

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

**CRIMINAL APPEAL NO. AAU 005 OF 2025**  
**[Suva High Court: HAC 313 of 2020]**

**BETWEEN** : **MIKAELE LAWANIYAVI** *Appellant*

**AND** : **THE STATE** *Respondent*

**Coram** : Qetaki, RJA

**Counsel** : Mr. K. R. Prasad 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 (First Accused) was jointly charged with Isikeli Lagibalavu (Second Accused) and Josateki Rabula (Third Accused) 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 4<sup>th</sup> to 6<sup>th</sup> December 2024. He was found guilty and on 20<sup>th</sup> December 2024 the Appellant 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. The Appellant faced difficulty with the appeal process. The Legal Aid Commission was requested to assist the Appellant, and the Court accepts the application despite the delay. Paragraphs 1.9 and 1.10 of the Appellant's written submission explains the position:

*“1.9 On 22 April 2025, the Legal Aid Commission by its Officer Ms. L. M. Ratidara appeared in the matter and the Office of the Director of Public Prosecutions rendered appearance by its Mr R. Kumar. The Legal Aid Commission indicated that it held no record if the Court has allowed any enlargement of time application in favour of the Appellant or whether the State conceded to the out of time application. According to the Record of Appearances of the Legal Aid Commission dated 22 April 2025, the State had conceded that it had no objections to the Appeal being out of time and the Court confirmed then that the Appeal is to be considered timely and we are to assist with the Submissions – adjourning the matter to 18 June 2025 to check on submissions.*

*1.10 These submissions are developed in good faith and emphasize the grounds of appeal forwarded in the document (type-written and hand-written) titled “Grounds of Appeal Against Conviction and Sentence” dated 03 March 2025. The grounds of appeal in the document of 03 March 2025 are consolidated to form the following: Grounds of Appeal.....”*

**(B). Grounds of Appeal**

[4] **Grounds Against Conviction**

1. The conviction cannot be supported by evidence as the learned trial Judge erred in fact and in law to determine that a joint enterprise prevailed between the Appellant and the other two accused persons; and
2. The learned trial Judge erred in fact and in law by attributing the cause of death of the deceased to the Appellant in equal degree with Accused 2 and Accused 3.

[5] **Ground Against Sentence**

3. The learned trial Judge erred in principle and in fact when sentencing the Appellant to 7 years with a non-parole period of 4 years with such term being harsh and excessive considering the culpability of the Appellant against the injuries allegedly caused by the Appellant.

**(C). Agreed Facts**

[6] The Appellant admitted the following facts - see paragraph [18] of judgment:

1. The deceased in this matter is Subhas Chand, 56 years old bus driver of Naduru, Nausori.
2. The Accused is 43 year old school teacher.
3. On 3<sup>rd</sup> of October, 2020 the Accused was present at the Nausori bus stand together with his girlfriend Rajeli Navo.
4. While he was at Nausori bus stand the Accused noticed that the deceased was having an altercation with two iTaukei boys.
5. The Accused witnessed the deceased pull out a Spanner. At the time he was holding an umbrella.
6. The Accused was arrested by police on foot patrol at the Nausori bus stand.
7. The deceased was rushed to the Nausori Health Center.
8. The Accused was cautioned interview by Sgt. 2204 Anoop Narayan on the 16<sup>th</sup> of October 2020 at the Nausori Police Station.
9. The caution interview of the Accused is agreed to be tendered by consent (The contents of the caution interview are not agreed to.)
10. On 9<sup>th</sup> October 2020 the deceased died.
11. The Post Mortem on the deceased was carried out by Doctor Daniella John.

#### **(D). The Law**

[7] Section 26 of the Court of Appeal Act allows the Appellant to appeal to the Court of Appeal on giving notice of his/her application for leave to appeal in such manner as may be directed by rules of Court within thirty days of the date of conviction.

[8] The test for leave to appeal against conviction and sentence is “*reasonable prospect of success*”- see **Caucu v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018) and in line with 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).

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

*“It is well settled 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).”*

**(E). High Court Judgment Dated 5 December 2025 (per Goundar J)**

[10] 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***

[11] 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***

[12] The Medical Evidence tendered for 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 3<sup>rd</sup> 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.

[13] 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.

[14] 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.

[15] Dr Daniella John, who conducted the Post-Mortem 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.

[16] The Medical Officer of CWM Hospital, Dr Nasedra 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.

### ***Conclusion***

[17] After carefully analyzing all the evidence at the trial, 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 Centre 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 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 the 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.”*

**(F). Appellant’s Case**

[18] **Ground 1:** The Appellant submits that the Appellant had no common intention with Accused 2 and Accused 3 as the admitted facts prove an altercation or disagreement with two itaukei boys witnessed by the Appellant as a bystander and not a participant.

[19] The evidence reveals that the Appellant had no intention to cause serious harm by pokes of the umbrella.

[20] The evidence reveals different degrees of “assault” to support the non-existence of common intention in particular: -

- (a) Virisila Biudai (PW1) attributes a poke of the umbrella to the deceased’s nose as the assault.
- (b) Veniana Devu (PW2) does not attribute an assault by the Appellant and instead attributes punching by Accused 2 and Accused 3 as the assault.
- (c) Isikeli Lagibalavu (Accused 2) attributes two pokes of the umbrella to the deceased being right side of the deceased’s abdomen and the deceased’s face.

[21] The Appellant submits that the evidence does not support the negative inference drawn that the Appellant intentionally assaulted the deceased with the umbrella on the spur of the moment as part of joint enterprise to assault the deceased. The Appellant submits that this ground not only presents an arguable point for consideration by the full court, but the ground is also meritorious. That these submissions demonstrate that there is no

nexus between the Appellant and the other Accused's (Accused 2 and 3) as having known one another and/or formed a common intention to execute an unlawful purpose.

[22] Additionally, the Appellant submits that there is no nexus that can be drawn from the admitted facts to deduce common intention (or even prior knowledge of the Appellant) and that by taking the admitted facts as proved. The contents of the record of interview are not agreed to.

[23] Further, the Appellant submits that the learned trial Judge chose to draw an adverse reference on the action of the Appellant without any evidence to suggest that the Appellant intended to cause harm. The learned trial Judge in fact accepted that DW1 (Accused 2) and Accused 3 were the aggressors. Therefore, the Appellant submits that this ground of appeal is not only arguable, but presents reasonable prospects of success on its merits before the full court.

[24] **Ground 2:** The Appellant submits that the eye witness testimonies reveal different degrees of "assault" to support the non-existence of common intention.

[25] The Appellant submits that the Medical Evidence of Dr Daniella John (PW7) on the injuries to the deceased attribute the cause of death to "head injuries leading to a stroke in the brain and death of the deceased".

[26] The Appellant submits that the Medical Evidence of Dr Verenika Raiwalui (DW2) is inconclusive to attribute the cause of death to the alleged use of an umbrella by the Appellant as: (a) that the steel point at the end of the umbrella could cause penetrating bone fractures if used with appropriate and sustain force", and (b) comminuted fractures could also be caused by several punches using significant or considerable amount of force.

[27] The Appellant submits that this ground of appeal (as with the first ground of appeal) not only raises arguable points for the consideration of the full court but that this ground has merits. The Appellant submits that from the accounts of the eye witnesses, the purported strikes of the umbrella and the "cuts was not serious to contribute in any way to head injuries found on the deceased".

- [28] The Appellant further submits that although the evidence suggests that the Appellant struck the deceased, the intent behind such use of the umbrella was not to harm the deceased but to diffuse the tension and situation. The Appellant wanted that deceased's attention to diffuse the tension. Although the actions of the Appellant caused injuries to the deceased, the evidence of Dr Daniella John is clear that the injuries to the face of the deceased was a cut , which was not serious to contribute in any way to the other head injuries found on the deceased. The same doctor's evidence further clarifies that it was the head injuries that lead to a stroke in the brain and the death of the deceased.
- [29] **Ground 3 – Sentence:** The Appellant submits that it can be deduced from the evidence that the Appellant's culpability is low. However, the sentence does not reflect the Appellant's low culpability, as the Appellant's sentence and the sentence of 2<sup>nd</sup> Accused and 3<sup>rd</sup> Accused are the same.
- [30] That the learned trial Judge was mistaken in exercising his discretion when sentencing the three accused, by regarding the Appellant as acting in joint enterprise with the other two Accused. The evidence before the Court did not present an instance of joint enterprise. Also, the learned trial Judge failed to take into account some relevant consideration. In sentencing the learned trial Judge stated that the Appellant caused the deceased to bleed from a cut and lose consciousness whereas four medical professionals who attended to the deceased do not attribute any loss of consciousness or even death of the deceased from the bleeding through injury caused by the umbrella.
- [31] The Appellant submits that as a consequence of the errors above, the sentencing direction has miscarried and that to allow the sentence of the Appellant to remain the same as with the co-accused is unreasonable or unjust. The Appellant submits that the sentence ground has merit and the full court need to review the sentence.

### **(G). Respondent's Case**

- [32] **Grounds 1 and 2:** Both grounds of conviction relate to joint enterprise and they are jointly addressed in the State's submission. The State submits that the nature and essential features of joint enterprise is explained in the case **Nacagilevu v The State** [2016] FJSC 19; CAV0023 of 2015 (22 June 2016), as follows:

*“[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 paragraphs 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.”*

[33] The State submits that the learned trial Judge had adequately outlined the principles and the evidence adduced at the trial in paragraphs [13], [14] and [15] of judgment.

[34] The State relies on the learned trial Judge’s findings having set out in paragraphs [62] to [69] of the judgment as follows:

*“[62] I feel sure that the First Accused engaged in the conduct of assault and battery. The issue is whether he was acting in concert with the Second and Third Accused to assault the deceased.*

*[63] Virisila’s evidence is that before the First Accused assaulted the deceased, the Second and Third Accused had already punched the deceased on the face and head several times. There is no evidence to suggest that the First Accused was part of the initial intention to assault the deceased. He did not know the Second and Third Accused. He was not with the Second and Third Accused at any time. He was present at the bus stand with his spouse and when he saw the deceased having an altercation with two iTaukei boys and that the deceased was pulling out a spanner, he poked the deceased with an umbrella.*

*[64] It is not necessary for all three Accused to have come together to agree to assault the deceased. The formation of joint enterprise may be spontaneous, and the fact the participants acted on the spur of the moment does not negate their criminal liability on the basis of joint enterprise.*

*[65] According to Virisila, the First Accused was forceful when he poked the deceased on the face with his umbrella. The evidence regarding use of force*

*makes sense. Immediately after the deceased was poked on the face with the pointy metal edge of the umbrella, the deceased lay his head on the engine compartment of the bus and started to lose consciousness. This is when Virisila called out for help and Saula came and carried the deceased to the Health Centre.*

*[66] I do not believe that the First Accused used the umbrella to diffuse a heated impasse involving the deceased and the Second and Third Accused. I believe the First Accused intentionally used the umbrella as a weapon to assault the deceased. It must have occurred to him that the deceased was trying to defend himself with the spanner from a sitting position and surrounded by two men. Yet the First Accused chose to attack the deceased with his umbrella on the spur of the moment as part of joint enterprise to assault the deceased.*

*[67] The cause of death is not an issue. The medical evidence is that the deceased died of brain injury caused by blunt force trauma to the head and face. While the medical evidence is conclusive that comminuted fractures are caused by the use of significant or considerable force, the doctors are not certain as to whether the serious injuries, that is, bone fractures found on the right side of the deceased's face were caused by the assault with the umbrella or with the punches to the face. The doctors quite rightly concluded that since they did not see the assault they cannot determine which particular assault caused the fatal injury to the deceased.*

*[68] In the case of joint enterprise, it is not necessary for the Prosecution to prove who struck the fatal blow. What the Prosecution has to prove is that the as ground of appeal against conviction on the deceased was in pursuit of common intention to assault leading to death of the deceased. I find that is what occurred in this case.*

*[69] The issue is whether the First Accused realized the possibility of causing serious harm to the deceased when he assaulted the deceased in concert with others. The First Accused knew that the umbrella he was holding was long and had a sharp metal edge at the end. He made a conscious decision to use that part of the umbrella with force to attack the face of the deceased slightly below the eye. Anyone in his position would have realized the possibility of serious harm to the deceased. I feel sure that the First Accused did in fact realized the possibility of serious harm to the deceased and yet went ahead to forcefully poke the deceased with the sharp metal edge of the umbrella he was holding.”*

- [35] Evidence of joint enterprise in relation to the Second and Third Accused are set out in paragraphs [76] to [81] of the judgment.
- [36] The State submits that the grounds against conviction have no merit. There was direct evidence that the First Accused at the time of the incident struck the deceased on the face with an umbrella. The First Accused was not intent on diffusing the argument.
- [37] The State submits that based on the evidence, the learned trial Judge was capable of coming to the conclusion that the evidence supported the fact that the Appellant was part of a joint enterprise to assault the deceased.
- [38] **On Sentence- Ground 3:** The Appellant contends that the sentence is harsh and excessive under the circumstances. The State submits that the sentence for Manslaughter is 25 years imprisonment, see section 239 of the Crimes Act 2009, however , the sentence of 7 years with a non-parole period of 4 years is within range: see **Kim Nam Bae** (supra), where this Court said:

*“The cases demonstrate that the penalty imposed for manslaughter ranges from suspended sentence where there may have been grave provocation to 12 years imprisonment where the degree of violence is high and provocation is minimal. It is important to bear 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 the range depending on its own facts.”*

- [39] There is no merit on this ground of appeal to justify a review by the full court. The Appellant submits that the learned trial Judge had not acted upon a wrong principle or allowed extraneous or irrelevant matters to guide or affect him. The sentence is not harsh or excessive. The ground has no merit.

## **(H). Analysis**

### **Ground 1:**

- [40] The Appellant contends that the learned trial judge was mistaken in convicting the Appellant when the evidence did not support a conviction. That his conviction cannot be support by evidence as the learned trial Judge was mistaken in determining that the

Appellant was part of a joint enterprise with his co-Accused (Second and Third Accused). Additionally, the Appellant contends that the learned trial Judge was mistaken in law by attributing the cause of death of the deceased to him in equal degree with the Second and Third Accused.

[41] The Appellant's submissions on this ground are set out paragraphs [18] to [23] above, which, contends that there is nothing in evidence to show that the Appellant intended to cause harm by pokes of the umbrella; evidence indicate that there were different degrees of assault , which supports the non-existence of a common intention; that the evidence does not support the negative inference drawn that the Appellant intentionally assaulted the deceased with the umbrella on the spur of the moment as part of joint enterprise to assault the deceased; that there is no nexus that can be drawn from the admitted facts to deduce common intention (or even prior knowledge of the Appellant) and that by taking the admitted facts as proved, as the record of interview "are not agreed to". Additionally, the Appellant submits that the learned trial Judge chose to draw an adverse reference on the action of the Appellant without any evidence to suggest that the Appellant intended to cause harm.

[42] Put another way, the Appellant is saying that, the Appellant with the Second and Third Accused had not formed a common intention to assault the deceased in the manner alleged by the Prosecution. That, based on the evidence, the Appellant did not realize the possibility of causing serious harm to the deceased when he assaulted the deceased with the use of an umbrella in the manner described by Virisila.

[43] According to an eye witness (Virisila), she was standing in front of the bus when she saw another itaukei man, referring to the First Accused (Appellant), calling from the driver's window side and poked the driver on the right side of his face near his nose with the pointing end of an umbrella from outside the bus. The poke was described by the learned judge as "like someone throwing a javelin", which caused the driver to start bleeding from the face. In cross-examination, Virisila said that, she saw the First Accused (Appellant) forcefully poked the driver on the face resulting in a cut and bleeding.

[44] It is also established by Virisila that, prior to seeing the First Accused poke the deceased with the umbrella, that the Second and Third Accused, were seen punching

the deceased in turn. She said that, the two Accused held the collar of the driver and punched him. The commotion attracted the crowd. It was at this stage that Virisila saw the First Accused (Appellant).

[45] It is not clear, considering the totality of the evidence that the Appellant (First Accused) with the Second and Third Accused were engaged in a joint enterprise in terms of **Nacagilevu v The State** [supra] and **Rasaku v State** (supra) - See paragraph [32] above. Ground 1 is arguable.

**Ground 2:**

[46] The appellant contends that the learned Judge erred in law in attributing the cause of death equally amongst the three accused. The Appellant submissions are set out in paragraph [24] to [28] above.

[47] The Appellant maintains that the use of the umbrella was in order to diffuse the tension and was not intended for the purpose of harming the deceased. Although the actions of the Appellant caused injuries to the deceased, the evidence of Dr Daniella John is clear that the injuries to the face of the deceased was cut and the cut was not serious to contribute in any way to the other head injuries found on the deceased. The same doctor's evidence further clarifies that it was the head injuries that lead to a stroke in the brain and the death of the deceased. The Appellant submits that this ground of appeal not only raises arguable points for consideration by the full court but that the ground has merits.

[48] All the issues that the Appellant raised are addressed by the learned trial Judge in paragraphs [62] to [69] of the judgment - see also paragraph [34] above. It light of the Appellant's submissions, this issue is best left for the full court to consider the effect and implications of the expert medical opinion of Dr Daniella John. This ground is arguable.

***Sentence Ground***

**Ground 3:**

[49] The Appellant contends that the learned trial Judge was mistaken in sentencing the Appellant for the manslaughter of Subhas Chand to 7 years imprisonment with a non-

parole period of 4 years, which sentence is similar to the sentence of the Second and Third Accused. His submissions are captured in paragraphs [29] to [31] above. In brief, the Appellant submits that his sentence is harsh and excessive as it does not reflect of the Appellant's low culpability. That as a consequence of the mistake, the sentencing direction has miscarried. To allow the Appellant to remain the same as with the co-accused is unreasonable or unjust.

[50] The following parts of the Sentencing are relevant to the Appellant's sentence appeal:

*"[13] In selecting a starting point, I consider that this 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 of 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] Mikaele you are 48 years old and a vocational school teacher by profession. You have positive impact on many young man you have taught in school for 20 years.....*

*[18] All three of you have previous good character and family circumstances that operate as mitigating factors.....*

*[19] But the offence involves the 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 human life requires denunciation in the strongest terms.*


*.....*

*[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 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."*

- [51] The Sentencing and Penalties Act 2009 regulates the sentencing of convicted offenders. The Appellant contends that his culpability in the commission of the offence is low. In the judgment, there is no analysis to determine the respective contribution of each of the Accused. There is no proportionality in the sentence for each of the Accused. This is an issue that the full court could consider.
- [52] The second point which the full court could review is, whether there has been element of double-counting. Whether factors considered in the fixing of the starting point are also taken into account as aggravating factors. The full court could review the sentence in light of the above and sections 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 in determining whether the sentencing discretion has miscarried, do not rely upon the methodology used by the sentencing judge. The Approach taken is whether in all the circumstances of the case the sentence lies within the permissible range. Ground 3 is arguable.

**Order of Court**

1. *The Application for leave to appeal against conviction is allowed.*
2. *The Application for leave to appeal against sentence is allowed.*



**Hon. Justice Alipate Qetaki**  
RESIDENT JUSTICE OF APPEAL

**Solicitors**

Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent