

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

**CRIMINAL APPEAL NO. AAU 005 of 2019 and AAU 039 of 2020**  
**[In the High Court at Lautoka Case No. HAC 11 of 2013]**

**BETWEEN** : **ULAIASI GLEN RADIKE**

***1<sup>st</sup> Appellant***

**KELEMEDI SEVURA**

***2<sup>nd</sup> Appellant***

**ANARE MARA**

***3<sup>rd</sup> Appellant***

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

***Respondent***

**Coram** : **Mataitoga, P**  
**Morgan, JA**  
**Andrée Wiltens, JA**

**Counsel** : **Ms B. Malimali and Ms S. Tuicakau for 1<sup>st</sup> Appellant**  
**Mr K.R. Prasad for 2<sup>nd</sup> Appellant**  
**Ms P. Mataka for 3<sup>rd</sup> Appellant**  
**Mr T. Tuinuku for the Respondent**

**Date of Hearing** : **06 November 2025**

**Date of Judgment** : **28 November 2025**

**JUDGMENT**

**A. Introduction**

- [1] A late evening brawl (described by most witnesses as a “fight”) in the town of Nadi on 29 November 2012 resulted in the untimely death of a young 21-year old i-Taukei male.
- [2] The 3 appellants were jointly charged with murder in relation to their alleged conduct during the brawl, and after trial (*in absentia* in the case of Mr Mara), they were each convicted by the learned trial Judge. At the time, Mr Radike was 19 years old, and both Mr Mara and Mr Sevura were 21 years old.
- [3] The prosecution case was run on the basis of joint enterprise and relied on the fault element of recklessness. To find the appellants guilty of murder, for the reasons articulated in his judgment, the trial judge overruled the opinions of the assessors who considered by a majority of 2:1 that the appellants were not guilty of murder but were guilty of manslaughter. The trial judge subsequently sentenced the appellants to life imprisonment, each with a minimum term to be served of 14 years.
- [4] Leave to appeal conviction was granted to Mr Radike and Mr Sevura by Prematilaka J in a decision of 18 October 2022 on two grounds, namely in relation to the issues of joint enterprise and recklessness.
- [5] Separately, in a second decision of the same date, Prematilaka J. also granted Mr Mara leave to appeal conviction on the same two grounds, despite his application being well out of time. Mr Mara was also given leave to appeal his sentence in relation to whether his claimed lesser involvement merited a reduction of his minimum serving period. He was declined leave to appeal conviction on the other grounds advanced, but Mr Mara has subsequently renewed his application, as well as advancing additional grounds against conviction.
- [6] Despite leave having been declined to Mr Radike on other grounds advanced submissions were filed relating to the contended failure by the judge to put his case fairly to the assessors, that the totality of the evidence did not support conviction for murder, and 3

further grounds addressing the sentence imposed. We will not address these issues as leave was first required and has not been sought or obtained. Submissions were also made regarding the trial judge's alleged failure to provide cogent reasons for differing from the majority of the assessors. As this is a question of law only no leave is required.

**B. Points on Appeal**

[7] It is contended for all three appellants that there was no or no sufficient evidence of a joint enterprise; and further that this issue was not properly put before the Assessors in the summing up, nor adequately addressed in the judgment. That is submitted to be fatal to the convictions.

[8] Further, it was contended for all three appellants that the issue of their individual culpability on the basis of recklessness was also not properly put to the Assessors, nor appropriately addressed in the judgment. This too is submitted to be fatal to the convictions.

[9] We will also consider whether cogent reasons were provided for overturning the opinion of the assessors. For Mr Mara, there are additional issues raised. It was pointed out that the only identification of Mr Mara was by Ms Batiluva, who did not even know his name; and further that her evidence had not been tested by cross-examination. The evidence relating to Mr Mara's interview under caution and his response when formally charged was unsatisfactory and not properly considered. He also sought to appeal his sentence on the basis that he was a lesser player and should not have been sentenced on the same basis as those more responsible.

**C. Prosecution Case**

[10] It is necessary to set out the evidence in some detail. There were 16 prosecution witnesses, but few were of importance in terms of establishing what had occurred or identifying those responsible. The agreed facts were subsumed by the evidence led at trial. We will now discuss the relevant evidence critical to determining this appeal.

- [11] Ms Naomi Raikadroka, was present before and at the time of the brawl, with her sister (Mereani) and others. She gave evidence that she was distantly related to the deceased. When she arrived on the scene she saw him being attacked by 4 - 5 boys (she described them as teenagers, in their twenties), all wearing boots. They punched the deceased and kicked him until he fell on the ground. They then stepped on his head. She saw her sister attempt to intervene to stop the fight, but her sister was herself punched. The witness went to assist the deceased and noted copious blood coming from his head, and she observed the boys who had assaulted the deceased run off. Counsel for Mr Radike and Mr Sevura did not challenge this account.
- [12] Ms Mereani Raikadroka was the sister Naomi. She had been at a nightclub with the deceased prior to the brawl. He had gone to buy cigarettes, and she was following behind. When she caught up with him she saw that he was being beaten – punched and stepped on his head. She related: “*There were many people there. I didn’t see who was doing the beating, may be three.*” (punctuation added) She tried to intervene to stop them, but she was punched and accordingly failed in her attempt. The deceased ended up on the ground, bleeding from his head. Those who had assaulted him had run off.
- [13] Ms Mereani Raikadroka, when asked if she knew any of those assaulting, replied: “*Yes.*” When asked who they were she responded: “*I only know them if I see their faces.*” When further asked to describe those she could recognize, she responded: “*Two of them are sitting in court today, the third one is tall.*” She then pointed out Mr Radike and Mr Sevura as assailants. She stated that she had met them prior to the night of the brawl, at the house of a relative.
- [14] Ms Mereani Raikadroka was cross-examined about the light at the time, and her ability/opportunity to clearly see. She agreed it was dark and that things were happening very fast. Subsequently, she clarified: “*It was not that dark my Lord I could see*”.
- [15] Her statement to the police of 30 November 2012 was put to her. In it, it is recorded that she could not recognize the i-Taukei boys who were punching the deceased. Ms Raikadroka explained that she was drunk when she gave her statement, but not that drunk.

It was put to her that she had not named Mr Radike as an assailant as he hadn't been present at the brawl. She responded: "*He was there...*". When later also asked about her recognition of Mr Sevura, Ms Raikadroka asked the trial judge if she could say something, which was permitted. She then related that prior to her statement being taken she had been told of the deceased's demise and she felt sorry for those responsible; and further, she stated that she had been threatened by Mr Sevura, and was afraid of what might happen to her – that was her explanation for the contradictory statement about not being able to recognize the assailants.

- [16] Ms Batiluva had witnessed the brawl. When asked who was involved, she could not identify one of those who had participated by his real name, but said he was called Tuks. She said: "*I just saw Tuks punching [the deceased] and I saw the [the deceased] punch Leke. Two guys punched Leke ...*". She continued that the punches thrown by Tuks were to the deceased's face. She thought she only saw Tuks throw 2 punches. She was about 15 – 20 metres away. The witness was not cross-examined.
- [17] Ms McGoon confirmed that she been part of a group that evening who had initially been at a barrel night and who later all went together to Nadi to a nightclub, outside which the brawl took place. The three appellants were part of her group.
- [18] Retired Police Officer Apete, as a result of police investigations, arrested and cautioned Mr Radike and Mr Mara for murder at about 2.30am on 30 November 2012. They smelt heavily of liquor and in his view they were drunk. Despite that, he considered that they both understood their rights, although he did not record that in his statement given at the time.
- [19] Detective Corporal Gupta had attended the scene shortly after the brawl had been notified to the police. On arrival he saw 3 groups of people fighting, involving perhaps 25 individuals. He saw Mr Sevura (whom he knew from previous interaction) coming out from the crowd. He was alerted to Mr Sevura's involvement with the brawl by 3 female by-standers, and he accordingly arrested and cautioned Mr Sevura, before later escorting

him to the police station – he accepted that he had forgotten to record the fact of cautioning Mr Sevura in his statement.

[20] He confirmed there was a badly injured person at the scene who was taken to hospital but later died.

[21] As part of his enquiries at the scene DC Gupta learnt the brawl had commenced inside the nightclub before spilling outside, and that what had sparked the incident was an accusation that Mr Sevura had stolen a packet of cigarettes.

[22] Dr A. Mate, a forensic pathologist, conducted an autopsy on the deceased, and she produced a report of her findings. In her expert opinion, the cause of death was an extensive subarachnoid hemorrhage due to blunt force trauma. Dr Mate estimated the time of death to be 10.30pm on 29 November 2012. She also noted the smell of alcohol from the deceased's stomach contents.

[23] Dr Mate stated that the most extensive injuries that she observed, causing the death, were to the deceased's head including a deep wound on the right scalp with bruising to the right cheekbone. In Dr Mate's opinion, the blunt force trauma could have been due to a motor vehicle accident, falling from a considerable height, or as a result of an assault. She explained that one punch would likely have been insufficient to cause the injuries noted, there would have had to be repeated punches. She considered kicks to the head or stomping on the head could constitute blunt force trauma. She accepted also that a hard fall when intoxicated could be a cause of head injury but that was unlikely to cause as extensive injuries as those inflicted on the deceased.

[24] The prosecution relied heavily on incriminating admissions in statements made by each of the appellants under caution and when formally charged. Although the admissibility of those admissions was challenged, this Court does not have before it the evidence led at the *voir dire*, nor the trial judge's reasons for ruling all the statements admissible. The various statements were adduced at trial as exhibits, and the relevant probative parts are discussed next.

(i) Mr Radike

[25] Mr Radike was interviewed by Sgt Khan witnessed by former Acting Crime Officer Mr Prasad, from 30 November 2012 to 3 December 2012. In the course of the interview a scene reconstruction was undertaken, before the interview was resumed. There was further delay in completing the interview awaiting the postmortem examination. Mr Radike made the following statements:

- He is known as Dike.
- He attended a barrel night with several friends, including Ms McGoon, Tuks, Ian and Leke. They consumed numerous jugs of beer, before they went to Nadi.
- After arrival, Ema told him Leke was fighting with some boys; and he and Bill went to look for Leke, but to no avail. He then went with Tuks to another area looking for Leke. He saw Leke fighting with 2 boys, and Bill was also there. It was sufficiently light for him to be able to see.
- Bill and a Fijian boy were pushing and pulling each other. He yelled at the boy, who yelled back. He [Mr Radike] then “...punched *[the boy]* on the face twice, and then Tuks came and myself and Tuks started punching that Fijian boy.” Bill went to stop Leke. Then, “*Leke came and joined myself, Tuks and we all started punching and kicking that Fijian boy.*”
- Then, Mereani Raikadroka and another came to take him [Mr Radike] away, and he started to go with them. Bill was trying to stop Tuks and Leke. Then, “*I looked back saw that Fijian boy was lying down Leke and Tuks were kicking him and I went back and started kicking that Fijian boy on the ground.*” He did so as he was angry, “*heated up*”; as he thought the boy had been punching his friend Bill.
- He could not recall how many times he had punched the boy, as he was drunk. He kicked him on the ground “*about twice*” and “*...to his face, legs and chest*”. When the allegation was put that he kept on kicking [the deceased] on the face and body causing him bodily injuries, he replied: “*I did that.*”
- He was drunk and did not think about whether the boy could die. He knew to assault was contrary to the laws of Fiji. He did not mean to kill the boy.

- Subsequently Mereani Raikadroka took him away from the scene – Leke and Tuks also left when the police arrived.
- At a later stage of the interview, when asked how the deceased died, he replied: *”I think from our punches and kicks.”* He explained further: *“Myself, Leke, Tuks and Bill we all had punched [the deceased], and also myself, Leke and Tuks we had kicked [the deceased].”*
- After the postmortem examination had been completed, he was further questioned. It was put that he had assaulted the deceased causing his death. He responded: *“I assaulted him but didn’t really mean to kill him”*. He explained that by assault he meant hitting someone with punches and kicks. He said: *“I only punched and kicked [the deceased] but I didn’t mean to kill him.”*

[26] Mr Radike was formally charged by D/Sgt Tanu on 4 December 2012. There was no witness present. After the charge was put, Mr Radike responded: *“I admit to punching [the deceased] with my friends, Bill, Kele, Anare and some others which I don’t know. I gave [the deceased] a punch on his face and a punch to the left side of his ribs....I am sorry for what I have done because I was trying to save my friends...”*

(ii) Mr Mara

[27] Mr Mara was interviewed by Sgt Yagavito, witnessed by former Inspector Tauvoli, on 30 November 2012. The interview concluded on 3 December 2012, the delay being caused by waiting for the post mortem examination. Mr Mara told the interviewing officer that he had attended a barrel night with several others, including Mr Radike, where they had consumed *“plenty”* of alcohol – he said he was *“very drunk”*. Later, they all went to the Deep Sea Nightclub in Nadi to dance. Of significance during the interview, Mr Mara stated:

- He is known as Tuks.
- During the dance Ema approached and told him that Leke had been assaulted outside so Mr Mara informed Ian and Mr Radike, and they went to see. Mr Mara saw Leke fighting with a boy. Mr Radike then punched that boy and the

boy fell down. The boy stood up and Mr Mara tried to punch him once, but missed – he did so as he thought the boy had punched Leke. Mr Mara said he injured his hand when his fist landed on the road – when asked further about this he said he had injured his hand punching the boy.

- Subsequently, he said he threw four punches to the boy's face and mouth. When asked to explain the inconsistency, he said he had lied as he was frightened due to the boy dying.
- He said Mr Radike had thrown the first punch "...and we both punched him until he fell down. We kept on punching him whilst he was lying down...". The punches were aimed at the face, mouth and head. He knew they were punching him "for quite a few times". He knew the boy would be injured, but he did not mean for him to die.
- Mr Mara said he later ran away.

[28] Mr Mara was formally charged by D/Cpl Matarugu on 4 December 2012. In response to the charge after being cautioned, Mr Mara stated: "*I admit that I did punch [the deceased]. I did not intend to kill him.*"

[29] Although it is recorded that Sgt Doughty witnessed the procedure, when asked about that D/Cpl Matarugu agreed that was not correct – he had been briefed that the Sgt would be present as a witness, but the Sgt simply did not attend. He had included the Sgt's name as per his briefing, but pointed to the absence of the Sgt's signature on the record as evidence of his non-attendance. The document produced was a copy only, the original having been misplaced.

(iii) Mr Sevura

[30] Mr Sevura was interviewed by Cpl Nalevea on 29 November 2012. In brief, Mr Sevura stated that he had gone with friends, including Mr Radike and Mr Mara, to the army camp barrel night at Namaka, where they had consumed rum punch and beer. They later went to the Deep Sea nightclub in Nadi. He asked someone there for a cigarette, and he was punched. He fell down after being punched twice. He then got up and punched his

assailant twice to his chest. After that, he went away, being pulled aside by PW3 to stop the fighting. When asked what happened next, he replied: “*The others came running down with Vilimoni, Anare, Tukai and Dike.... To fight as well.*”

[31] The allegation was squarely put that he and others had assaulted the deceased and caused injuries to his head. Mr Sevura denied that and said he did not know anything. Mr Sevura agreed to stand in an identification parade. It was put to him, at a resumption of the interview, that two persons had identified him as being one of those who had punched the deceased. He responded that he did not know anything as he was heavily drunk.

[32] Mr Sevura was formally charged on 4 December 2012 by Inspector Lolo. It was put that he and others had assaulted and kicked the deceased, causing his death. He stated: “*I admitted to the offence put to me. I was drinking beer on that day with my friends. We had argument and we assaulted him. I only threw 2 punches. I seek forgiveness and I did not mean to kill him.*”

[33] There was no defence evidence.

**D. The relevant parts of Summing Up**

[34] We will address only the parts of the summing up that relate to the grounds of appeal advanced. There is no challenge to the remainder of the summing up.

(i) Joint Enterprise

[35] In explaining this legal concept to the assessors, the judge stated:

“42. *Joint enterprise is when an offence is committed not just by the person who actually does the act, but also by the person who assists him to commit the offence. Here all the accused persons have been jointly charged with the offence of murder.*

43. *When two or more persons get together and form a common intention to do something unlawful together (like assaulting the deceased) and in the course of carrying out that unlawful act, commit another offence which is a probable consequence of the unlawful purpose, then each of them who are part of the plan (no matter how big or small their role) is also guilty of the resulting offence, even*

*if he or she did not do the act which actually constitutes the offence. The word “plan” does not mean there has to be any formality about it. A plan to commit an offence may arise on the spur of the moment nothing needs to be said at all. It can also be inferred from the behaviour of the parties.*

44. *If you find that there was a joint enterprise between the three accused persons, then you decide if [the deceased’s] death was caused by any one of the accused and if so, then all three are guilty of either murder or manslaughter. It does not matter who’s [sic] punching, kicking or stepping killed [the deceased]. If one of them is responsible then they all are.”*

(ii) Recklessness

[36] When identifying the legal ingredients of the charge, the judge instructed the assessors that the prosecution had to prove beyond reasonable doubt that the appellants, *inter alia*:

- “(e) *were reckless as to causing the death of the deceased by their conduct. The accused persons are reckless with respect to causing the death of the deceased if:*
- (i) *They were aware of a substantial risk that death will occur due to their conduct; and*
  - (ii) *Having regard to the circumstances known to them, it was unjustifiable for them to take that risk.”*

[37] The judge went on:

- “19. *What you will have to consider with regard to this particular state of mind is whether the accused persons were aware of a substantial risk that death will occur due to their conduct and having regard to the circumstances known to them, it was unjustifiable to take that risk.*
27. *The prosecution is saying that the accused persons were not necessarily intending to kill the deceased but they say they were reckless in causing the death of the deceased. A person is reckless with respect to causing death if he is aware of a substantial risk that death will occur by his actions and having regard to the circumstances known to him it was unjustifiable to take that risk.*
28. *What you have to consider with regard to this particular state of mind is whether the accused persons did foresee or realise that death was a probable consequence or likely result of their conduct and yet they decided to go ahead and engage in the conduct regardless of that consequence.*
29. *The accused persons must foresee that death was a probable consequence or the likely result of their consequence and after realizing that, if they decided to go ahead and engage in that conduct regardless of the likelihood of death resulting, then they were reckless as to causing the death of the deceased. In order to*

*constitute the offence of murder by recklessness, actual awareness of the likelihood of death occurring must be proved by the prosecution beyond reasonable doubt.*

32. *An intoxicated person may still be capable of forming the necessary state of mind to commit an offence. You should still ask yourselves the question, whether you are sure that all the accused persons decided to go ahead with their conduct, having realized that death was a probable consequence, although they were drunk.”*

(iii) Other Issues

[38] Others relevant parts of the summing up relevant to Mr Mara’s appeal are now referred to:

- “16. *You will notice that the amended information has three accused mentioned, only accused one and accused three are present in court. The second accused Mr Anare Mara is not present in court. The law provides for an accused to be tried in his absence known as a trial in absentia. Although the second accused was not in court throughout the duration of the trial he is entitled to all the rights of an accused who is present in court that is a fair trial.*
17. *You are reminded not to take the absence of the second accused from this trial to his disadvantage or against him or his non-attendance negatively.*
50. *Although the second accused was absent from this trial still you should consider the above directions [relating to cautioned interviews and formal charging responses] when you are considering what weight you wish to give to the admissions contained in the caution interview and charge statement of this accused person.*
77. *[The evidence of Ms Batiluva was set out].*
- 80 – 85. *[The evidence of Sgt Yagavito was set out in detail, relating to the taking of Mr Mara’s interview]*
- 108 – 117. *[The evidence of D/Cpl Matarugu was set out, detailing what occurred at Mr Mara’s formal charging]*
152. *On 2<sup>nd</sup> May, 2013 the information was put to the second accused he had pleaded not guilty to the charge. When the information was read in court on the first day of the trial a not guilty pleas was entered for the accused in his absence.*
153. *At the end of the prosecution case, a case to answer was ruled which required the second accused to open his defence although he was not present in court the options that were made available to the other two accused were also made available to the second accused. The second accused was deemed to have exercised his right to remain silent.*
154. *All the accused persons take up the position that there was a fight between them and the deceased. The accused persons state that they had consumed alcohol and were drunk but that they were not reckless in causing the death of the deceased.*

158. *In respect of the second accused Anare Mara the prosecution says the fourth witness...saw the fight at the back of the Deep Sea Night Club she saw Tuks the second accused punching [the deceased] twice on the face. The second accused in his caution interview admits he is also known as Tuks.*
160. *All the accused persons have denied committing the offence as alleged. All the accused persons say they were not reckless with respect to causing the death of the accused. They were not aware that death would occur by the conduct since they were intoxicated at the time. They did not foresee or realise that death was a probable consequence or the likely result of their conduct.”*

**E. The relevant parts of the Judgment**

[39] After a brief traverse of the prosecution evidence, the trial judge recorded that:

- “13. *All the accused persons have denied committing the offence as alleged. They say they were not reckless with respect to causing the death of the deceased. They were not aware that death would occur by their conduct since they were intoxicated at the time. They did [not] foresee or realise that death was a probable consequence or the likely result of their conduct.*
14. *I accept the evidence of all the prosecution witnesses as truthful and reliable.*
18. *In any event the accused persons have not disputed that they were at the scene, had assaulted the deceased or their assault had caused the death of the deceased what they disputed is that they were not reckless in their conduct due to the influence of alcohol.*
19. *I do not accept that the accused persons were not reckless when they were assaulting the deceased because they were intoxicated. The accused persons knew that death was a probable consequence of their conduct and they decided to go ahead with the conduct, regardless of the consequence.*
20. *In the record of interview and charge statement of the first and second accused both the accused persons were able to remember details of what had happened and what they had done to the deceased on 29 November, 2012.*
24. *I am satisfied beyond reasonable doubt that on 29 November, 2012 all the accused persons had engaged in the conduct of punching, kicking and stomping the deceased on the face and head wearing their boots causing the death of the deceased.*
25. *I also accept that all the accused person were aware of the likelihood of death occurring by their conduct and yet they continued with their conduct regardless. In other words the accused persons were reckless with respect to causing the death of the deceased since they were aware of a substantial risk that death will occur due to their conduct and having regard to the circumstances known to them it was unjustifiable for them to take that risk.”*

**F. Discussion**

[40] Although there was much advanced about the circumstances in which the identification of each of the appellants was made, each appellant has confirmed the accuracy of their identification by their admissions of their presence and actions taken at the scene to the police. The criticisms of Mereani Raikadroka's evidence, in particular, are accordingly of no consequence, as the confessions establish that she was in fact an accurate witness of the events. Her credibility was bolstered by those confessions. Similarly, the criticism by Mr Mara of his identification by Mr Batiluva is undermined by his admissions of presence and involvement. We agree with the trial judge's findings on this.

(i) Other Issues

[41] It is convenient to consider the additional matters raised for Mr Mara first.

[42] Mr Mara contended that the evidence of Ms Batiluva was unsafe and unreliable, because she did not know Mr Mara's name but only knew him as Tuks. She was also said to be unsure in relation to how many punches he had thrown. Secondly, Mr Mara contended the trial was unfair to him; that the trial judge had not protected his fair trial rights. Thirdly, this Court was invited to consider Mr Mara's interview under caution, and in particular to note that following each break, Mr Mara made further admissions. Mr Mara's response when formally charged was also challenged on the basis that there was no second officer witnessing the process.

[43] The assessment of Ms Batiluva's credibility and reliability was a matter for the trial judge who saw and heard the witness. This point has no merit.

[44] As set out above in the passage quoted from the summing up, the trial judge was very much aware of Mr Mara's absence and the need to protect his position and his rights. We are satisfied that there is also no merit in this contention.

[45] Whether or not to accept the contents of Mr Mara’s cautioned interview is a matter of credibility, and the trial judge believed all the police officers involved. There is some basis for the contention that after each break during his interview under caution Mr Mara was more forthcoming – however there can be a number of reasons for that. Had Mr Mara wished to challenge this, he should not have absented himself from the trial. It is now too late to re-visit that. There is no merit in this ground.

[46] The absence of a witness at the formal charging process, due to a shortage of manpower, is unfortunate and undesirable. However, it is not a basis to rule the evidence either inadmissible or unreliable, especially given that the trial judge believed and accepted the evidence of the police witnesses. Unfortunately, despite best efforts, original documents are occasionally lost or misplaced. In such circumstances, there can be no objection to the best available evidence being proffered. We note also that the shortage of them proves, there was no witness for Mr Radike being charged; not after Mr Sevura was interviewed under caution as formally charged.

(ii) Joint Enterprise

[47] Given the evidence of the involvement of each of the appellants by the eye witnesses (Ms Naomi Raikadroka, Ms Mereani Raikadroka and Ms Emma Batiluva) and the admissions made by each of them, it is beyond doubt that all three appellants were involved in assaulting the deceased. The pathologist (Dr Mate) established that as a result of blunt force trauma, the deceased passed away that same evening. Accordingly, the trial judge’s task was to determine if the appellants, as a result of their actions, were criminally responsible for the death.

[48] It was contended that there was no direct evidence of joint enterprise. We accept those submissions.

[49] It was further submitted that there was insufficient reliable evidence from which a safe inference could be drawn that the appellants had acted together as part of a common agreement or plan. While there was criticism of the prosecution allegation in the closing

address that the appellants had “a common intention to assault the deceased to such an extent that he is never able to get up again”, the trial judge’s task was to evaluate the evidence, not the Crown’s theory of the case.

[50] There are five key aspects to the law relating to joint enterprise:

- The law holds responsible each person involved in a joint enterprise for the actions of others made in furtherance of a common plan or agreement to commit an offence;
- Each person in the group must be part of that shared plan or common purpose;
- The crime that was committed must have been within the contemplation of the participants;
- Presence alone is insufficient – there must be evidence against each of those involved of actual encouragement, assistance or participation in the commission of the offence. Such evidence may be inferred from all the established facts and circumstances surrounding the commission of the offence; and
- The law will not attribute to other persons involved in a joint enterprise all acts done outside of the agreed common goal.

[51] We consider the appellants’ criticisms of the summing up in relation to explaining the concept of joint enterprise to be misplaced.

[52] The trial judge recorded in the judgement that he directed himself in terms of the summing up – in other words, in a manner we consider wholly appropriate in relation to this aspect.

[53] However, despite the appropriate directions, we consider the judge erred in inferring from the established evidence and surrounding circumstances that there was a plan or a common purpose.

[54] There was considerable evidence of the large amount of alcohol the appellants had consumed prior to getting involved in the incident. It was dark, and there were many other people in the vicinity. There was undoubtedly tension, as well as confusion as to what was

going on. Further, it must be borne in mind that the appellants were still very young. Those factors needed to be taken into account when assessing their conduct in the circumstances as they then perceived them to be.

[55] There is clear evidence pointing to Mr Radike first confronting the deceased and inflicting violence towards him. There is also ample evidence showing that others joined in, including both Mr Mara and Mr Sevura. However, there is no evidence that their joining in was part of any plan formed between the three of them. To draw that inference is to ignore at least one other possible inference, namely that the conduct by Mr Mara and Mr Sevura was simply an instinctive, spur of the moment, decision on each of their parts individually, to respond to their friend being assaulted. It is trite that an adverse inference may only be drawn if there are no other exculpatory inferences available.

[56] We consider the trial judge erred in this regard. However, that is not necessarily fatal to the convictions.

[57] The consequence of this conclusion is that the actions of each appellant must be examined separately to determine their roles, and their criminal culpability, in relation to each.

(iii) Recklessness

[58] In Fiji, the definition of “recklessness” is as set out in section 21(2)(a) of the Crimes Act 2009, as below:

“21

[1] *A person is reckless with respect to a circumstance if –*

(a) *He or she is aware of a substantial risk that the circumstance exists or will exist; and*

(b) *Having regard to the circumstances known to him or her, it is unjustifiable to take the risk.*

(2) *A person is reckless as to a result if –*

(a) *he or she is aware of a substantial risk that the result will occur; and*

(b) *having regard to the circumstances known to him or her, it is unjustifiable to take that risk.*

(3) *The question whether taking a risk is unjustifiable is one of fact.*

(4) *If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy the fault element.*

(relevant parts underlined)

[59] Leave was granted in relation to the issue of “recklessness”. The main reasoning behind the decision to grant leave is that there are two possible differing interpretations of the legislated phrase “...the result will occur”, which conundrum emanates from the decisions in *State v Naivalurua*<sup>1</sup>, *Rawat v The State*<sup>2</sup> and *State v Mow*<sup>3</sup>.

[60] The issue devolves to whether the consequences of the alleged conduct (namely, the result) must be “possible” or “probable” to fit within the definition of being reckless. There is an added complication. Determination of a person’s recklessness necessarily involves assessment of a person’s subjective awareness of all the circumstances at the time of offending, but also requires consideration of whether a reasonable person would in those circumstances have regarded taking the risk as unjustifiable.

[61] The authority of *Whangarei District Council v Daisley*<sup>4</sup> usefully summarises the law as to recklessness in New Zealand as follows:

“[115] *It is necessary to define recklessness. In New Zealand law the term ordinarily means that the defendant took a risk in circumstances in which they knew there was a real possibility of harm and it was unreasonable, in the circumstances known to the defendant, to take that risk.*”

(our underlining)

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<sup>1</sup> *State v Naivalurua* [2022] FJCA 177

<sup>2</sup> *Rawat v The State* [2022] FJA 168

<sup>3</sup> *State v Mow* [2023] FJCA 36.

<sup>4</sup> *Whangarei District Council v Daisley* [2024] NZCA 161

- [62] This aspect was recently considered by the New Zealand Supreme Court in *Burke v The King*<sup>5</sup> where the majority considered that “probable consequence”, which is the statutory test laid down in section 66(2) of the Crimes Act 1961, should be interpreted as “a substantial or real risk” or something that “could well happen”. The entire Court agreed there was merit in jury directions emphasizing that the term “probable” should be regarded in contrast to merely “possible”.
- [63] We consider this view to be the correct position for Fiji. To interpret the phrase in question otherwise would lead to situations where all the possible results of certain actions would have to be considered when determining recklessness. A safer measure of criminal culpability surely follows when only the probable consequences of certain acts are taken into account.
- [64] In the instant case, the trial judge instructed the assessors, and subsequently himself, that what should be considered is whether the appellants were aware there was “a substantial risk” that death would occur, in accordance with section 21. He went on to discuss that this meant whether the appellants foresaw or realized that death was “a probable consequence or likely result”. We cannot fault this direction, so far as it goes.
- [65] However, the assessors were not instructed that “probable consequence” was to be considered in light of the circumstances as each appellant appreciated them to be at the time; and further then analysing, from the perspective of a reasonable person, whether to continue to assault (to take the risk) was unjustifiable or not. We consider this to be an error by omission, which is fatal to the convictions for murder.
- [66] Had the summing up directions included the further matters mentioned above, we are satisfied the trial judge would have arrived at a different conclusion and agreed with the majority of the assessors, and found the appellants guilty of manslaughter on the basis that each of the appellants must have appreciated that joining in the assault on the deceased

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<sup>5</sup> *Burke v The King* [2024] NZSC 37

would probably cause serious harm to the deceased, and further that to join in the assault was unjustifiable.

[67] It follows that we do not need to address the further point of law advanced by Mr Radike relating to the trial judge not cogently explaining his reasons for disagreeing with the majority of the assessors, nor the matters raised as to sentence.

**G. Decision**

[68] The convictions of murder and resulting sentences against all three appellants are quashed. Pursuant to section 24(2) of the Court of Appeal Act 1978, convictions for manslaughter pursuant to section 198 of the Penal Code are substituted.

[69] We consider the independent witnesses, as opposed to the appellants' admissions, establish that Mr Radike was one of several assailants, including both Mr Sevura and Mr Mara, who joined in on the assault on the deceased. Their evidence is that the deceased went to ground as a result of the attack, where he was further punched, kicked and had his head stomped on.

[70] We have no difficulty in accepting the partial admissions of each of the appellants. However, we consider each has attempted to minimize their involvement in the inconsistent explanations given in their interviews under caution and their responses to being charged. Their conduct would, on anyone's view, probably result in "serious harm" to the deceased. There can be no doubt that such conduct, in the circumstances as the appellants perceived them to be, would lead a reasonable person to conclude that for each of them to take the risk of involvement was reckless.

[71] The appellants are each sentenced to 9 years imprisonment, with a minimum period to serve of 8 years. That is in line with the authority of *Vakaruru v State*<sup>6</sup>, which sets the sentence start point at between 5 and 12 years imprisonment. This offending was unprovoked, and no doubt fueled by the consumption of alcohol. The deceased was set

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<sup>6</sup> *Vakaruru v State* [2018] FJCA 124

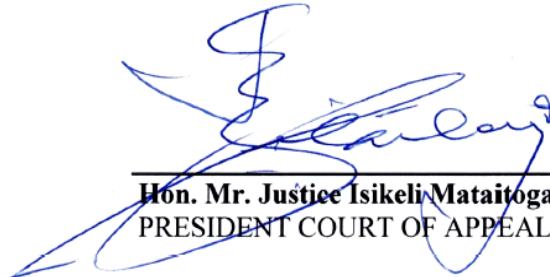
upon by 3 assailants, which is aggravating. In setting this sentence, the court has taken into account both that the appellants were young men at the time and that they have no previous convictions. Nevertheless, the taking of a young man's life is a very serious matter, with lasting consequences to the deceased's family which merits a condign punishment.

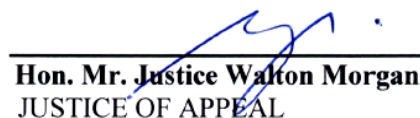
[72] Although the acts of each appellant were said to be different, their combined actions led to the death. The significant fact is that each has contributed to the death, and it is not possible to accurately isolate out and apportion what each appellant did; and they are accordingly treated as equally responsible and sentenced on the same basis.

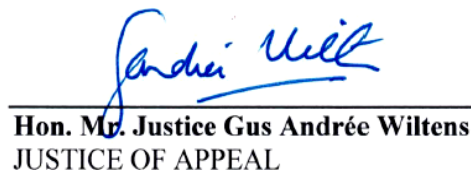
**Orders of the Court:**

1. The appeal is dismissed.
2. The appellants are convicted of manslaughter.
3. The appellants are sentenced to 9 years imprisonment with a non-parole period of 8 years.



  
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**Hon. Mr. Justice Isikeli Maitoga**  
PRESIDENT COURT OF APPEAL

  
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**Hon. Mr. Justice Walton Morgan**  
JUSTICE OF APPEAL

  
\_\_\_\_\_  
**Hon. Mr. Justice Gus Andrée Wiltens**  
JUSTICE OF APPEAL

**Solicitors:**

Waqanika Law for the 1<sup>st</sup> Appellant  
Legal Aid Commission for the 2<sup>nd</sup> Appellant  
Legal Aid Commission for the 3<sup>rd</sup> Appellant  
Office of the Director of Public Prosecution for the Respondent