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

CRIMINAL APPEAL NO. AAU 007 OF 2023
[Suva High Court: HAC 27 of 2019]

BETWEEN : **LEONE NAISAKE**

Appellant

AND : **THE STATE**

Respondent

Coram : Qetaki, RJA

Counsel : Appellant in Person

Mr S. Seruvatu for the Respondent

Date of Hearing : 27 February, 2025

Date of Ruling : 14 March 2025

RULING

Background

[1] The Appellant, 2nd Accused during the trial, was charged with another on a single count of Murder contrary to section 237 of the Crimes Act 2009. Count 2 of the Information reads:

Count 2

Murder: Contrary to section 237 of the Crimes Act 2009.

Apisai Lomani Junior and Leone Naisake on the 26th day of December, 20018 at Wailoaloa Farm, Nakasaleka, Kadavu in the Southern Division murdered **Filipe Lomani Junior.**

[2] In a judgment dated 2nd November 2022 the Appellant was convicted as charged. In a sentence delivered on 16th November 2022, he was sentenced to Life Imprisonment with a minimum term of 18 years.

[3] The Appellant personally filed a timely appeal against conviction dated 13 December 2022. Subsequently on 29th October 2024 the appellant filed Amended Grounds of Conviction Appeal and related submissions.

[4] On 5th December 2024, the Appellant filed his written submissions in support for an application for enlargement of time against sentence, and 2 grounds of appeal against sentence. Later in January 2025 the Appellant submitted an Additional Grounds of appeal against conviction.

Brief Facts

[5] The following brief facts is adopted from the Respondent's version in its written submissions filed on 26 February 2025:

"On 26 December at Vacalea Village, Kadavu, the two appellants and a few others carried on a drinking party which started after lunch on Christmas day. Alcohol was consumed and the party lasted throughout the night up to sometime after midday on 26 December 2018 when the group, led by the co-appellant, left for Wailoaloa farm. At the top of the hill overlooking the farm, the men were divided into two groups. Descending on both sides of the deceased's farm house. Though the co-appellant had said for no one to assault the deceased, things changed when the group descended on the farm at Wailoaloa.

The deceased, upon seeing the men approaching, ran from his farm house. The Appellant gave chase and immediately dealt heavy, forceful blows to the deceased's head, face and chest, swearing at the deceased as he was doing so. The group led by the co-appellant heard the deceased scream. When co-appellant arrived where the

appellant was assaulting the deceased, he too punched the deceased on the head and chest and hit the deceased's body with the flat surface of the cane knife he was holding. The appellant stomped and kicked the deceased on the chest and abdominal area.

The deceased was left at the farm injured and bleeding and the group returned to the village. It was the last time anyone would see the deceased alive.

A post-mortem examination revealed the cause of death as being severe bleeding within and underneath the second covering of the head, or brain injury due to severe blunt force trauma on the head. Bleeding and bruising between the last layers of the skin over the skull indicated severe force applied to the head."

Agreed Facts For Accused 2 (Appellant)

[6] At the trial the following facts are agreed between the 2nd Accused (now Appellant) and the Prosecution:

1. The 2nd Accused is 26 years old, farmer of Vacalea Village, Kadavu.
2. The deceased: Filipe Lomani Junior, originally of Rewa, is 36 years old, unemployed of Vacalea Village.
3. Seremaia Kaci is a farmer from Vacalea Village, Kadavu. In December 2018, he was farming at his farm in Vacalea.
4. Seremaia Kaci's farm is next to the farm where the deceased was farming.
5. On 25 December 2018 around midday, the 1st and 2nd Accused persons drank liquor under the mango tree beside the AG Church at Vacalea Village with the following:

   (a) Ilai Cila Tubuna Becirua
   (b) Timoci Nauagunu
   (c) Aminiasi Seru
   (d) Ilaisa Tadulala
   (e) Leone (from Rewa)
   (f) A few others

6. On 27 December 2018, the 2nd Accused and others took the deceased's body to the Vunisea Hospital.
7. On 27 December 2018, staff nurse Resina Qio of Vunisea Hospital called the Vunisea Police Station and reported the death of the deceased.
8. Constable Timoci and Constable Ovini came to Vunisea Hospital and unwrapped the body which was wrapped in a grey coloured tarpaulin which was secured with ropes and bedsheet. The bedsheet was stained with blood around the head area.
9. Injuries noted by Dr. Ravaele Inikasio. **(See #6, Agreed Facts for Accused 1)**
10. Deceased identified by Pita and Edward Loloma as their brother, Filipe Loloma Junior.
11. Postmortem conducted by Dr. Kalougivaki on 29/12/18.
12. Cause of death as found by Dr. Kalougivaki**. (See #10, Agreed Fact for Accused 1)**
13. Documents agreed to be tendered by consent. **(See #12, Agreed Facts for Accused 1), except for the birth certificate of the deceased).**

<u>Agreed Facts for Accused 1</u>

[7] The Agreed Facts for Accused 1 are set out in full in paragraph 6 of the judgment, and Agreed Facts #s 6, 10 and 12 are:

#6. Dr. Ravaele Inikasio noted the following injuries on the deceased:

a. Bruised and red spots on the forehead
b. Bilat eye swelling o/c bruises
c. Laceration on the left upper eyelid
d. Bruises over the facial area-back, left upper limb, abdomen and chest, left leg
e. Laceration on the left leg
f. Swollen lips
g. Facial area- blood stained offensive odour emanating from the body

#10. The cause of death was

a. Extensive sub-arachnoid hemorrhage and traumatic brain injury;
b. Antecedent causes were severe traumatic head injury and multiple traumatic injury.

#12. Agreed documents tendered by consent, with contents undisputed:

a. Post mortem report of Filipe Loloma Junior (deceased) dated 29/12/18
b. Toxicology analysis report of the deceased
c. Medical cause of death certificate of the deceased
d. Fiji Police Forensic Analysis Report of Cannabis dated 04/01/19
e. Photographic booklet of the alleged murder scene at Wailoaloa Farm dated 27/12/18
f. Birth Certificate of the deceased
g. Rough and fair sketch plans of alleged murder scene at Wailoaloa Farm, Vacalea, Kadavu.

Grounds of Appeal

[8] The Amended Grounds of Appeal against conviction filed on 29 October 2024 are:

Ground 1: *That the learned Judge had erred in law in considering the State Prosecution Agreed facts that was also agreed by the Appellant and had failed to make any independent assessment of paragraphs 6, 10 and 12 of the Agreed facts of Accused 1 by:*

(i) Comparing all the witnesses' evidence [PW2 and PW3] of assault and make a care proper analysis of injuries sustained if it was possible that such injuries could only be caused by the Appellant's alone; and

(ii) Whether PW2 and PW3's denial of taking part to the assault can be supported by their inconsistent evidence if PW2's evidence are to be considered as tainted by an improper motive.

Ground 2: *That the learned trial Judge had erred in law in convicting the Appellant on mutual corroboration of PW2 and PW3 without carefully warn herself of the dangers of considering the circumstances of such a witness such as PW2 and PW3*

who was also arrested and threatened by Police and the possibility that would occur to a suspect held in Police custody.

Ground 3: *That the learned trial Judge had erred in law and in fact in failing to carefully analyse the absence of some independent source of evidence such as Talatala (Pastor) (PW4) and the handyman whom the Police had failed to obtain their evidence to support Ovini Burekalou's evidence about the Appellant's oral confession.*

Ground 4: *That the learned trial Judge had erred in law in failing to make a proper analysis of the piece of evidence given by the staff nurse namely Resina Qio regarding the inconsistent and omission of her evidence about the Appellant claimed oral confession of assaulting the deceased to death; and W/CPL Moli's evidence.*

Ground 5 (Additional Ground dated 21 January 2025): *That the learned trial Judge erred in law and in facts when she failed to consider and assess the question on the Appellant's intoxication evidence required to prove beyond reasonable doubt the fault elements of the murder charge. Thus, the failure has caused a substantial miscarriage of justice.*

[9] The grounds of appeal against sentence filed on 5th December 2024 out of time, are:

Ground 1: *That the time spent in custody (remand period) was not considered and deducted from the minimum term which is an error in terms of section 24 of the Sentencing and Penalties Act 2009:* ***Tevita Vuniwai v State*** *AAU 176 of 2019 at paragraph 119.*

Ground 2: *That the deterrence and possibility of rehabilitation was not considered by the trial Judge in the sentencing process thus section 4(1) of the Sentencing and Penalties Act 2009 was not complied causing a serious error in the sentencing process of this matter:* ***Darshani v State*** *AAU 64 of 2014 at paragraph 15.*

Test For Leave to Appeal

[10] The test applicable for granting leave to appeal to the full court may be stated as follows:

> *"To succeed in an application for leave to appeal, all that is required of the Appellant is, to demonstrate arguable grounds of appeal":* **Chand v State**, AAU0035 of 2007;19 September 2008 [2008] FJCA 53.

[11] Other formulation of the test are: "sufficiently arguable ground" in **Bailey v Director of Public Prosecutions** [1988] HCA 19; (1988) 78 ALR 116; (1988) 62 ALJR 319; (1988) 34 A Crim R 154 (3 may 1988) ; "having a real prospect of success" in **R v Miller** [2002] QCA 56 (1 March 2002) , and "No prospect of success" and "reasonable prospect of success" are also applicable in other cases.

[12] **Appellant's Case – Conviction Appeal**

Ground 1: The Appellant contends that:

1. The Agreed Facts of Accused 1 (#s 6, 10 and 12 - paragraph [7] above) at paragraphs 6 and 7 of the judgment, especially Dr Ravaele Inikasio's notes on the injuries sustained by the deceased, ought to be proven beyond reasonable doubt by formal evidence, for the reasons that: the medical evidence was proposed by the prosecution and to which the Appellants and the Prosecutions had agreed. The Agreed Facts should not be considered by the trial judge to support the Appellant's conviction.
2. The Agreed facts is "fake" as it does not have any document to prove it. Yet the Appellants who were laymen were driven to admit them.
3. The Agreed Facts should not be used or considered in order to convict the Appellant.
4. The learned trial Judge failed to give any indication as to how she would treat the Agreed Facts earlier agreed by the Prosecution and the Appellants before the commencement of the trial, and later there was no proof.
5. The learned trial Judge ought to be concerned only with evidence adduced at the trial.

6. In the context of Ground 1(a), in considering PW12's evidence (Dr. Kalougivaki) on the injuries sustained and the cause of death etc, the learned High Court Judge should also examine the evidence of PW2, Timoci Nauagunu, regarding the amount of liquor consumed by the Appellant, considering the hours and amount of drinking, the status and condition of the Appellant, his state of drunkenness and bodily strength etc.
7. Could PW2 and PW3's denial of taking part in the assault (paragraph 14 of judgment) be supported? Could PW2's evidence be regarded as tainted by improper motive?
8. That the evidence of PW2 and PW3 are tainted by improper motives. The learned trial Judge had turned a blind eye to the essential nature of PW2 and PW3's evidences and the circumstances of how they both ended up at the Police Station and how their statement was obtained by Police.
9. That PW2 and PW3's evidences cannot support each other in considering the circumstances of how their evidence was obtained. They gave their statement whilst kept at then Police Station in Police custody, and there were numerous factors that exist at the material time where the lack of reliability is heightened by those factors. For example, PW2 was threatened by Police to give a statement against Accused 1 and 2 or they would pin the murder charge on him, and he was also arrested as a suspect. PW3 lied to the Police initially, later his statement was corrected. He was also taken into custody by Police for suspicion due to his inconsistent statements.
10. The Appellant submits that the incriminating evidence of PW2 and PW3 was tainted by an improper motive and was in that general class of witness about whom a warning should be given, even the trial Judge should warn herself.
11. Several authorities were cited in support of the Appellant's submissions, some of which will be considered and commented upon in the Analysis to follow.

<u>Ground 2:</u> It is the Appellant's submission that the conviction cannot stand due to the doctrine of mutual corroboration at common law. The common law originally held that it was not possible for one witness whose testimony requires corroboration, to be

corroborated by another witness whose testimony also required corroboration and vice versa.

Ground 3: That there was a material contradiction in PW5's evidence. Ovini Burekalou's evidence is purely hearsay evidence and should not be considered as none of the persons he mentioned the Appellant was relaying a story of his claim to, were called to prove his claim. Bokini's (PW5) evidence should not be considered to convict the Appellant.

Ground 4: The learned trial judge did not address some material contradiction, inconsistencies and omission on PW2, PW3, PW5 and PW8's evidences. The trial Judge did not evaluate and critically analyse the evidences, as such, the findings of the trial Judge on facts and credibility require and calls for the appeal Court to intervene. However, no illustrations/examples were provided to support the argument.

Ground 5: The Appellant submits that, the learned trial Judge should have directed her mind on the question of intoxication because it was an Admitted Fact #5 and was also part of evidence in chief of PW2 and PW3 - see paragraph 10) of judgment. It is submitted that the learned trial Judge failed to analyse the question of intoxication in the judgement when discussing the fault element of the offence/charge of murder. The question is whether the Appellant's state of drunkenness is sufficient in the context of knowledge of the substantial risk to cause death may occur - section 32(1) of Crimes Act 2009.

[13] **Respondents Case**

Ground 1: The Respondent submits the following:

1. Section 135(1) of Criminal Procedure Act applies. It states:

   "135(1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or any element of an offence, and such an admission will constitute sufficient proof of that fact or element."

2. The Appellant was represented by a Senior Counsel from the private bar, and at no point did counsel for the Appellant made issue of the admitted facts or raised issue about the Doctor Ravaele's evidence.

3. Paragraph 31 of the Court's judgment, the learned Judge stated:

   "Dr Ravaele Kelekele, the Senior Medical Officer at the Vunisea Hospital on 27 December 2018 viewed the body of the Deceased with the Police Officers at the motury.The Prosecution did not have a copy of this officer medical report and he was not able to give evidence of the injuries. The injuries he noted form part of the facts agreed by the prosecution and both accused persons."

4. The injuries sustained by the deceased were already an admitted facts-signed by the accused and his counsel which is sufficient proof of the fact that the deceased had injuries at the material time.

5. The accounts of PW2 and PW3 were consistent in that they saw the Appellants assaulting the deceased, in fact PW2 (Timoci Nauagunu) gave evidence that he had tried to stop the Appellant from inflicting heavy blows on the deceased, paragraph 12:

   "The 2nd Accused ran after Filipe, apprehended him and started punching him. ***He tried to stop the 2nd Accused but the 2nd Accused pushed him back.*** *The 2nd Accused was angry and swearing at Filipe. Tubuna also tried to stop the 2nd Accused but was also pushed back.* ***The second Accused continue punching Filipe all over his face and chest. The punches landed on Filipe's nose and eyes. He saw ten punches thrown and they were heavy, forceful blows.***

6. The learned trial Judge dealt with the sworn evidence of PW2 and PW3 in paragraphs 63 to 75 of the Judgment. They were direct witnesses to the murder. The Court had considered their sworn evidence and the veracity of the defence cross-examination and found them credible as witnesses.

7. The Appellate Courts have always agreed with the observations in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) in which this Court stated:

   "It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess the credibility and weight and we should not lightly interfere. There

was undoubtedly evidence before the Court that, if accepted, would support such verdicts. We are not able to usurp the functions of the lower Court and substitute our own opinion."

Ground 1 has no reasonable prospects of success.

Ground 2: This ground appears to be a repetition of Ground 1. The issues relevant to PW2 and PW3s evidence has been properly canvassed in Ground 1 and in the Judgment at paragraphs 63 to 75.

Ground 3: It is submitted by the Respondent that PC Bokini's account is that the Appellant had stated he had been in a fight with the deceased resulting in his death, which is corroborated by first responder Resina Qio when the deceased's body was brought to the hospital by the appellant. At paragraphs 34 and 35 of the Judgment, it was stated:

"34. Resina Qio was the staff nurse at Vunisea Hospital on 27 December 2018 when the body of the deceased was brought in by the chaplain and another male. The chaplain who drove the vehicle bringing the body to the hospital told her there was a deceased body on board. She asked the person standing with the driver what happened and how the person died, ***He replied there had been a fight between them and he beat the deceased until he died. He said he was from Naitasiri. She identified the 2nd Accused in Court as the said person.***

35. In cross- examination, staff nurse Resina agreed her statement given to the Police on 28 December 2018 did not say that the 2nd Accused had told her he beat the deceased until he died. ***The statement she had given was that the 2nd Accused had said they had been involved in a drinking party and he had beaten the deceased to death."***

[14] It is clear the Accused had mentioned to independent people an account of how the deceased met his death. Isaia Tuinuku Ogoogo's sworn testimony was that he had taken the appellant who had accompanied the deceased's body to the hospital.

[15] This ground has no reasonable prospect of success.

[16] **Ground 4:** The Respondent submits that a proper study of the learned trial Judges judgment, reveal otherwise. That is, that the trial Judge had considered the inconsistencies of Resina Qio's evidence and her out of Court statement and had made proper evaluation accepting the sworn witness account and that of Police Officer WPC Moli. The learned trial Judge, at paragraphs 76 and 77 of the Judgment stated:

> *"76. Resina Qio stated when 2nd Accused and the chaplain brought in the body of the deceased, she had asked the 2nd Accused how the deceased had died and he replied that they had fought and he beat the deceased until he died. She was cross-examined on why this piece of information was not in her statement to the Police and she replied that she had told the Police. Sgt. Moli testified that Resina Qio had told her the same thing. She had not given it in her statement thinking Resina Qio would give it in hers.*
>
> *77. A statement given to the Police or made out of Court is not evidence. The Court relies on evidence given on oath in Court. Any inconsistencies between an earlier out of Court statement and the evidence on oath goes to the weight the Court can give to the evidence.* ***I believe Resina Qio's evidence. I believe Sgt. Moli's account that she did not include this piece of information in her statement thinking Resina Qio would include it in hers. Resina Qio's evidence corroborates Timoci's evidence of the 2nd Accused assaulting the deceased."***

[17] Respondent submits that this ground has no prospect of success.

[18] **Ground 5 (Additional Ground):** The Respondent submits that the Appellant's case was that they did not cause the death of the deceased. The Appellant was represented at the trial by a Senior Counsel from the private Bar. The defence chose to remain silent. There was no evidence that bore clear narrative on the issue of intoxication. The defence had not raised a defence of Intoxication during the trial. At the trial, there was no clear narrative by the defence that intoxication caused the appellant to react the way he did. The Respondent submits that the prosecution case demonstrated, in the absence of a clear narrative on the issue of intoxication, that the Appellant had not been affected by

intoxication to cause his lapse of Judgment in recklessly inflicting heavy blows on the deceased that substantially contributed to his death. This ground has no reasonable prospect of success.

Sentence Appeal - Enlargement of Time To Appeal Against Sentence

[19] In **Kumar v State; Sinu v The State** [2012] FJSC 17 Criminal Appeal No. CAV0001/09 (21 August 2012) the Supreme Court stated the 5 factors to be taken into consideration for an application to appeal out of time:

(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) Whether there has been substantial delay; nonetheless is there a ground that will probably succeed;

(v) It time is enlarged, will the Respondent be unfairly prejudiced.

[20] The Appellant contends he was not well versed with the appeal process, however, he had filed a timely conviction appeal, thus the Appellant's reasoning for the delay may be viewed as dishonest and misleading. The delay is quite substantial as it is over 2 years. Byrne J, in **Miller v The State** AAU0076/07 stated:

> *"…that the Courts have said time and again that the rules of time limits must be obeyed, otherwise the lists of the Courts would be in a state of chaos. The law expects litigants and would-be appellants to exercise their rights promptly and certainly, as far as notices of appeal are concerned within the time prescribed by the relevant legislation."*

[21] The Appellant submits that his remand period of 9 months was not considered by the sentencing Court. The Respondent submits that considering the facts of the case, a feature that is present is the extremely high range of the category of the offence, taking account of the manner the Appellant and another, with brutality, caused the death of the deceased. However, in the end the ultimate sentence fell in the "High" range. The Respondent

submits the Appellant may have merit on this ground of appeal given the observation in **Vuniwai v State** [2024] FJCA 100; AAU176.2019 (30 May 2024).

Analysis

[22] In analysing the judgment and I bear in mind nature of the applications before me, the facts of this case, the legal principles applicable to the consideration of whether or not to grant leave to appeal against conviction , and enlargement of time against sentence, the relevant legal authorities , and the respective Cases/Submissions of the Appellant and the Respondent.

[23] **Ground 1:** The Appellant submits that the learned trial Judge erred in failing to conduct an independent assessment of paragraphs 6,10,and 12 of the Agreed Facts of Accused 1 by comparing all the witnesses evidence (PW2 and PW3) of assault and make a proper analysis of injuries sustained if it was possible such injuries could only be caused by the Appellants alone ; and whether PW2 and P3W's denial of taking part to the assault could be supported by their inconsistent evidence if PW2's evidence are to be considered as tainted by an improper motive.

[24] Section 135 of the Criminal Procedure Act 2009 states:

> *"135 (1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or any element of an offence, and such an admission will constitute sufficient proof of the fact or element.*
>
> *(2) Every admission made under this section must be in writing and signed by the person making the admission, or by his or her lawyer, and-*
>
> *(a) by the prosecutor; and*
>
> *(b) by the Judge or magistrate.*
>
> *(3) Nothing in subsection (2) prevents a court from relying upon any admission made by any party during the course of a proceeding or trial.*

[25] Section 135 (1) makes it clear that the admission of admitted facts or any element of an offence in criminal proceedings constitute sufficient proof of the fact or element. Admitted facts or any element of an offence are made in writing and signed by the person

making the admission by his or her lawyer, and by the prosecutor; and by the Judge or Magistrate presiding (section135(2). Further, the Court cannot be prevented from relying upon any admission made by any party during the course of any proceeding or trial-(section 135(3).

[26] In **Mohammed Zahid Khan v State** [2020] AAU 4/17 (apf HAC 21/13L) Ruling 3 June 2020 at [27] and [28] per Prematilaka, who refused leave to appeal against conviction. The brief notes of the case states: *"After accepting a medical report as an agreed fact. Q was not required to call the doctor who examined V to give evidence. If the appellant wanted to elicit more from the doctor, he could have called him or refrained from agreeing to treat the medical report as an agreed fact, thus judge's analysis of absence of evidence of vaginal trauma or physical signs of sexual penetration and injury on V's body cannot be criticised given V's evidence she did not offer physical resistance to penetration. Without the benefit of the medical report and V's evidence, trial judge's omission to address assessors on the medical report which stated the findings of clinical examination are not consistent with the history given by V cannot result in a miscarriage of justice."*

[27] The Appellant appear to suggest that the evidence of PW2 and PW3 are *'tainted by improper motives* and their evidences against the Appellant ought to be disregarded or given less weight. However, as will be apparent in this analysis, the learned trial Judge had carefully assessed , evaluated, and weighed and critically analysed PW2's and PW3's evidences , and the totality of the evidence which included the evidences of PW5 and PW 8. The learned trial Judge accepted their evidences as truthful. Ground 1 is not arguable.

[28] **Ground 2:** The issues raised here are the same as in Ground 1, focussing on the evidence of PW2 and PW3, and their relationship, alleged by the Appellant to be that of '*accomplices'* which notion was dispelled through critical analysis of their evidence by the Court. Paragraphs 63 to 75 of the judgement are relevant. Paragraphs 73 to 75 only of the portion of that Judgment are reproduced below:

> *"73. On the evidence before the Court, I do not consider the witness Timoci Nauagunu and Aminiasi Seru are accomplices.*

74. *I have also considered Timoci Nauagunu's evidence that the Police had told him that he needed to give a statement in relation to the accused persons otherwise they would pin the murder charge on him and he would not see his family again. He denied being told to blame the accused persons or he would be blamed. Being told to give a statement in relation to the accused persons is not the same thing as to blame them of the alleged offence. Notwithstanding, I treat with some caution his evidence.*

75. *Having done so, I found him to be a reliable and truthful witness. I believe his evidence that the 2nd Accused had punched the deceased numerous times on the face and chest, and stomped and kicked the deceased's chest. I believe his evidence that when 1st Accused arrived at the scene, he too punched the deceased on the head and chest, and hit his chest with the flat side of the cane knife."*

[29] Further, at paragraphs 78 and 79 of the Judgment, the learned trial judge stated:

"78. I have considered the evidence of Aminiasi Seru. In his evidence, he apologized for giving incorrect evidence in Court by saying that he had been sent by the 1st Accused to get the deceased to the farmhouse, and also for the inconsistency between his Police statement and his evidence on oath. The inconsistencies in my opinion are on peripheral matters and do not shake the basis of the prosecution case. He said before the groups descended on the farm, the 1st Accused had told them not to do anything to Filipe. He gave evidence exonerating the 1st Accused from a plan to assault the deceased, and also evidence that the 2nd Accused and 1st Accused had punched the ach gave evidence of h on the head and on the chest, His evidence of the assault was consistent and unshaken.

79. *Similarly, any inconsistencies between the evidence of Timoci and Aminiasi do not in my opinion shake the basis of the prosecution case. Each gave evidence of what they saw and as they remember the events that happened. They were in different groups as they descended and so would have seen events from different places and angles."*

[30] Ground 2 is not arguable. It has no merit.

[31] **Ground 3:** Having considered the submissions by the parties, and looking closely at paragraphs 34 and 35 of the Judgment (see paragraph [13] Ground 3 above) and the evidences, including the Admitted/Agreed facts, I agree with the Respondent's submissions. PC Bokini's account that the Appellant had stated he had been in a fight with the deceased resulting in his death, was corroborated by the evidence of staff nurse Resina Qio at the time the deceased's body was brought to Vunisea Hospital. The Appellant had mentioned to independent people an account of how the deceased met his death. The ground is not arguable. There is no prospect of it succeeding on appeal.

[32] **Ground 4:** The Appellant complains that the learned trial judge did not address the contradictions, inconsistencies and omissions in PW2, PW3, PW5 and PW8's evidence. The Appellant had not provided any or sufficient reason to support and justify the allegations advance under this ground. The appellant has been vague on the "*contradictions, inconsistencies and omissions* "referred to, from the judgment. A proper study and consideration of the Judgment reveals the opposite, as the learned trial Judge had, as seen in discussions on the preceding grounds, properly evaluated and critically analysed the evidences before the Court in arriving at the decisions .Paragraphs 76 and 77 of the Judgment (see paragraph [16] , Ground 4, above) ,is another illustration, which is also relevant to this ground, where the learned trial Judge had considered the inconsistencies of Resina Qio's evidence and her out of Court statement. This ground fails. It is not arguable.

[33] **Ground 5 (Additional ground):** On the Appellant's contention that the learned trial Judge should have directed her mind on the question of intoxication, I agree with the Respondent's submissions The Appellant and his co-Accused did not pursue the defence of intoxication at the trial. Their case /defence was, that they did not cause the death of the deceased. Section 32(1) of the Crimes Act 2009 applies, it states:

> *"32(1) If any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether the knowledge or belief existed.*

Ground 5 fails, it is not arguable.

Enlargement of time

[34] On the application for enlargement of time to appeal sentence, having considered the test along with the facts and circumstances of this case, the reasons for the delay is not acceptable nor convincing. One need to consider also the guideline in **Vuniwai v State** (supra).

[35] The crime committed is categorised as "Extremely High", and fits into *"6. A murder committed with extreme brutality, cruelty, depravity or callousness or cold-blooded execution"* The starting point is 25 years imprisonment and the minimum term range is 20-30 years. However, the Appellant's sentence for Murder is Life Imprisonment, with a minimum term of 18 years, which is below the minimum for "Extremely High" category. The sentence ground is not arguable. It has no merit.

Conclusion

[36] In consideration of the foregoing, the application for leave to appeal against conviction is not allowed. The application for enlargement of time to seek leave to appeal conviction is likewise not granted.

Order Of Court

1. *Application for leave to appeal against conviction is refused.*
2. *Application for Enlargement of time to appeal against sentence is refused.*

Hon. Justice Alipate Qetaki

RESIDENT JUSTICE OF APPEAL