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

CRIMINAL APPEAL NO. AAU 106 OF 2023
[Suva High Court: HAC 057 of 2022]

BETWEEN : **VILIKESA DELANA**

Appellant

AND : **THE STATE**

Respondent

Coram : Qetaki, RJA

Counsel : Appellant In-Person
Ms. L. L. Latu for the Respondent

Date of Hearing : 30 September, 2025

Date of Ruling : 22 December, 2025

RULING

(A). Background

[1] The appellant with another was convicted for one count of murder contrary to section 237 of the Crimes Act 2009 following a trial in the High Court in Suva on the 15th July 2023.

[2] The appellant also pleaded guilty to one count of theft contrary to section 291 of the Crimes Act 2009.

[3] On 29th June 2023, the appellant was sentenced to life imprisonment with a minimum term of 15 years imprisonment, to be served before pardon is considered. The appellant was further sentenced to imprisonment for 4 months for theft. The terms of imprisonment were to be served concurrently.

[4] The facts of the case were summarized by the sentencing Judge, as follows:

> *"It was proved that you and the first Accused, Emori Naqova, killed the Deceased while executing an unlawful enterprise of assaulting the Deceased on the 22nd of January 2022.After assaulting the Deceased, you stole his blue knapsack bag……."*
>
> *"The crime is a sorrowful tragedy. You and the first Accused found the Deceased and another was assaulting a girl in a narrow lane in Nausori town on the night of 22nd of January 2022. You were returning home after spending time in a nightclub. You and the first Accused then confronted the Deceased and his friend. You and the first Accused then started to Assault the Deceased and killed him."*

[5] The prosecution relied on the evidence of 4 prosecution civilian witnesses who claimed to have witnessed the alleged incident, 3 police officers and a pathologist who conducted the postmortem of the deceased. The admissible record of interview and charge statement and the doctor's medical findings were also relied upon by the prosecution.

[6] The appellant gave sworn evidence and denied the allegations claiming the entire allegations were fabricated.

[7] Being dissatisfied with his conviction and sentence, the appellant filed an untimely appeal on 6th December 2023 and on 20th March 2025, the appellant filed Notice of Enlargement of Time against conviction and sentence.

[8] On 20th August 2025, the appellant filed his written submissions, a reply was filed by the respondent on 29th September 2025.

(B). Grounds of Appeal

[9] The appellant urged 4 grounds of appeal against conviction and 2 grounds against sentence, as follows:

Against Conviction

Ground 1: *That the learned Judge erred in law and facts causing substantial miscarriage of justice when he did not properly evaluate the lack of evidence presented by the witnesses to establish whether the appellant could be liable to be convicted of count 1 based on the principle of joint enterprise.*

Ground 2: *That the issue of causation was not properly and carefully evaluated by the learned trial Judge thus causing the conviction wrong.*

Ground 3: *That the dock identification held by PW2 (Timaima) was unreliable and should be unaccepted since there are evidence of coaching provided to the witness to mention the appellant's name at the police station.*

Ground 4: *That the requirements of the Turnbull guideline was crucial to determine the different poor condition of identification witness in this case thus the non- compliance cause substantial miscarriage of justice.*

Against Sentence

Ground 1: *That the learned trial Judge erred in law and fact when there was no discount given due to the period of time (remand period) already spent in custody.*

Ground 2: *That the learned judge erred in law for failing to consider the permission of possible rehabilitation and differences.*

(C). The Law

[10] Section 35(1) of the Court of Appeal Act deals with the power of a single Judge and states that:

"A judge of the Court may exercise the following powers of the Court-

(a)……

(b) to extend the time within which notice of appeal or of an application for leave may be given……"

(D). Enlargement of Time Application Guidelines

[11] In **Kumar v State; Sinu v State** CAV 0001 of 2019: 21 August 2012[2012] FJSC 17, the Supreme Court held:

"[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:

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

[12] In **Rasaku v State** CAV0009, 0013 of 2009,24 April 2013 [2013] FJSC 4, it is emphasized that the above factors may not be necessarily exhaustive. However, they are convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the Court to uphold its own rules, while always endeavoring to avoid or redress any grave injustice that might result from the strict application of the rules of court. In paragraphs [18] and [19] of judgment, the Supreme Court observed that:

(a) *the enlargement of time for filing a belated application for leave to appeal is not automatic but involves the exercise of discretion of Court for the specific purpose of excusing a litigant for his non-compliance with a rule of court that has fixed a specific period for lodging his application: See* ***Ratnam v Cumarasami****[1964] 3 All ER 933 at 935*

*and **Revici v Prentice Hall Incorporated and Others** [1969] All ER 772 per Edmund Davis LJ at page 774; and*

*(b) enlargement of time has generally been permitted by courts only exceptionally, and only in an endeavour to avoid or redress some grave injustice that might otherwise occur from the strict application of rules of court: See **Gallo v Dawson** [1990] HCA 30; (1990) 93 ALR 479 at 480 to 481.*

(E). Duration of Delay and Reasons

[13] The delay in this case is substantial, being 1 year 6 months.

[14] The appellant submits the following reasons as contributing to the delay: (1) The appellant had submitted his notice of appeal earlier within time on 29 November 2023.The Registry had received the application but had misplaced it; (2) The appellant had no knowledge of the appeal process since he is a first offender; (3) The appellant is not familiar with the criminal justice system, and (4) The appellant was prejudiced in his lack of knowledge and inadequate resources.

(F). Consideration of Ground of Merit

Submissions

Against Conviction

[15] Ground 1: The appellant submits that the trial Judge did not properly evaluate the "*sudden physical withdrawal of the appellant during the commission of the crime*". His withdrawal under the circumstances should have been evaluated by the trial Judge in his judgment. The appellant explained at length in his submissions his analysis of this particular aspect of the evidence. There is a conflict between Sulueti and Kelera's evidence after the bag was picked up by the appellant.

[16] The respondent opposes this ground on the basis of the findings of the trial judge based on evidence at trial. It submits that based on the Court's findings, the appellant was not

the accused that withdrew from a joint enterprise, thus avoiding criminal liability. It was the co-accused Semiti who withdrew- this is reflected in paragraphs 45 – 56 of the judgment. Based on the totality of the evidence and the "prosecution test" the prosecution failed to establish Semiti's criminal responsibility for committing the crime under the joint enterprise principle and acquitted him accordingly.

[17] Ground 2: The appellant challenged the prosecutions witnesses' evidence at the trial, especially on Simitis's role in what eventually resulted in murder. It was Semiti who delivered the punch that knocked the deceased to the ground. There are conflicting evidence, and the trial Judge did not properly analyse these. The appellant submits that both Timaima's and Sulueti's evidence are doubtful. The CCTV footage evidence did not support their claims that the appellant assaulted, kicked and stomped the decreased causing his death on the night in question. The appellant submits that the "*evidence on causation was not properly established and that the conviction should be quashed" ...*

[18] The respondent opposes this ground; it submits that it is absurd. The trial Judge had considered the entirety of the evidence and discussed the cause of death in paragraphs 66 to 70 of the judgment. These were reproduced in the respondent's submissions. Based on such the respondent submits that the ground has no prospect of success.

[19] Ground 3 The appellant challenges the method of dock identification as unreliable and unacceptable under the circumstances. That PW2's evidence should be discredited as not proper. Timaima's evidence on this aspect was not properly scrutinized. The CCTV footage evidence contradicts the other prosecutions witnesses' evidence on identification. The appellant's involvement was not assessed and established. The witnesses were coached to mention the appellant's name during investigation. Dock identification is totally unacceptable.

[20] The respondent submits the ground is misconceived as identification was never disputed based on the Admitted facts filed by the appellant counsel. That the only trial issue was whether the appellant and his co-accused with common intention, assaulted the deceased.

[21] Ground 4: The Turnbull Guidelines could have been used. There were irreconcilable differences /conflicts in evidence that needed to be reconciled. Witnesses were in different locations around the crime scene. There was insufficient lighting, "the distance "weren't accurately established, that is the relative distances of the actors (including the appellant) vis a vis the deceased in the unfolding of events.

[22] The respondent's submission on this ground is consistent with its response to ground 3 above. That identification was not in dispute. However, the appellant claimed in his summarized evidence at paragraph 13 that he was assaulted by one of the men, he fell and was unconscious. That the evidence of PW2 and PW3 were consistent and coherent that they clearly saw the deceased assaulted and he further fell and was kicked and stomped by the appellant. Whether the prosecution had established the Turnbull principle on identification is not certain at this stage as the respondent does not have the benefit of the record. Based on paragraph 38 of the judgment, it is evident the trial Judge was satisfied that PW2 was not mistaken, he saw the appellant and his co-accused Emori punched the deceased and kicked and stomped him.

Against Sentence

[23] Ground 1: The appellant complains that the period he had served while on remand was not taken account of by the sentencing Judge. He relies on **Vuniwai v State** [2004] FJCA 100; AAU176.2019(30 May 2024) case as establishing the principle that any period of time already spent in custody by the appellant should be discounted during the sentence process.

[24] The respondent submits that the appellant referred to **Vuniwai** to bolster his argument. The respondent referred to **Rai v State** [2024] FJCA 115; AAU89,2022 (17 June 2024) and quoted from it at length, Of much interest are paragraphs [32] and [33].

[25] The respondent acknowledge that the non-consideration of the pre-trial remand is an error that warrants the Full Court's intervention and to adjust the minimum term. This ground is meritorious.

[26] Ground 2: The appellant submits that the trial Judge failed to consider the question on the possibility of rehabilitation of the offender before imposing the minimum term of life imprisonment sentence. The appellant submits that, the Sentencing and Penalties Act 2009 provide factors that a trial Judge must observe and apply in terms of appropriateness of a sentence to be imposed, and proper discount should be given in this regard.

[27] The respondent submits that this ground is misconceived. Considering the level of culpability, level of harm, the aggravating factors and mitigating circumstances of the offending in this matter, his mandatory life imprisonment term was justified in law with the minimum term which commensurate the offending balancing the interest of justice, rehabilitation, deterrence and public safety.

Analysis

[28] Having considered the submissions from both the appellant and respondent, I hold that the delay though substantial, is justified. The appellant had In Person, submitted his notice of appeal on time to the Registry. His story for not meeting the filing date in the circumstances is not uncommon from prisoners in custody.

Against Conviction

[29] **Ground 1**: In consideration of the two submissions, it is possible that the respondent was referring Semiti's withdrawal rather than the appellant's withdrawal from the joint enterprise. It is important that the element of a joint enterprise is proven against the appellant. This requires careful examination of not only the evidence of the appellant, but also of the prosecution witnesses. The availability of the full record of the High Court to

the full Court will enable the Court to undertake that scrutiny and reassessment of the evidence. The ground is arguable.

[30] **Ground 2**: The ground is closely tied to the first ground. It is about the assessment of the facts leading to the finding that the appellant was guilty of joint enterprise. The facts must add up to the elements of the offence under the law. This also involves careful assessment of the role of Semiti, who threw the punch initially against the deceased, and Emori. Can their actions collectively, if carefully assessed and analysed, support a joint enterprise causing the death of the victim.

[31] Where does the appellant fit in the chain of causation given the role of Semiti and Emori in the offending and given the appellant's contention that the evidence of 'the prosecution witnesses were in conflict on his alleged participation. The appellant had consistently challenged the lack of adequate and proper assessment of evidence of the prosecution witnesses by the trial Judge.

[32] The role of Semiti, and the role of the appellant and Emori can be revisited when the record is available to the full Court. The appellant had raised the issue of conflict of evidence on his participation and role in the evidence of Sulueti and Kelera. Also, the CCTV evidence appears to uncertain/unclear and in doubt as to the appellant's involvement in the joint enterprise. The evidence on the cause of death, discussed in paragraphs 66 to 70 of judgement may need further review against the testimonies of the prosecution witnesses, in the context of this ground. The ground is arguable.

[33] **Ground 3:**While the legal effect of the Admitted facts cannot be called into question, and in this case the accused was represented by counsel at the trial, the evidence that are available that points to the cause of death as in the post mortem report is open to careful scrutiny when the record is available. Whether the Turnbull Guidelines principles were established is also not certain and this will be clarified when the record is available. This ground is arguable.

[34] Given the above analysis, I am of the opinion that the grounds of appeal against conviction are arguable. They have merit.

Against Sentence

[35] On the sentence grounds, the guidelines to be followed when sentence is challenged on appeal were outlined in **Kim Nam Bae v The State** [1999] FJCA 29 , as follows, when a Judge:

(a) *Acted upon a wrong principle;*
(b) *Allowed extraneous or irrelevant matters to guide or affect him;*
(c) *Mistook the facts;*
(d) *Failed to take into account some relevant consideration.*

[36] Ground 1 is conceded. Section 24 of the Sentencing and Penalties Act 2009 and case law had established that any period served by a person who has been convicted, while in custody must be deducted as part of the sentence exercise. This was not complied with and the full Court can make the adjustment as necessary. The ground is arguable.

[37] There are relevant authorities establishing legal principles which can be considered for and against this ground. See for instance: **Mohammed Ismail v The State**, CAV 0002 of 2022(26 October 2023); **Kreimanis v State** [2023] FJSC**; Navuda v State,** Criminal Petition N0. 0013 of 2022(26 October 2023); **Tora v State.** , Criminal Appeal No. AAU0063/2001(per Calanchini JA). This ground is arguable.

[38] The grounds of appeal against sentence are arguable.

(G). Conclusion:

[39] The respondent has not argued that it will be prejudiced if leave is granted. Leave is granted for the appellant to appeal his conviction and sentence.

Orders of Court:

1. *The application for extension of time for leave to appeal against conviction is allowed.*
2. *The application for extension of time for leave to appeal sentence is allowed.*

Hon. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

Solicitors
Appellant In-Person
Office of the Director of Public Prosecutions for the Respondent