

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

CRIMINAL APPEAL NO. AAU 014 OF 2025
[Suva High Court: HAC 313 of 2020]

BETWEEN : **JOSATEKI RABULA** *Appellant*

AND : **THE STATE** *Respondent*

Coram : Qetaki, RJA

Counsel : Ms. S. Prakash for the Appellant
Mr. R. Kumar for the Respondent

Date of Hearing : 09 September, 2025

Date of Ruling : 30 September, 2025

RULING

(A). Background

- [1] The Appellant (Third Accused) was jointly charged with Mikaele Lawaniyavi (First Accused) and Isikeli Lagibalavu (Second 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. He was found guilty in a judgment delivered on 5 December 2024, and on 20th December 2024 the Appellant was sentenced to 7 years imprisonment with a non-parole period of 4 years.
- [3] The Appellant was represented by Counsel (Legal Aid Commission) at the trial. However, he initiated his appeal In-Person, and completed his notice of appeal against conviction, which was stamped in the Registry dated 10 February 2025 as date “Received”. The notice was eventually stamped ‘Filed’ on 03 March 2025.

[4] On 26 June 2025, when the appeal was listed for First Call, the Court directed Legal Aid Commission to assist the Appellant, who filed a Notice of Enlargement of time to appeal, as it was apparent that the filing of the application was delayed.

[5] I have accepted the leave application as a timely application as the Appellant had initiated the appeal In-Person which appeared to be within the 30 days after the sentencing, although the Legal Aid Commission had correctly filed a Motion seeking Enlargement of time on 22 August 2025 with an Affidavit in Support sworn by the Appellant. The State also views any delay under the circumstance as minimal.

(B). Agreed Facts

[6] The Appellant had admitted the following facts:

1. The deceased in this matter is Subhas Chand, 56-year-old bus driver of Naduru, Nausori.
2. The Accused is 22 years old, unemployed of Lomainasau village.
3. On 3rd of October 2020 the Accused was present at the Nausori bus stand together with his friend Isikeli Lagibalavu (2nd Accused)

(C). Ground of Appeal

[7] The Appellant had filed his appeal against conviction in person on 03 March 2025, urging the following ground:

(a) The learned trial Judge erred in fact and law when the conviction is unreasonable and cannot be supported by the totality of the evidence.

(D). The Law

[8] Section 26 of the Court of Appeal Act allows the Appellant to appeal to this Court 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.

[9] The test for leave to appeal against conviction and sentence is “*reasonable prospect of success*” - **Caucau 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; CAV 10 of 2013 (20 November 2013).

[10] The factors that will be considered by a Court in Fiji for granting of enlargement of time are as follows:

- (i) *The reason for the failure to file within time.*
- (ii) *The length of the delay.*
- (iii) *Whether there is a ground of merit justifying the appellate court's consideration.*
- (iv) *Whether there has been a substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
- (v) *If time is enlarged, will the Respondent be unfairly prejudiced.*

See **Kumar v State; Sinu v State** FJSC 17; CAV0001.2009 (21 August 2013) and **Rasaku v State** [2013] FJSC 4; CAV0009.0013.2009 (24 April 2013).

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

[11] 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

[12] 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

[13] 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 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.

[14] 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.

[15] 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.

[16] 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.

[17] 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

[18] 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

[19] The Appellant submits that, there needs to be a proper consideration of evidence on all the elements of Manslaughter, especially on the following aspects: (a) Evidence of PW1 and PW2 in relation to whether they indeed had clear unobstructed view of the incident; (b) Cross examination of expert medical evidence, particularly from Dr. Paula Nakabea, Dr Daniella John and Dr. Vereniki Raiwalui; (c) Whether the Appellant was part of a joint enterprise with the Second Accused - Isikeli Lagibalavu and First Accused - Mikaele Lawaniyavi to assault the deceased, and (d) In absence of sworn evidence from the Appellant, whether his Record of Interview ought to have been analysed to determine fault element of recklessness.

Element (i) The Accused did a willful act:

[20] The Appellant submits that as per the Amended Information, the State relied on the physical element of assault upon the deceased. It led evidence from 4 eye witnesses to prove the physical element of assault arising from the incident that occurred on 3

October 2020 between 12 and 1 pm. the ground of appeal is arguable, and that enlargement of time and leave be allowed for the Appellant to argue his appeal before the Full Bench.

[21] PW1 Virisila Biudai testified that on the date of the incident she was at the bus stand to catch a bus when she witnessed a bus drove by and the driver (referring to the Deceased) was honking the horn. When the bus came to a complete stop, two itaukei youths entered the bus and started punching the driver. She was standing outside at the entrance of the bus and nothing obstructed her view of the incident. The driver was sitting on the driver's seat. The first youth (referring to the Appellant) went and punched the driver three times on the head from behind the seat while the second youth (referring to the Second Accused)-Isikeli Lagibalavu) punched the driver three times while standing on the steps of the bus. They both held the collar of the driver and punched him. They were saying something to the driver but she could not hear what was being said. The driver was afraid.

[22] The commotion attracted the crowd. The witness moved to the front of the bus. While she was standing in front of the bus, she saw another itaukei man (referring to the First Accused-Mikaele Lewaniyavi) calling the driver from the driver's window side and poked the driver on the right side of his face near the nose with the pointing end of the umbrella from outside the bus. He poked the driver with the umbrella like someone throwing a javelin. The driver started bleeding from his face and he tried to cover his face with his hands and then he lay forward on the engine compartment of the bus and started to lose consciousness.

[23] The witness called out for someone to attend to the driver and some people came and helped him. On 17 October 2020, the witness identified the three perpetrators in a police identification parade held at the police station.

[24] PW2 was Viniana Devu. She testified that she was standing at the bus stand when she saw two itaukei man arguing and throwing punches at a bus driver. She said the boy who was behind the driver threw short punches and the driver tried to avoid the punches by moving his head. The punches landed on the back of the driver's head. She said the punches were hard. She saw the driver stood up and was looking around to grab something around him perhaps to defend himself but when the witness moved

closer, she saw the driver was already lying on the compartment of the engine near the driver's seat, covering his face.

[25] The witness clarified she saw both boys punch the bus driver boy on the steps of the bus punched the driver's head, the boy behind the driver's seat punched the head of the driver twice.

[26] PW3 was Paula Naisarani. He testified that he saw a bus drove passed right in front of where he was sitting and it looked like a boy was hit maybe by the side mirror of the bus. The bus driver did not realize that he had hit someone and he did not stop the bus. The bus stand was crowded at the time. The witness saw the boy who was hit by the bus and his friend trying to look for the bus which hit the boy when the bus stopped at the stand. He did not see what the boys did but when he heard the commotion he went to the bus and saw the driver was lying on the engine cover and bleeding from his face. The driver was still conscious and the witness carried the driver and took him to the Nausori Health Centre. When a nurse took over at the Health Centre, Aula returned to his home.

[27] PW4 was Ashwant Vikash. He testified that he worked as a bus supervisor for Tacirua Transport Company. His duties involved keeping a count of the buses that arrive and depart from the bus stand. He was present at the bust stand when the deceased drove his bus and parked at the Suva Nausori Express Lane. He was about 5-7 meters away s inside the bus. From the bus and was talking to a passenger when he noticed two itaukei youths talking to the deceased inside the bus. While he was talking to other passengers someone called out to him to check out his driver. The witness went to the driver and saw the driver was injured and bleeding from his face. The driver was sitting on his seat with his head facing downwards. The driver was still conscious but had difficulty to communicate. The driver appeared to be in pain. The driver was taken to the hospital.

[28] The Appellant submits that based on the evidence of eye witnesses; it is clear that the incident had occurred at Nausori bus stand. Naturally, this place would have been bustling with people as well as buses. As per the Appellant's record of interview (tendered by consent), an arm-wrestling competition was also ongoing in close

proximity to where the incident occurred. As such, it can be reasonably inferred that the surrounding area was fairly crowded before the incident occurred.

[29] When the Second Accused-Isikeli Lagibalavu was hit by the deceased's bus, he went inside the bus to confront the deceased. Even though there are no admissions in the Appellant's Record on Interview, evidence from, PW1 and PW2 suggested that the appellant was present inside the bus and stood behind the deceased. As per PW1, the commotion caused a crowd to gather near the bus.

[30] The Appellant submits that, according to PW1, she witnessed the Appellant and the Second Accused - Isikeli Lagibalavu punching the deceased. The physical act occurred inside the bus and PW1 was standing outside the bus at the entrance. Although she stated that nothing obstructed her view of the incident, the Appellant submits that her evidence on this aspect is questionable because of the following reasons:

- (a) It is unclear at this stage if PW1 was standing directly at the entrance of the bus steps or along the side of the bus near the entrance steps;
- (b) PW1's view of the incident was not at eye level as she was standing on the ground and the incident occurred at the driver's seat, which is at a higher level;
- (c) The position of Second Accused-Isikeli Lagibalavu standing directly in front of her on the bus steps would have been a major obstruction of her view of the Appellant's movements;
- (d) The movements of the Second Accused-Isikeli Lagibalavu directly in front of her would also have caused considerable obstruction of her view of the Appellant's movements;
- (e) Despite standing outside the entrance of the bus, PW1 could not hear the conversation by the Second Accused-Isikeli Lagibalavu and the Appellant with the deceased. This could mean that either she was not standing close to the entrance as she so testified and/or there was noise

and distractions from the crowd which may have impeded her focus on the incident and movement of the Appellant;

- (f) PW1 could not state where the punches to the deceased landed on his body;
- (g) PW1 did not remain in one place throughout the incident. She had moved in front of the bus after some time. Because the bus is much higher than an ordinary man's height, it would have been difficult for PW1 to clearly see inside the bus; and
- (h) The incident was emotionally charged and quick-paced and it would have been challenging for any reasonable person to maintain focus and clarity of the incident.

[32] As such, the Appellant submits that PW1 did not have a clear view of the incident and her evidence that she witnessed the Appellant punching the deceased needs to be scrutinized further by the Full Bench in totality.

[33] The Appellant submits that PW2 testified that she was standing at the bus stand when she saw the boy standing behind the deceased (referring to the Appellant) throw short punches at the back of his head. She stated that the punches were thrown twice by the Appellant and were hard punches. However, the Appellant submits that PW2's evidence is also questionable on this aspect for the following reasons:

- (a) It is unclear at this stage as to the distance from where she was standing to the bus where the incident occurred;
- (b) It is unclear whether PW1 was standing on the side or front of the bus, which would inevitably affect her view of the incident;
- (c) It is also unclear as to whether PW2's view of the incident inside the bus was obstructed taking into consideration that a crowd had gathered near the bus; and

- (d) The incident was emotionally charged and quick-paced and it would have been challenging for any reasonable person to maintain focus and clarity of the incident.

[34] The Appellant submits that PW2 did not have a clear view of the incident and her evidence that she witnessed the Appellant punching the deceased needs to be scrutinized further by the Full Bench.

Element (ii) -That willful act caused the death of the deceased

[31] The State relied upon the expert medical evidence to prove causation -that the physical act of assault upon the deceased had caused his death.

[32] Dr Rhindu Chand attended to the deceased at the first instance when he was brought to Nausori Health Centre. He stated that the injuries near the nasal area could have been caused by the sharp edge of an umbrella and blunt force injuries on the head by several punches to the head.

[33] Dr Paula Nakabea, who is a radiologist, suggested that the deceased suffered from comminuted fracture on right side of sphenoid bone likely caused by punches to face with considerable force.

[34] Dr Daniella John who conducted the deceased's post mortem, suggested that the deceased had fractures in sphenoid bone which caused right cerebral infarction, in other words, head injuries lead to stroke in the brain and death of the deceased.

[35] Dr Luke Nasedra gave brief evidence explaining reasons for lost medical folder of the deceased.

[36] Apart from above, Dr Vereniki Raiwalui was also called as a defence witness on behalf of Second Accused-Isikeli Lagibalavu. He stated that the deceased suffered from brain injuries secondary to blunt trauma caused by right maxillary antral fractures. He stated that an umbrella can cause penetrating bone fractures if used with force, whilst agreeing that comminuted fracture can also be caused by punches of considerable force. He agreed that comminuted fracture on right side of face resulted in severe brain injury of the deceased.

[37] At paragraph 67 of the judgment, the learned trial judge acknowledged that the medical evidence presented by the doctors did not exactly demonstrate whether the serious injuries on the right side of the deceased's face (comminuted fractures) were caused by the assault from an umbrella or by punches.

[38] As per the Appellant's Record of Interview, the Appellant went to look for the Second Accused - Isikeli Lagibalavu and saw him having arguments with the deceased whilst pulling him. He stated he saw an itaukei man (referring to First Accused - Mikaele Lawaniyavi) hitting the deceased on his head with an umbrella and when the deceased looked outside, the first Accused Mikaele Lawaniyavi struck the umbrella towards his face near his eye. The Appellant then grabbed the Second Accused - Isikeli Lagibalavu and pulled him out of the bus. The Appellant denied punching the deceased and this was confirmed by the Second accused - Isikeli Lagibalavu in his oral testimony.

[39] Based on the answers given by the Appellant in his Record of Interview, he appeared to have provided an explanation for the presence of blunt force trauma injuries on the deceased's head-assault with an umbrella by First Accused. Taking in consideration the learned trial judge's sentiments on the cause of death, the Appellant submits that there is a need to fully examine court records to ascertain whether there was a possibility for the deceased to have sustained head injuries from the actions of First Accused-Mikaele Lawaniyavi.

Elements (iii) and (v)-At the time of the willful act, the Accused is reckless as to causing serious harm to the Deceased.

[40] In this matter the State relied upon "recklessness" as the fault element. As per section 21(2)(a) of the Crimes Act 2009, a person is reckless with respect of a result (serious harm) if he or she is aware of a substantial risk that the result (serious harm) will occur and having regard to the circumstances known to him or her, it is unjustifiable to take that risk.

[41] The State also relied upon the principle of "joint enterprise" on the basis that the Appellant and the other two accused persons were reckless in causing serious harm to the Deceased. The Amended Information did not provide a basis for joint enterprise,

nor did it particularize it. Be that as it may, section 46 of the Crimes Act 2009 states that:

“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.”

[42] In **Rasaku v State** [2013] FJSC 4, the Supreme Court stated:

“The doctrine of common enterprise has been applied consistently in a large number of criminal cases in England and other common law jurisdictions, including those such as Fiji in which the Penal Code is structure on the foundations 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. As Lord Lane CJ explained in R v Hyde [1991]1QB 13435-136-e cases where death results to the victim

*There are broadly speaking, two main types of joint enterprise cases where death results to the victim. The first is where primary object of the participants is to do some kind of physical injury to the victim. The second is where the primary object is not to cause any physical injury to any victim, but, for example, to commit burglary. The victim is assaulted and killed as a (possibly unwelcome) incident of the burglary. The latter type of case may pose more complicated questions than the former, but the principle in each is the same. A must be proved to have intended to kill or to do serious bodily harm at the time he killed. As we pointed out in Slack [1989] QB 775; at 781, **B**, to be guilty, must be proved to have lent himself to a criminal enterprise involving the infliction of serious harm or death, or to have and express or tacit understanding with A that such harm or death should, if necessary, be inflicted.”*

[43] The Appellant submits that the principle of joint enterprise in this matter can only be maintained against the appellant if it is proved that he allowed himself to participate in the infliction of assault of the Deceased, or if he had an understanding with the Second Accused - Isikeli Lagibalavu and the First Accused - Mikaele Lewaniyavi that the Deceased ought to be assaulted.

[44] The State's case was that the Appellant entered the bus with the Second Accused- Isikeli Lagibalavu, stood behind the Deceased, and punched the deceased together. First Accused - Mikaele Lawaniyavi joined in on the assault by poking the Deceased striking the deceased with an umbrella.

[45] However, the Appellant's Record of Interview states that he saw Second Accused - Isikeli Lagibalavu having an argument with the deceased whilst pulling his collar. He then saw First Accused - Mikaele Lawaniyavi striking the Deceased with an umbrella, after which he grabbed Second Accused - Isikeli Lawaniyavi and pulled him away. The Appellant denied punching the Deceased. The Appellant's Record of Interview does not depict whether the Appellant was standing behind the Deceased or not. The Appellant also did not know the First Accused - Mikaele Lawaniyavi.

(G). Respondent's Case

[46] The Respondent submits that the delay is trivial and not a cause of any prejudice to the respondent. In the light of related rulings in AAU004 of 2025 and AAU 005 of 2025, there appears to be a ground worthy of being considered by the Full Court with the benefit of the Appeal Record and that is whether, based on the totality of the evidence, the principle of joint enterprise (*even if spontaneous*) was satisfied.

[47] On the Ground of Appeal (Conviction only), the Respondent, in written submissions, submits as follows:

"1.7 It is respectfully submitted firstly, that considering the related Leave Rulings vide AAU 004 of 2025 and AAU 005 of 2025 (both Rulings delivered on 08 August 2025), this Honourable Court has consistently permitted the appellant's co-convicts to canvass their respective appeals before the Honourable Full Court so the Full Court may, with the benefit of the appeal records, consider whether the joint enterprise manslaughter convictions are reasonably supported by the totality of the trial evidence.

1.8 While this does not mean that the Appellants in AAU 004 of 2025 and AAU 005 of 2025 would be inevitably successful in assailing their respective manslaughter convictions (as the Honourable Appellate Court does not substitute its views over the Trial Courts unless the conviction

was wholly unreasonable and unsupported by the trial evidence. it (the issue of joint enterprise) does provide a sufficiently reasonable basis for the Appellants to argue their respective appeals before this Honourable Full Court.

1.9 For consistency, the appellant herein raises a complaint that his conviction for joint enterprise manslaughter is unreasonable and not supported by the totality of the trial evidence. This question can only be answered by the Honourable Full Court with the benefit of the complete trial transcripts and therefore, enlargement of time for leave to appeal conviction may be properly allowed to the humble appellant.

2.0 Disposal

2.1 It is respectfully submitted that in light of the Leave Rulings in related AAU 004 of 2025 and AAU 005 of 2025, it would be proper and consistent that an enlargement of time for leave to appeal conviction to be granted to the appellant in AAU 014 and AAU 005 of 2025.”

(H). Analysis

[48] The Appellant contends that the learned Judge was mistaken in fact and in law when convicting the Appellant as the conviction is unreasonable and cannot be supported by the totality of the evidence. The State is not opposing the application for leave to appeal for the reasons stated in its submissions in Part (G), paragraphs [50] and [51] above.

[49] The Appellant submits that, there needs to be a proper consideration of evidence on all the elements of Manslaughter. The Appellant had submitted a comprehensive written submissions the substance of which are captured in the Appellant’s Case (Part (F), see paragraphs [19] to [49] above. The Appellant specifically raise a number of aspects of the evidence that need to be reviewed, including whether PW1 and PW2 had clear unobstructed view of the incident; the medical evidence which in cross examination appear to be inconclusive; the concept of joint enterprise, and establishment of a “common intention”.

Manslaughter - Element (I) -The Accused did a willful act

[50] PW1s evidence is being challenged and critically analysed, particularly in paragraph [24] which states:

“[24] Virisila’s evidence is that on 3 October 2020 at around 12 noon she was at the bus stand to catch a bus when she witnessed a bus drove by and the driver was honking the horn. When the bus came to a complete stop, two itaukei youths entered the bus and started punching the driver. She was standing outside at the entrance of the bus and nothing obstructed her view of the incident. The driver was sitting on the driver’s seat. The first youth (referring to the Third Accused) went and punched the driver three time on the head from behind the seat while the second youth (referring to the Second Accused) punched the driver three times while standing on the steps of the bus as you enter. The two Accused held the collar of the driver and punched him. The two Accused were saying something to the driver but she could not hear what was being said. The driver was afraid.” (Underlining is for emphasis)

[51] Questions were also raised with regards to PW2, Viniana’s evidence at paragraph [30] of judgment, as follows, which was also critically analysed.:

“[30] The second witness, Viniana’s evidence is that she was standing at the bus stop when she saw two itaukei man arguing and throwing punches at a bus driver. She said that the boy who was behind the driver threw short punches and the driver tried to avoid the punches by moving his head. The punches landed on the back of the driver’s head. She said the punches were hard. She saw the driver stood up and was looking around to grab something around him perhaps to defend himself but when Veniana moved closer she saw the driver was already lying on the compartment of the engine near the driver’s seat, covering his face.”

[52] Both PW1 and PW2 were cross examined - see paragraph [29] and [30] of judgment. Whether PW1 and PW2 had clear unobstructed view of the incident? According to Appellant (Paragraph 35 of Written Submissions). PW1’s and PW2’s evidence on this aspect are questionable because of the following reasons:

“(a) It is unclear at this stage if PW1 was standing directly at the entrance of the bus steps or along the side of the bus near the entrance steps;

- (b) *PW1's view of the incident was not at eye level as she was standing on the ground and the incident occurred at the driver's seat, which is at a higher level;*
- (c) *The position of Second Accused-Isikeli Lagibalavu standing directly in front of her would also have caused considerable obstruction of her view of Appellant's movement;*
- (d) *The movements of Second Accused-Isikeli Lagibalavu directly in front of her would also have caused considerable obstruction of her view of the Appellant's movements;*
- (e) *Despite standing outside the entrance of the bus, PW1 could not hear the conversation by the Second Accused-Isikeli Lagibalavu and the Appellant with the deceased. This could mean that either she was not standing close to the entrance as she so testified and/or there was noise and distractions from the crowd which may have impeded her focus of the incident and movements of the Appellant;*
- (f) *PW1 could not state where the punches to the deceased landed on his body;*
- (g) *PW1 did not remain in one place throughout the incident. She had moved in front of the bus after some time. Because the bus is much higher than an ordinary man's height; and*
- (h) *The incident was emotionally charged and quick-paced and it would have been challenging for any reasonable person to maintain focus and clarity of the incident."*

[53] In consideration of the above, it may be asked whether PW1 did not have a clear view of the incident and her evidence that she witnessed the Appellant punching the deceased needs to be scrutinized further by the Full Court.

[54] PW2's evidence (Paragraph 37 of Appellant's written submission) is also questionable, for the following reasons:

- “(a) It is unclear at this stage as to the distance from where she was standing to the bus where the incident occurred;*
- (b) It is unclear whether PW 1 was standing on the side or front of the bus, which would inevitably affect her view of the incident;*
- (c) It is also unclear whether PW2’d view of the incident inside the bus was obstructed, taking into consideration that a crowd had gathered near the bus, and*
- (d) The incident was emotionally charged and quick-paced and it would have been challenging for any reasonable person to maintain focus and clarity of the incident.”*

[55] Given the above factors, it is unclear and doubtful whether PW2 had a clear view of the incident and her evidence that she witnessed the Appellant punching the deceased needs to be scrutinized further by the Full Bench.

Manslaughter - Element (ii) -That wilfull act caused the death of the deceased

[56] From the totality of the evidence, taking note of the learned judge’s assessment and determination (See Part (F), paragraphs [19] to [49] above), whether there was a possibility for the deceased to have sustained head injuries from the actions of the Appellant? Was this aspect of the evidence carefully assessed and evaluated? Was the Appellant’s Record of Interview considered assessed? There is need to fully examine Court records. See also paragraphs [35] to [43] above. The Record of Interview provides an explanation for the prescence of blunt force trauma injuries.

Manslaughter - Elements (iii) and (v)-At the time of the wilfull act, the Accused is reckless as to causing serious harm to the Deceased

[57] The State had relied on “recklessness” as the fault element. Section 21(2) (a) of the Crimes Act 2009, indicates that a person is reckless with respect of a result (serious harm) if he or she is aware of a substantial risk that the result (serious harm) will occur and having regard to the circumstances known to him or her, it is unjustifiable to take that risk.

[58] The State also relied on the principle of “joint enterprise” (section 46 of Crimes Act 2009), and the Appellant asserts that the Amended Information did not provide a legal basis for joint enterprise, nor did it particularize it. Lord Lane, CJ explained in **R v Hyde** [1991] 1 QB 13435-136, and, adopted by the Supreme Court in **Rasaku v State** [2013] FJSC 4, stated:

*“There are broadly speaking two main types of joint enterprise cases where death results to the victim. The first is where the primary object of the participants is to do some kind of physical injury to the victim. The second is where the primary object is not to cause any physical injury to any victim, but, for example, to commit burglary. The latter type of case may pose more complicated questions than the former, but the principle in each is the same. A must be proved to have intended to kill or to do serious bodily harm at the time he killed. As we pointed out in **Slack** [1989] QB 775; at 781, **B, to be guilty, must be proved to have lent himself to a criminal enterprise involving the infliction of serious harm or death, or to have an express or tacit understanding with A that such harm or death should, if necessary, be inflicted.**” (Underlining and highlighting for emphasis)*

[59] In this matter, bearing in mind that *“The formation of 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”*, see **Rasaku v State** (supra), it may appropriately be raised whether, the principle of joint enterprise can only be maintained against the Appellant if it is proved that he allowed himself to participate in the infliction of assault of the Deceased, or if he had an understanding with the Second Accused-Isikeli Lagibalavu and First Accused-Mikaele Lawaniyavi that the Deceased ought to be assaulted.

[60] The Appellant at paragraph 55 of its written submissions states:

“There are questions surrounding the totality of evidence in relation to joint enterprise and the fault element of recklessness. The learned judge determined that the Appellant acted in joint enterprise with the co-offenders through the evidence of eyewitnesses and Second Accused Isikeli Lagibalavu. However, the Appellant’s Record of Interview which was readily available as evidence too, was not analyzed.....”

[61] Issues and questions have been raised with regards to the evidence of PW1 and PW2 (Eye witnesses); the medical evidence and conclusions drawn from it; the lack of analysis of the Appellant's Record of Interview, and that together with the questions around how, the link between joint enterprise, recklessness and the facts were established.

[62] The ground of appeal is arguable.

(I). Conclusion

[63] The First Accused - Mikaeli Lawaniyavi (AAU004 of 2025), and Second Accused Isikeli Lagibalavu (AAU005 of 2025), Co-Accused in HAC 313 of 2020 (Suva High Court) have been granted leave to appeal (Criminal Appeals AAU 004 of 2025, AAU 005 of 2025 and AU 014 of 2025). The Court Registry is requested to consider having the three appeals placed before the Full Court in the same Session of the Court of Appeal.

Order of Court

1. *The Appellant's application for leave to appeal against his conviction is allowed.*
2. *This appeal (AAU 014 of 2025) is to be Called Over and Listed for Hearing before the Full Court together with AAU 004 of 2025 and AAU 005 of 2025.*



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

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