any part of his body. He said they did not plan to assault the driver. Josateki said he was just standing there he did not assault the driver.

[15] Dr Vereniki Raiwalui was called as an expert witness by the Appellant. He has had 28 years of experience. He compiled a medical report of the deceased. The doctor agreed in cross-examination by counsel for State that comminuted fractures could be caused by several punches using significant force. Dr Raiwalui agreed that it was the comminuted fracture on the right side of the deceased's face that resulted in the severe brain injury.

Trial judge's Analysis

[16] The learned trial Judge analyzed the evidence of the Second and Third Accused in paragraphs [71] to [83]. The 2nd Accused's evidence reveal that he was standing at the bus stand with his friend the Third Accused when he was hit by the side mirror of a bus that came to the parking bay. He only went to the deceased to confront him on why he hit him with his bus. He did not punch the deceased. He also exonerates the Third Accused. The learned trial Judge stated that identity is not in issue, for them the issue for determination are:

1. Whether or not they acted in concert to assault the deceased?
2. Whether or not they realized the possibility of causing serious harm to the deceased?
3. Whether the deceased died as a result of the injury inflicted by their assault and battery?

[17] The Appellant's evidence that he went to confront the bus driver on why he was hit by the side window of the bus was accepted. He downplayed his role during the altercation with the deceased. He denied any wrongdoing. This is consistent with what he told the police in his caution interview. He says he did not assault the deceased at all, and his friend, the Third Accused also did not assault the deceased at all. He said that the deceased was assaulted with an umbrella by someone else. That led to the death of the deceased.

[18] The prosecution evidence reveal that the Appellant was angry that the bus did not stop when he was hit by the side mirror. He and Third Accused immediately went to confront the driver. The Appellant stood right next to the deceased on the steps and held him by his collar and while conversing punched the deceased several times. On

the evidence the trial Judge found that Second and Third Accused were the aggressors. The deceased picked up the spanner to defend himself from the punches thrown at him.

[19] The learned trial Judge believed in the evidence of Virisila and Veniana who testified that: both the Second and Third Accused punched the deceased during the altercation. The two were not clear on which part of the face and the head the punches landed, but they were consistent in their account that both accused punched the head and the face of the deceased several times. Virisila and Veniana also stated that the punches were hard. The learned trial Judge did not see any material inconsistency in their evidence regarding Second and Third Accused punching the deceased.

[20] The learned trial Judge held that the only logical inference that is being drawn from the evidence is that both Accused were acting in concert and in pursuit of their common intention to assault the deceased. The learned Judge stated that it does not matter who struck the fatal blow although the evidence points to the Second Accused. The latter was standing next to the deceased and the evidence is that he threw several punches at the deceased's face while conversing with him, meaning the deceased had turned his head left and faced the Second Accused during the conversation where the Second Accused was standing. The deceased's full face was exposed to the left side of the bus where the Second Accused was standing and it was not impossible for the Second Accused to inflict the fatal trauma injury on the right side of the deceased's face.

[21] The learned trial Judge was not surprised there was no injury to the Second Accused's knuckles, because: It is not necessary for Second Accused to sustain injuries when you punch someone's face. The medical examination that reveals no injuries on the knuckles of Second Accused was done on 15 October 2020, twelve days after the incident.

[22] The learned trial Judge stated that the number of punches and targeting of the head and face of the deceased while he was in sitting position with restricted mobility proves that both the Second and Third Accused realized the possibility of causing serious harm to the deceased and yet went ahead to engage in the conduct of assault and battery. There is no iota of evidence of medical negligence in the treatment of the

deceased at the Nausori Health Center and CWM Hospital as suggested by counsel for the Second Accused.

Conclusion

[23] The learned trial Judge concluded as follows:

“81. It was the joint assault on the deceased by all three Accused on 3 October 2020 that substantially contributed to his death on 9 October 2020. As Dr Chand said in his evidence that the deceased was brought to the Health Center in a critical condition with a decreased level of consciousness and not able to respond. He had his eyes closed and he had no verbal or motor response like movements. He had visible facial injuries – hematoma on the lower eye lid, laceration on the right nostril area and fresh nose bleed. His oxygen level was decreasing and he had a high heart rate. His Glasgow Coma Scale (GCS) level was 8/15 indicating a severe brain injury.

82. The doctor immediately attended to the deceased and tried to stabilize him. He was given tetanus injection to prevent infections and put on IVF and oxygen to assist with breathing and he was immediately transferred to CWM Hospital in an ambulance. I find the doctors treated the deceased in good faith and with competent skills.

83. The Prosecution has proved the charge of manslaughter against all three Accused beyond a reasonable doubt. There is no need to consider the alternative charge.”

(E). The Law

[24] Section 26(1) of the Court of Appeal Act 1949 requires that a person convicted who desires to appeal is to apply for leave of the Court of Appeal in such manner as may be directed by the rules of court within 30 days of the date of conviction.

[25] Section 35(1) (a) and (b) of the same Act empowers a single Judge to give leave to appeal and to extend time within which notice of appeal or of an application for leave to appeal may be given.

[26] The test for leave to appeal against conviction and sentence is *“reasonable prospect of success”* – see **Caucou v State** [2018] FJCA 171; AAU0029 of 2016

(04 October 2018) and the line of similar authorities on “arguable *grounds*”: **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU 10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV10 of 2013 (20 November 2013).

[27] When sentence is challenged, the court is guided by the requirements set out in **Kim Nam Bae v The State** Unreported Criminal Appeal AAU 15 of 1998 (26 February 1999), as follows:

*“It is well established that before the Court could disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its discretion. If a trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the appellate Court may impose a different sentence. The error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (**House v King** [1936] HCA 40; (1936) 55 CLR 499).”*

[28] The factors to be considered for enlargement of time are: (a) the length of the delay; (b) the reason for the failure to file within time; (c) whether there is a ground of merit justifying the appellate court’s consideration and where there is substantial delay, nonetheless is there a ground of appeal that will probably succeed and (d) if time is enlarged, will the respondent be unfairly prejudiced: **Kumar and Sinu v The State** [2012] FJSC 14; CAV 1 of 2019 (21 August 2012).

(F). Appellant’s Case

[29] **Reasons for delay:** The following reasons for the delay were raised in submission:

- (i) Delay in obtainment of court judgment. Although judgment was delivered on 5 December 2024, the sentencing was on 20 December 2024. This coincided with the legal vacation.
- (ii) Delay in filing was not deliberate, reckless or negligent, but arose due to a combination of administrative delays and unavoidable challenges. Firstly, The Appellant’s Solicitor was abroad, and Office was closed until 16 of January 2025. The Sentencing order had to be

corrected, and efforts to obtain a corrected copy before the Christmas break was unsuccessful. The inability to access critical court documents impeded the preparation and filing of the appeal. On returning from leave, the Appellant's Solicitors decided to consult a senior legal practitioner (who had been acting pro bono) for expert assistance in drawing up the appeal grounds, however, the said legal practitioner was out of the country and not available for consultation until 24 January 2025.

(iii) The circumstances leading to the delay were not caused by any fault of the Appellant.

[30] The factual background clearly meets the threshold that courts have previously accepted as sufficient justification for extending procedural timelines: **Rasaku v State** [2013] FJSC 4.

[31] **Duration of delay**: The Appellant submits that the delay was only 16 days which is relatively short and not substantial. That it should not prevent a litigant from pursuing a meritorious appeal: **Brown (1963) SASR 190 at 191**. The delay of 16 days in this case is minor and excusable. It is not substantial particularly when it results from circumstances beyond the Appellant's control. It is a criminal matter involving serious consequences.

[32] **Merits of the prosed appeal and Likelihood of success**: The Appellant submits that the key aspects of the evidence were misinterpreted specifically regarding the alleged punches by the co-accused and the Appellant's unarmed status. The absence of a weapon should be a mitigating factor, reflecting lesser severity compared to the armed defendant. The trial Judge also misinterpreted the application of joint enterprise, causation of death, possible medical negligence, reasoning in the judgment, lack of direct evidence implicating the Appellant, imposition of an excessive sentence, and failure to consider mitigating factors and individual culpability.

[33] The Appellant is convicted under the doctrine of joint enterprise for manslaughter. For a conviction under joint enterprise, the prosecution must prove that the accused foresaw serious harm as a consequence of the joint action: **Tapoge v State** [2017] FJCA 140.

- [34] The Appellant challenges whether the mens rea required under joint enterprise law was properly established in relation to him. That the prosecution did not clearly distinguish between the roles, intentions, and actions of the co-accused or the omission which may have led to an unjust conviction based on guilt by rather than individual culpability.
- [35] The Appellant submits that it is arguable that the Appellant neither foresaw serious harm nor participated in a way justifying joint enterprise conviction. The trial Judge may have erred in law by treating joint participation as sufficient without addressing whether the Appellant shared the necessary foresight. Although the principle holds that continued participation with foresight attracts liability, this does not remove the requirement for individualized sentencing.
- [36] The Appellant was unarmed and allegedly only threw punches after provocation, where the first accused used an umbrella deliberately. Despite this, all received the same sentence. This failure to differentiate culpability is a sentencing error warranting appellate correction-see **Baleiwairiki v State** [2022] FJCA 176, adopting **Clayton v The Queen** [2006] HCA 58, which emphasized that culpability attaches only where the accused foresees serious injury or death and continues to participate. This case is not within the scope of that proposition. The Appellant lacked such foresight and equal sentencing despite differences reflects a failure to apply the settled principle.
- [37] The Appellant submits that the substantial and arguable legal issues warrant the appeal. This appeal is not speculative. It raises serious questions of law and fact which go to the core of criminal liability. The Appellant submits that there is likelihood of the appeal succeeding.
- [38] The Appellant does not dispute that there were eye witnesses confirming the Accused throwing punches at the deceased. It is the culpability that the Appellant is questioning. The Appellant believes that the case was not proven beyond reasonable doubt. Three individuals were involved of which the Appellant neither knows the First Accused nor did they premeditate any of the actions. The prosecution has failed to prove that it was the Appellant's punches which led the death of the deceased.

[39] With reference to the issue of joint enterprise and the application of the principles in **Nacagilevu v State** [2016] FJSC 19; CAV 023.2015 (22 June 2016) that:

“If two people jointly commit an unlawful act, each is equally liable no matter who did what. There does not have to be any prior agreement either written or oral...”

The Appellant submits that whether or not the Accused agreed, he neither consented nor foresaw the action of others. The acts of the First Accused were independent, raising serious doubt whether the Appellant’s conduct alone could justify a seven-year sentence. The appeal’s likelihood of success is evident if individual culpability is properly considered.

[40] The State has not identified any tangible prejudice that would result from granting of this application. The 16 days delay has not impaired evidence, disrupted proceedings, or otherwise compromised the State’s ability to respond. In contrast denying this application would severely prejudice the Appellant, who may otherwise be required to serve a significant custodial sentence despite a legally contestable conviction. That the grant of extension of time exists to ensure the rules of court do not become instruments of injustice: **Gallo v Dawson** [1990] HCA 30.

(G). Respondent’s Case

Conviction Grounds

[41] **Grounds i and viii** - which are similar grounds have no merit. There were direct eye witnesses evidence given by two independent witnesses that confirmed that 2nd Accused (Appellant) at the time of incident had thrown punches at the deceased. This is adequately summarized in paragraphs 24 to 34 of the judgment. There was no mistake of facts by the learned Judge that the 2nd Accused assaulted the deceased by punching him. The learned Judge found the two State witnesses’ evidence credible and reliable and he was in the best position to make this assessment as he was the trial Judge and watched them give evidence during the trial.

[42] **Grounds ii, iii, v, iv, xiii, xvi and xvii** - These deal with the issue of joint enterprise. In dealing with the issue of joint enterprise the Supreme Court, Justice Hettige, in **Nacagilevu v State** (supra) stated:

*“[36] The joint enterprise is a legal doctrine that is well settled in Fiji. The Supreme Court in **Rasaku v State** [2013] FJSC 4; CAV0009, 2009 (24 April 2013) expounded the doctrine of joint enterprise in paragraph 44 and 45 as follows:*

“If two people jointly commit an unlawful act, each is equally liable no matter who did what. There does not have to be any prior agreement either written or oral. It can be spontaneous. The doctrine of common enterprise has been applied consistently in a large number of cases in England and other jurisdictions, including those such as Fiji in which the Penal Code is structured on the foundation of the Common Law of England. The formation of a joint enterprise may be spontaneous, and the fact that the participants acted on the spur of the moment does not negative their criminal liability on the basis of joint enterprise.”

- [43] The State submits that the learned Judge had adequately outlined the principles and evidence adduced during the trial in relation to the issue of joint enterprise in the judgment at paragraphs [13] and [14] of judgment. See also paragraphs [62] to [69] of judgment on (Evidence of Prosecution). Evidence of 2nd and 3rd Accused is at paragraphs [76] to [81].
- [44] The State submits that there is no merit in these grounds, and they should be dismissed. The learned Judge did not conflate the evidence of accused persons. The evidence supports the Judge’s decision that the three accused persons including 2nd Accused (Appellant) jointly acted to assault the deceased which resulted in his death.
- [45] **Medical Negligence - Ground vi** - At trial the prosecution called Doctor Nasedra the Medical Superintendent at CWM Hospital where the deceased was admitted. He testified that no medical negligence and he had not been alerted to any complaint regarding the medical care given to the deceased while a patient. If there were any, he would have been notified. He tendered the deceased’s medical folder which include medical history of the deceased, and treatment at the hospital. Based on the doctor’s evidence and documents available, there were no medical negligence evidence. Doctor Chand who treated the deceased at Nausori Health Center confirmed there was no medical negligence in treatment of the deceased at the NHC. Dr Raiwalui was called by the Appellant himself as his witness. He too could not conclude that there had been any medical negligence which had occurred in the deceased treatment

while at CWM Hospital. Doctor John, Pathologist, tendered the deceased's original post mortem report which stated that the deceased died of brain injury caused by blunt force trauma to the head and face There is no merit on this ground.

- [46] **Ground xv and xiii - Burden of proof** - In paragraph 2 of judgment the learned Judge affirmed that the onus is on the Prosecution to prove the charge beyond reasonable doubt. There is no onus on the Accused to prove anything. Each element of the charge must be proved beyond a reasonable doubt but not every fact of the story. After careful consideration of all evidence during trial throughout the judgment including evidence adduced by the defence, the learned Judge had rightly come to the conclusion that the Prosecution has proved the charge of manslaughter beyond reasonable doubt - Paragraph [83]. This ground should be dismissed. There is no prospect of success.

Sentence grounds

- [47] **Grounds vii, ix, x, xi and xiv** - The maximum penalty for manslaughter is a penalty of 25 years imprisonment-see section 239 of Crimes Act 2009. A survey of cases demonstrate that the penalty imposed for manslaughter range from a suspended sentence, where there may have been grave provocation to 12 years imprisonment where the degree of violence is high and provocation minimal. Upper range are required where the degree of violence used is high and any provocation minimal. Sentences at the lower end of the scale are reserved for those cases where the violence used is minimal and the provocation extreme: See **Kim Nam Bae v The State** (supra), and bearing in mind that this range covers a very wide set of varying circumstances which attract different sentences in different manslaughter cases. Each case will attract the appropriate sentence within range depending on its own facts.

- [48] These grounds have no merit. See also **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015). However, every sentence that lies within the accepted range may not necessarily fit the crime. The learned trial judge had clearly outlined the reasons for arriving at the starting point, having taken into consideration all relevant factors.

(H). Analysis

Exercise of discretion-factors

- [49] The Supreme Court in **Kumar v State; Sinu v State** (supra) had provided a principled approach by which appellate courts are to consider an application for leave to appeal out of time, the factors being, the reasons for failure to file within time, the length of the delay, whether there is ground of merit justifying the appellate court's consideration, whether there has been substantial delay, nonetheless there is a ground of appeal that will probably succeed, and will the respondent be unfairly prejudiced, if time is enlarged.

Reasons for the delay

- [50] The reasons for the delay is explained in paragraphs [29] above. The State does not accept that the reasons for the delay are reasonable or justifiable for the reasons that in this case the Appellant is incarcerated, however unlike **Fisher v State** [2016] FJCA 57; AAU132.2014 (28April 2016) the Appellant is represented by counsel in the High Court trial, and in this appeal. The legal vacation and Christmas holidays are not good reasons for the delay. Judgment was delivered on 5th December, although the sentencing was delayed to 20 December with some minor corrections to be made. There was sufficient time for the appeal to be filed by 19th January 2025. The necessity to engage a consultant on the grounds of appeal is not understandable, as counsel at the trial is also counsel in this appeal. The Court Registries are open to midday each working day during the legal vacation. The reasons for the delay is not reasonable.

Length of delay

- [51] The delay is 16 days and the reasons for the delay are unacceptable. However, the Appellant should not suffer adverse consequences for delays that stem from lapses of his legal representative. The Court will need to consider the grounds of appeal to determine whether there is a ground of merit.

Is there a ground of merit? Likelihood of success

[52] The Appellant's Case is set out in paragraphs [29] to [40] above and the State's case is set out in paragraphs [41] to [48] above. The Appellant had proposed 12 grounds against conviction and 5 grounds against sentence. The Appellant's written and oral submissions did not discuss each ground specifically, however it touched on a number of serious and important issues which fall within the ambit of the 17 grounds urged by him in this leave application. In brief, the issues raised by the grounds of appeal include the following: That the learned trial Judge **erred in law** by:

- (a) Failing to consider the absence of weapon used by the Second Accused in causing harm to the deceased;
- (b) Failing to properly apply the principles of joint enterprise in relation to the three Accused particularly when the Second Accused does not know the First Accused, and there was no common plan linking their actions ;
- (c) Failure to adequately direct himself adequately on the standard of proof required in establishing joint enterprise liability;
- (d) Not taking into account material facts such as the cause of death as per the medical examination, and the fact that the umbrella was the "final blow" that caused the death of the deceased;
- (e) Not properly addressing the issue of medical negligence, in the context of prolonged hospitalization and lack of medical documentation;
- (f) Failing to properly consider the excessive delay of over 12 months in delivering judgment when sentencing the Appellant, impacting the fairness of the trial;
- (g) Failing to properly consider the lack of direct evidence linking the Second Accused actions to the fatal injury of the deceased, in light of consistent denial of assault by the Second Accused, and absence of direct evidence to the contrary, etc.;

- (h) Imposing a harsh and excessive sentence of 7 years imprisonment on the Appellant under the circumstances;
- (i) Failing to consider all of the Appellant's mitigating factors when determining the starting point;
- (j) Failing to consider alternative verdicts consistent with the evidence presented including the probability that the Second Accused could have been charged with a lesser charge of assault etc.;
- (k) Failing to address the doctrine of overwhelming supervening acts in relation to the First Accused use of the umbrella;
- (l) Failing to properly assess the proportionality of the sentence imposed on the Appellant in light of comparative case law;
- (m) Failing to adequately assess whether the prosecution discharged its burden of proof;
- (n) Failing to give proper weight to the principle of individual culpability in a joint enterprise case, and
- (o) Failing to address the potential prejudicial impact of conflating the actions of all Accused.

[53] The Appellant also urge that the learned trial judge **erred in law and in fact** by:

- (p) Misinterpreting the evidence regarding alleged punches thrown by the Second Accused, and
- (q) Taking irrelevant matters into consideration when sentencing the Appellant, including assertions that the Appellant with the other two accused “walked away from the scene pretending nothing had happened”, and further asserting in the sentence that the Appellant's falling down after being hit was an exaggeration to justify his response, and other unrelated observations such as “unbeknown to the victim the side mirror of his bus....”

Grounds i and viii

[54] This relate to the issue in [52] (j) and [53] (p) above, and possibly other issues of contention by the Appellant. The learned trial judge in reviewing the evidence stated that, in his evidence the Appellant stated that he went to confront the bus driver on why he was hit by the side window of the bus. He downplayed his role during the altercation with the deceased. His denial of wrongdoing was consistent with what he told the police in his caution interview. He said he did not assault the deceased at all. That the deceased was assaulted with an umbrella by someone else which led to the death of the deceased.

[55] Section 46 of the Crimes Act 2009 states:

“46 Offences committed by joint offenders in prosecution of common purpose

When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

[56] Manslaughter is defined in section 239 of the Crimes Act 2009 as follows:

“A person commits an indictable offence if-

- (a) the person engages in conduct; and*
- (b) the conduct causes the death of another person; and*
- (c) the first mentioned person-*
 - (i) intends that the conduct will cause serious harm; or*
 - (ii) Is reckless as to a risk that the conduct will cause serious harm to the other person.*

Penalty- Imprisonment for 25 years.”

[57] The Appellant admitted (paragraphs [46] to [54] of the judgment) to grabbing the driver by the collar with his right hand, and his left hand held on to the railing. He released the driver’s collar when the driver picked up a rod and swung the rod at him. He saw the driver being poked twice with an umbrella and saw the driver started to

bleed. He did not plan to assault the driver, and the medical evidence showed that his knuckles was not injured. However, the prosecution witnesses Virisila and Veniana had testified that both the Appellant (2nd Accused) and the 3rd Accused punched the deceased. The learned trial Judge believed the account of the two witnesses: see paragraph [76] of judgment.

[58] Whether the learned trial Judge misinterpreted the evidence in arriving at the conclusion that the Appellant had with the co-accused assaulted the deceased, is a point of contention. The Appellant had not shown or demonstrated through written or oral submissions, how that piece of evidence was misinterpreted. The Appellant argued in his defence that his knuckles were not injured, although that was dismissed by the learned Judge, as not evidence to support the position that the Appellant did not punch the deceased. The learned Judge stated that the Appellant had punched the deceased face, and it is not necessary for the accused to sustain injuries, secondly, the medical examination was conducted 12 days after the alleged incident occurred.

[59] The learned trial Judge observed that, the Appellant and the Third Accused had thrown a number of punches, and targeting the head and face of the deceased while he was in a sitting position, with restricted mobility, proves that both the Appellant and the Third Accused realized the possibility of causing serious harm to the deceased. Yet they went ahead to engage in the conduct of assault and battery. The learned trial Judge concluded that the joint assault by the three Accused on 3 October 2020 had substantially contributed to the deceased's death on 9 October 2020. This linking by the learned trial Judge of the acts of the Second and Third Accused with the conduct/acts of the First Appellant is also point of contention. The link is affirmed and supported by the medical evidence, -see paragraphs [81], [82] and [83] of the judgement and paragraph [23] above, although the evidential basis of the link is unclear.

[60] The learned trial Judge stated that, the Appellant under the circumstances foresaw the serious harm as a consequence of the joint action: **Tapoge v State** (supra). The learned trial Judge in paragraph [83] of the judgment (see paragraph [23] above), concluded that the prosecution has proved the charge of manslaughter against all three Accused beyond a reasonable doubt. The grounds are arguable.

Grounds ii, iii, v, xiii, iv, xvi and xvii

- [61] They relate to issues in connection with joint enterprise and its application in this case, and especially as relate to the position of the Appellant. In terms of issues the grounds are linked to paragraphs [52] (a), (b), (c), (d), (k), (n) and (o). The issue is whether the learned Judge had properly applied the principles of joint enterprise in relation to the three Accused persons, and related issues, especially where the Appellant does not know the First Accused and there allegedly was no common plan linking their actions. There are also other questions; whether the learned trial Judge had directed himself adequately on the standard of proof required in establishing joint enterprise liability; Whether the learned Judge had taken into account material facts such as the cause of death (as per the medical examination) and the fact that the umbrella was the “final blow” that cause the death of the accused; whether individual culpability in a joint enterprise was given proper weight by the learned trial Judge. This is largely also linked to the above discussions on **Grounds I and viii** above.
- [62] The appellant had raised a number of issues including whether the mens rea (intention) required under joint enterprise law was properly established in relation to the Appellant? The Appellant submits that the prosecution did not clearly distinguish between the roles, intentions, and actions of the co-accused or the omission which may have led to an unjust conviction based on guilt rather than individual culpability. Whether the standard of proof required have been established after thorough and critical analysis of the facts and the elements of the principles of a joint enterprise under section 46 of the Crimes Act 2009, and in line with the elements of the offence of Manslaughter under section 239 of the Crimes Act. These are some of the issues that may need to be considered by the full court.
- [63] The legal principles established through legal authorities (case law) are quite clear, however, the legal principles will need to be applied to the particular facts and circumstances of each case. In my view there is a question/ issue around, how the link between the legal principles and the facts are established, in this case, for the Court to determine that there is a common intent, and a common purpose to commit the offence subject of the charge. The decision whether the Prosecution has discharged the burden of proof beyond reasonable doubt, given sections 46 and 239 of the Crimes Act 2009

is very much dependent on the determination on how the law meet the facts. These grounds are arguable.

On Sentence

[64] Five (5) grounds (Grounds vii, ix, x, xi, and xiv) are urged against sentence. The sentencing grounds allege that the learned trial Judge erred in law by : failing to properly consider the excessive delay of over 12 months in delivering judgment , impacting the fairness of trial; that the sentence is harsh and excessive given the mitigating factors and the context of the circumstances which the Appellant found himself in; failing to adequately consider all of the Appellant’s mitigating factors in this case when determining the starting point of the sentence; taking irrelevant matters into consideration when sentencing the Appellant, and failing to properly assess the proportionality of the sentence imposed on the Appellant in light of comparative case law. The State had addressed the sentence grounds in its submission-see paragraphs [47] and [48] above.

[65] In sentencing the three Accused persons, the learned sentencing Judge stated:

“[11] None of you showed any compassion to the victim on the day he was assaulted while he was working as a driver. All three of you walked away from the scene after seriously injuring the victim, pretending nothing had happened.

*[12] Manslaughter carries a penalty of 25 years imprisonment and the tariff is from a suspended sentence to 12 years’ imprisonment (***Kim Nam Bae v State***). Counsel for the State has helpfully tabulated a summary of recent cases of manslaughter which I adopt as a guide:.....{Recent Cases: ***State v Ketenalagi*** - Sentence [2020]FJHC 145;HAC051.2018 (26 February 2020); ***State v Dumukoro*** - Sentenmce [2016] FJHC 199; HAC027.2014 (23 March 2016), and ***State v Naimoso*** [2018] FJHC 345;HAC095.2016(27 April 2018)}*

[13] In selecting a starting point, I consider that his is not a case of one punch killing. This is a case of a joint enterprise to assault the victim by three men using multiple blows to the face and head of the victim, causing serious facial and brain injuries and death of the victim. The victim died as a direct result of the assault on him. All three offenders are equally culpable for the victim’s death.

[14] *The aggravating factors are that the assault was inflicted by three perpetrators, an umbrella was used as a weapon as a final blow to immobilize the victim from defending himself, the victim was a public transport driver and was attacked while working, and the assault was an act of aggression or road rage.*

[15]

[16] *Isikeli, you are 24 years old and married with a young child. You work as a Factory Process Worker for Punja & Sons PTE Limited.*

[17]

[18] *All three of you have previous good character and family circumstances that operate as mitigating factors. Isikeli and Josateki were young and in their early twenties. Their young age mitigates the offence.*

[19] *But the offence involves use of violence to take away a human life. Human life is protected by the Constitution and International Law. Any criminal conduct that takes away a human life requires denunciation in the strongest terms.*

[20] *As this Court observed in State v Ketenalagi - Sentence [2020] FJHC 145; HAC051.2018 (26 February 2020) at [1]:*

“Any conduct that takes away the life of an innocent person must be denounced in the strongest terms. In other crimes the court will have seen and heard the victim in order to assess the impact of the crime but in manslaughter cases that is not possible because the loss is a human life. The impact of loss of a life is borne by the victim’s family. They will have to live only with the memories, never to see the victim again.”

[21] *For all three offenders, I use 6 years imprisonment as a starting point, add 4 years to reflect the aggravating factors and deduct a total of 2 years to reflect the mitigating factors and 2 months remand period. I deduct a further 1 year to reflect the post-charge delay of four years.”*

[66] The full court could review the sentence in light of the grounds urged and section 4(1) and 18(1) of the Sentencing and Penalties Act 2009, and the mitigating factors. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered: **Koroicakau v State** [2006] FJSC

5; CAV0006U.2005S. The approach taken by the appellate courts is whether in all the circumstances of the case the sentence imposed lies within the permissible range. The grounds against sentence are arguable.

[67] There appears to be no conceivable prejudice to the State if the Appellant succeeds.

Order of Court

1. *Application for extension of time to appeal against conviction is allowed.*
2. *Application for extension of time to appeal against sentence is allowed.*



A handwritten signature in black ink, appearing to read "Alipate Qetaki", is written over a horizontal line.

Hon. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

Solicitors

KS Law for the Appellant

Office of the Director of Public Prosecutions for the Respondent