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

CRIMINAL APPEAL NO. AAU 019 OF 2023
[Suva High Court: HAC 185 of 2020]

BETWEEN : **1. SEVANAIA NAROGI**
2. INOKE NAGATA
Appellants

AND : **THE STATE**
Respondent

Coram : Qetaki, RJA

Counsel : Ms L Manulevu; Ms L Ratidara for the 1st Appellant
Mr J Cakau for the 2nd Appellant
Ms L Latu for the Respondent

Date of Hearing : 23 April, 2025

Date of Ruling : 25 April, 2025

RULING

Background

[1] The Appellant and two others were charged on the amended information as follows:

Count 1

Statement of offence

Act with intent to cause grievous harm: Contrary to section 255 (a) of the Crimes Act 2009.

Particulars of offence

Sevanaia Narogi on the 14th day of April 2020, at Naqia, in the Easter Division, grievous harm to Inoke Lagicere, with intent to cause grievous harm to Inoke Lagicere, unlawfully caused grievous harm to Inoke Lagicere with a cane knife.

Count 2

Statement of offence

Act with intent to cause grievous harm: Contrary to section 255(a) of the Crimes Act 2009.

Particulars of offence

Sevanaia Narogi, Kameli Tukana, Mafoa Korosaya and **Inoke Nagata** on the 14th day of April 2020, at Naqia, in the Eastern Division, with intent to cause grievous harm to Inoke Lagicere, unlawfully cause grievous harm to Inoke Lagicere by throwing Inoke Lagicere over the Naqia bridge.

Count 3

Statement of Offence

Assault causing actual bodily harm: Contrary to section 275 of the Crimes Act 2009.

Particulars of offence

Sevanaia Narogi, Kameli Tukana, Mafoa Korosaya and **Inoke Nagata** on 14th day of April 2020 at Naqia, Eastern Division, assaulted Inoke Lagicere by kicking and punching him thereby causing him actual bodily harm.

Count 4

Statement of offence

Common Assault: Contrary to section 274(1) of the Crimes Act 2009.

Particulars of offence

Sevanaia Narogi on the 14th day of April 2020, at Naqia, in the Eastern Division, unlawfully assaulted Inoke Lagicere by slapping him.

[2] On 5th September 2022, the 1st and 2nd Appellants were convicted after a trial at the High Court in Suva of the following offences:

Count 1: Act with intent to cause grievous harm – 1st Appellant only.

Count 2: Common assault- 1st Appellant only. Prosecution did not prove beyond reasonable doubt that Accuse committed *an Act With Intent to Cause Grievous Harm.*

Count 3: Common assault- both Appellants and 2 others. Prosecution did not prove beyond reasonable doubt that Accused persons committed *Assault Casing Actual Bodily Harm.*

Count 4: Common Assault 1st Appellant only

[3] The Appellants were both sentenced on 13th December 2022 with the following terms: The 1st Appellant was sentenced to 2 years 11 months and 1 week imprisonment with a non-parole period of 2 years. The remaining 11 months and 1 week is to be suspended for 3 years. And on Count 2, 3 and 4 he was sentenced to Aggregate sentence of 8 months imprisonment to be served concurrent to Count 1. The 2nd Appellant was found guilty of Count 3, he was sentenced to 7 months, 1 week imprisonment.

[4] Both the Appellants lodged timely appeals against conviction on differing grounds. This Ruling addresses the grounds of appeal filed by each of the Appellant.

Facts

[5] The facts as contained in paragraphs [2] to [6] of the sentencing remarks are as follows:

> 2. *The four of you were part of a group of Police officers from the Eastern Division Taskforce Team (the EDTT) dispatched from Nausori Police Station to Naqia Village, Wainibuka, for a drug raid on 14 April 2020. The target of the said raid were two persons from Naqia village. From Naqia, you travelled to the Ba Police Station to interrogate a suspect. You returned to Naqia village where marijuana plants were uprooted from one of the suspect's farm and you arrested him. A person named Samu had run away from the Police earlier.*

3. *While the other officers were having dinner at Nakulukulu Settlement in Naqia, you, Sevanaia Narogi, were on your mobile phone on the Naqia bridge. You were sitting on the bridge when the victim returned from his farm. He was holding a cane knife in his hand. You approached him and, grabbed hold of the handle of the knife, asked the victim if he was the person named Samu who had run away earlier from the Police.*

4. *Despite the victim's denial that he was not Samu, you suddenly pulled the knife from the victim's hand, slashing through three of his fingers, completely severing the tendons of two. I found that in pulling the knife from the victim while he was holding onto it, Accused 1 would have been aware that serious injury would result to the victim's hand.*

5. *The three medical doctors who gave evidence at the trial testified to the serious nature of the injuries. The tendons of the index and middle finger were totally severed and required multiple surgeries to repair. Though the hand had healed, some of the joints had become still.*

6. *After pulling the knife from the victim's hand, you then threw him over the bridge. You soaked the victim in the water and once revived, took him through the old road to the bus stop where you and the other three Accused persons punched and kicked him. This was the subject of the charge in Count 3.*

Ground of Appeal of 1st Appellant (Amended Notice Filed on 05 February 2025)

[6] **Ground 1:** *That the learned trial Judge erred in law and fact in convicting the Appellant when the evidence in totality does not support the conviction.*

Grounds of Appeal of 2nd Appellant (Amended Grounds of appeal filed on 17 March 2025)

[7] The 2nd Appellant's ground of appeal against conviction are as follows:

Ground 1: *That the learned Judge erred in law and in fact when she failed to consider the Turnbull test in arriving at her decision when convicting the 2nd Appellant with common assault.*

Ground 2: *That the Judge erred in law and in fact when she allowed dock identification of the 1st and 4th Appellant in the absence of identification parade first held particularly when prosecution witnesses only knew of their names but were unable to match the names to the person until they attended the court cases.*

Ground 3: *That the learned Judge erred in law and in fact when she convicted the 2nd Appellant with common assault in the absence of any evidence of joint enterprise with the other 3 accused, even though the victim nor any other prosecution witness gave evidence that 2nd Appellant had assaulted the victim.*

The Law

[8] Section 21(1) (a) of the Court of Appeal Act states that an appeal to this Court on a question of law alone is of right, no leave is required.

[9] Where an appeal involves a question of mixed law and fact or fact alone, leave is to be obtained.

[10] Section 35 (1) (k) of the Act empowers a single Judge of this Court to grant leave to appeal.

[11] The test for granting leave to appeal against conviction is whether any grounds of appeal has *"a reasonable prospect of success*:" **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019), **Naisua v State** AAU0144 of 2019 (20 April 2020. See also **Caucau v State** AAU0029 of 2016 (4 October 2018), **Navuki v State** AAU0038 of 2016 (4 October 2018), **State v Vakarau** AAU0052 of 2017 (4 October 2018) and **Sadrugu v The State** Criminal Appeal No. AAU0057 of 2015 (06 June 2019, [2019] FJCA 87.

Discussion

(A) 1st Appellant's Case

[12] The 1st Appellant question whether it was reasonably open for the trial Judge to be satisfied beyond reasonable doubt of the Appellant's guilt given the evidence adduced which was relied on to convict the Appellant. The test on whether the verdict is unreasonable and not supported by the evidence had been discussed in a plethora of authorities: **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU0125 of 2015 (27 May 2021), **Koli v State** [2021] FJCA 97; AAU116.2015 (27 May 2021), **Balak v State** [2021];AAU132.2015 (3 June 2021, **Pell v Queen** [2020]HCA 12, **Libke v R** [2007] HCA30; (2007) 230 CLR 559, **M v Queen** [1994] HCA 63;(1994) 181 CLR 487,493.

[13] The Appellant submits that there are clearly a lot of discrepancies in the evidence of the complainant and the Matea family, who were the only ones that witnessed the alleged incidents on the bridge, under the bridge and at the old road to which the Appellant is charged with.

[14] The Appellant submits that, there is no evidence in support of the assertion that the complainant was thrown over the bridge in an unconscious state, and if so, did the 1st Appellant jump in after him or did he make his way under the bridge to get to the complainant? There is no evidence on this. Can the complainant survive being thrown over the bridge in an unconscious state? When the complainant was thrown over the bridge, where did he land? Did he fall into the river or elsewhere? There are no answers provided in the Judgment on the above questions.

[15] The complainant had denied running away from the Appellant and he had jumped over the bridge. At paragraph 94 of the judgment the Court accepted the evidence of Rigamoto Matea who had stated that he saw what happened under the same lighting that the complainant considered too dark for identification purposes.

[16] The 1st Appellant submits that in total, the evidence adduced by the prosecution pertaining to Counts 1, 2 and 3 of the information to which the Appellant is charged with is not enough to support the conviction for all counts.

[17] In terms of Count 4, the 1st Appellant submits that, there was no evidence in the medical report that supports that the complainant was slapped by the 1st Appellant. There was no medical evidence on any injuries or tenderness on the complainant's cheeks. That there is not enough evidence to support the 4th Count.

(B) Respondent's Submissions

[18] The prosecution relied on the direct evidence of the complainant, medical evidence, eye witness accounts of the offending, circumstantial evidence and Record of interviews of the appellants to prove its case. In the conviction ground the 1st Appellant contends that the prosecution bears the legal burden in proving its case beyond reasonable doubt and had failed to lead evidence supporting the conviction, specifically on the evidence of the complainant and the Matea family for counts 1, 2 and 3 nor the lesser charge.

[19] The Respondent submits that for count 1, it is misconceived that the 1st Appellant asserts that the prosecution is only relying on the evidence of the complainant and the Matea family to prove the offending. At paragraphs 72 to 91 of the Judgment, the trial Judge: (a) quoted the correct elements for the offending act with intent to cause grievous bodily harm, (b) discussed the evidence adduced by the prosecution to prove its case, (c) apart from the complainant's evidence the court referred to other prosecution evidence, for example, Litia Ravutia and Sanaila Wailuku, (d) the Record of interview of the Appellant corroborate his meeting the 1st Appellant on that night, and (e) the medical evidence led and tendered by the three doctors proved that the injuries sustained by the complainant was grievous in nature.

[20] For count 2, the Respondent submits that apart from the complainant's evidence, and evidence of the Matea family, the trial Judge had discussed its analysis of the evidence at paragraphs 92 to 105 of the Judgment, and had come to the conclusion that there was insufficient evidence against act with intent to cause grievous bodily harm. That resulted

from the prosecution's failure to lead any evidence of injury that resulted from the act of throwing the complainant over the bridge, however, there was sufficient evidence of a lesser charge of common assault since it doesn't require any injury hence this argument is misconceived.

[21] For count 3, the trial Judge had discussed the evidence and its analysis at paragraphs 106 to 128 of the Judgment. This relates to when the complainant was further punched and kicked by the four named accused, including the 1st Appellant, under the principle of joint enterprise, behind the bus stop.

[22] The learned trial Judge discussed the evidence of the complainant, Sanaila Waliku, Litia Ravutia, Latileta Maraivalu and other evidence led by the prosecution. The trial Judge was satisfied that the prosecution had proved this count that the 1st Appellant and co-accused had the common intention to assault the complainant. Given that there was difficulty in proving the bodily harm, it was justified in law for the trial Judge to acquit the 1st Appellant for assault causing bodily harm but convict him for a lesser charge of common assault, hence the 1st Appellant's argument on this count is misleading.

[23] For count 4, the Respondent submits that section 274 of the Crimes Act 2009 does not require injuries to be proven by the prosecution and this was mentioned by the trial Judge at paragraph 104 of the Judgment. The learned Judge's further analysis on this count at paragraphs 129 and 130 of the Judgment.

[24] The Respondent concludes that this ground is baseless and there is no real prospect of success hence this ground must be denied.

(C) Analysis

[25] This analysis takes into account the judgment of the learned trial Judge, the written and oral submissions of the 1st Appellant and the Respondent, the relevant statutory provisions and law, including case law. The 1st Appellant contends that the learned trial judge erred in law and in fact in convicting him of the charges in Counts 1 *(Act with Intent to Cause Grievous Harm),* Count 2 *(Common Assault)*, Count *3 (Common Assault)* and Count 4

(Common Assault), when the totality, of evidence adduced by witnesses for the prosecution does not support the convictions.

[26] From the facts of the case (see paragraph 4 above), the 1st Appellant, had approached the victim, who was holding a cane knife at Naqia bridge, grabbed hold of the handle of the knife, and pulled the knife from the victim while he was holding on to it, in circumstances where 1st Appellant would have been aware that serious injury would result to the victim's hand. Injuries aside, the facts as established need to be carefully examined in terms of the practicality of the commission of the physical elements of the offence in count 1. See facts as stated in paragraph [5] above. If 1st Appellant had grabbed hold of the handle of knife (paragraph [5]3): What is the victim holding at that time? When the knife is pulled from the victim' hand, where was the victim's hand (paragraph [5]4), at the time given the 1st Appellant had got hold of the handle already. Injuries to the victim as a result were, according to three medical doctors who gave evidence at the trial, serious in nature. Could there be other factors involved, which the Record of the High Court may disclose, that occurred at the relevant time of the alleged commission of the offence alleged in count 1?

[27] It is alleged that the 1st Appellant than threw the victim over the bridge, and later with three other persons took the victim through the old road and to the bus stop where they punched and kicked the victim.

[28] The 1st Appellant's denies that and contends that the evidence provided by the complainant and the Matea family were insufficient to sustain a conviction for Counts 1and also Counts 2 and 3 which relate to the alleged incidents on the bridge, under the bridge and at the old road.

[29] It would appear that the learned trial Judge dealt with Count1 *(Act with intent to cause grievous harm)* in paragraphs 72 to 91 of the Judgment where she analyzed the elements of the offence against the evidence adduced at the trial. On the identity of the 1st Appellant, the learned trial Judge discussed the evidence adduced by the prosecution to prove its case. Apart from the evidence of the victim (paragraph 73 of judgment), there were supporting evidence on the identity of the 1st Appellant from other witnesses namely, Rigamoto Matea and his children Joni and Milika Matea who saw a person sitting at the

bridge who approached another person that came to the bridge after him – see paragraph 74 of judgment; Litia Ravutia, who said that when the police officers ate in front of her house on the night of 14 April 2020, one of the officers was missing – see paragraph 75 of judgment.; Sanaila Waliku who had spent 4-6 hours with the Police officers that day and had observed them all. He knew their names and faces, and he identified the 1st Appellant by name in Court - see paragraph 76 of judgment. These evidences relied upon by the prosecution which were accepted by the learned trial Judge and relied upon by the Respondent in its current submissions are all disputed based on the facts as alleged of the 1st Appellant, as referred to later on in this analysis.

[30] In his caution interview by IP Iosefo Tawake, the 1st Appellant had stated,

> *"77……. Accused 1 stated that he did not eat with others and had gone to sit somewhere in the middle of the bridge where he played with his phone and went on Facebook. He approached Inoke when Inoke came to the bridge. In the conversation that followed, Inoke raised his hand with the knife and he went for Inoke's hand. Suddenly, Inoke turned, ran and jumped off the bridge."*

[31] The caution interview appear to be accepted only in part by the learned trial Judge. The learned trial Judge was satisfied beyond reasonable doubt that Accused1/1st Appellant was on the bridge on the night of 14 April 2020 and had confronted Inoke Lagicere when Inoke returned from his farm. However, the conclusion appear confusing, the injury seems to be the prominent consideration and not how it was caused. It is not consistent with the facts stated in paragraph [5] above, which has been mentioned above. Medical evidence was accepted on the cause of the injury - see paragraph 82 of the judgment, as follows:

> *"82 I accept that Inoke Lagicere was holding the cane knife with the handle forward and the Accused 1 had pulled it from his hand. Dr Matanaicake evidence on how the injuries could have been sustained support Inoke Lagicere's account of what happened on the bridge.*"

[32] The prosecution tendered medical evidence including graphic photographs of Inoke Lagicere's injured hand taken by a Doctor Gounder at Korovou Hospital. Objection to the acceptance of the photographs was overruled by the learned trial Judge pursuant to section 133 of the Criminal Procedure Act 2009, but the objection was not sustained in view of section 133(3) of the aforesaid act. The Medical injuries cannot be disputed, the causes and how the injuries occurred appear to be in dispute, and need to be properly established. There need to be acceptable evidence that the said injuries, serious as they are, were a result of the act of the 1st Appellant as charged. There appear to be a cloud of doubt on how the injury actually occurred as to count 1, and it relates to identification evidence, as well as the physical acts.

[33] On whether there was intent to cause grievous harm, the learned trial Judge found that the intent to cause grievous harm is established, and the medical evidence showed the injuries sustained were serious and amounted to grievous harm:

> *"86.* ***Accused 1 pulled the handle of the knife while Inoke Lagicere was holding onto it****. As he did so, the blade of the knife slid through Inoke Lagicere' hand, slicing three of his fingers as it did so.* ***The injury was inevitable*** *and I have no doubt that Accused 1 was aware that this would occur in the ordinary course of events…….*
>
> *87.* ***The act, being without lawful justification or excuse****, was therefore unlawful.*
>
> *88. All the three doctors who attended to Inoke Lagicere's hand injuries gave consistent evidence that the injuries were serious. The tendons of the index and middle finger were totally severed and required multiple surgeries to repair. Though the hand had healed, some of the joints had become still."*(Highlight is for emphasis).

The highlighted portions of the learned trial Judge's finding, given the 1st Appellant's submissions, and the need to establish the physical acts with certainty for count 1, as referred to above, will require a thorough examination of the relevant evidences on what occurred. It is how the injury was caused that also require closer examination of the

evidences. The 1st Appellant's intent will be properly established when and after the facts/ evidence as highlighted are re- examined when the High Court Record is available.

[34] In Count 2, it was alleged that Accused1 /1st Appellant with intent to cause grievous harm to Inoke Lagicere, cause grievous harm to Inoke Lagicere by throwing him over the Naqia bridge. The 1st Appellant disagree as he contends that there is insufficient evidence to convict him on this Count 2. The learned trial Judge in dealing with Count 2 (paragraphs 92 to 105 of judgment), found, the identity of Accused 1 is established on the same evidence in support of Count 1. As already stated, the 1st Appellant disputes the evidence of him throwing the victim over the bridge, although the victim had also denied running away from Accused 1 and jumping over the bridge, as he had injured his fingers when Accused 1 suddenly pulled his knife from his hand. The learned trial Judge accepted that the victim did not jump from the bridge as alleged, supported by Rigamoto Matea and other eye witnesses, who denied that the victim Inoke had run away and jumped over the bridge, and that the victim was grabbed by Accused 1 and thrown over the bridge. The learned trial Judge stated:

> *"95. I believe Rigamoto Matea, Joji Matea and Milika Matea's evidence that Accused 1 had grabbed Inoke Lagicere's t-shirt and pants and threw him over the bridge. Dr Matanaicake said the injuries from such a fall would depend on where and how one fell. No evidence was led of any injuries sustained from this fall and medical officers who attended to Inoke Lagicere said they had concentrated on the serious injuries then seen, namely the injured figures."*

[35] I find that there is no evidence on the height of the bridge, and the physical conditions underneath and on the banks of the river/stream where the bridge stands and extends. In my respectful view, the evidence on what are below the bridge, where the victim landed, if thrown down, and what injuries he sustained collectively would be relevant in a case such as this. There may be something in the High Court Record, on the circumstances and environment under the bridge, which may provide a better basis for assessing the credibility of being thrown down the Naqia bridge with insignificant or minor injuries only, and in the unconscious condition of the victim.

[36] The learned trial Judge found (paragraph 97 of judgment) that prosecution did not point to any evidence of grievous harm resulting from the victim being thrown from the bridge, which, is fatal to a charge under section 255(1) (a) of the Crimes Act 2009. On Count 2, the learned trial Judge was not satisfied beyond reasonable doubt that Accused 1/1st Appellant had caused grievous harm to the victim. However, the learned trial Judge applied section 160 (2) of the Criminal Procedure Act 2009, which states:

"(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, the person may be convicted of the minor offence although he or she was not charged with it."

[37] On Count 3, alleges that Accused and the other accused persons had punched and kicked the victim causing him actual bodily harm. The prosecution alleges joint enterprise in that the accused person had a common intention to bring in the person apprehended regardless of who he was or of his condition, and that they formed a common intention to assault him. Accused 1/ 1st Appellant's presence was established after evidence of witnesses Sanaila Waliku, Lilieta Maraivalu and Litia Ravutia. He brought the victim from the river to the old road behind the bus stop Sanaila Waliku had been with the Police officers for some 3 to 6 hours that day and he had observed the Police officers and knew them by face and name. He had reason to remember Accused 1 who had been rude to him earlier. At paragraphs 116 and 117 of the judgment the learned trial Judge stated:

"116. On the combined evidence of Inoke Lagicere, Sanaila, Lilieta, Litia and IP Tawake, I am satisfied beyond reasonable doubt that all the four accused had been with Inoke Lagicere behind the bus stop.

117. On the evidence of Inoke Lagicere and Lilieta which I accept, I find it proved beyond reasonable doubt that Inoke Lagicere was physically assaulted behind the bus stop."

[38] To establish Count 3 the prosecution relies on the doctrine of joint enterprise. In **Nacagilevu v State** [2016] FJSC 19; CAV023.2015 (22 June 2016) the Supreme Court stated at paragraph [36]:

*"….. joint enterprise is a legal doctrine that is well settled in Fiji. The Supreme Court in **Rasaku v State** (2013) FJSC 4; CAV0009.2009 (24 April 2013) expounded the doctrine of joint enterprise in paragraphs 44 and 45 as follows:*

> *"If two people jointly commit an unlawful act, each is equally liable no matter who did what. There does not have to be any prior agreement either written or oral. It can be spontaneous. The doctrine of common enterprise has been applied consistently in a large number of cases in England and other jurisdictions, including those such as Fiji in which the Penal Code is structured on the foundation of the Common Law of England. The formation of a joint enterprise may be spontaneous, and the fact that the participants acted on the spur of the moment does not negative their criminal liability on the basis of joint enterprise."*

[39] The common law principle is expressed in section 46 of the Crimes Act. On the evidence, the learned trial Judge was satisfied beyond reasonable doubt that there was a common intention amongst the Police officers behind the bus stop to assault the victim and they did so assault him. That each of the participant is deemed to have committed the offence, and the absence of planning does not negative criminal liability on the basis of joint enterprise. On the evidence, there was bodily injury as required under section 4 of the Crimes Act 2009. On the specific facts of the case, the learned trial Judge was satisfied beyond reasonable doubt that bodily injury had been caused, in the form of the healed abrasions on the limbs and tenderness over the upper back and jaw region. In fact, actual bodily harm is an essential element of the offence. It is not possible to pin point the cause of such bodily injuries, that is, whether they were caused by the victim being thrown over the bridge, or by the assault at the bus stop at the back of the old road. The prosecution's failure to prove beyond reasonable doubt that the bodily injuries was caused by the assault is fatal to the success of Count 3. There is also the cloud of uncertainty in the evidence already referred to with regard to identity and whether the victim was thrown down the bridge.

[40] As a consequence the learned trial Judge is not satisfied beyond reasonable doubt that that the accused are guilty of assault causing actual bodily harm. However, the learned trial Judge is satisfied beyond reasonable doubt that the accused are guilty of common assault.

[41] On Count 4, Accused 1/1st Appellant is charged with slapping the victim. Sanaila's evidence is that Accused 1 had slapped the complainant's face in front of Liku's house – he was 1 to 2 meters away from Accused 1 and the victim at the time and was able to see from the outside lights from Litia and Liku's houses which reached where the victim was sitting. He said his view was impeded. The witness was not cross examined on this aspect of his evidence was determined that Accused 1 slapped the victim, and was accordingly convicted of common assault. It appears there was no reliable evidence that the victim was slapped by the 1st Appellant.

[42] There are discrepancies, as raised, in the evidence which the learned trial Judge accepted and for which the convictions on those counts were based. For example, whether the lighting was bright enough for purpose of identification? Witness Rigamoto Matea's evidence, at paragraph 94 of the judgment, who stated he saw what had happened, Rigamoto claim was in the context of the same lighting that the victim had considered too dark for identification purposes? If so, what are the implication on the findings of facts? Were there other factors or other evidence adduced on the how Rigamoto was able to reliably identify the 1st Appellant under the same lighting which the victim had considered to be too dark for him to identify his assailant? These concerns were echoed and reinforced by Counsel for 1st Appellant at the hearing.

[43] Having consider all of the above, I am of the view that the 1st Appellant had raised issues which could only be clarified having the benefit of the full Court Record of the proceedings of the High Court trial. The 1st Appellant's ground is arguable, having reasonable prospects of success.

(D) 2nd Appellant's case

[44] Ground 1 and 2 urged by the 2nd Appellant are dealt with together as they are closely related linked by the argument that the learned trial Judge erred in her approach to the identification of the 2nd Appellant, which lead to the finding of guilt on Count 3 of Common Assault after the learned Judge was not satisfied , that the prosecution had proven beyond reasonable doubt that both the Appellants had committed the offence of Assault Causing Actual Bodily Harm contrary to section 275 of the Crimes Act 2009.Specifically, the 2nd Appellant allege that the learned Judge erred in law and in fact when she failed to consider the Turnbull test in arriving at her decision to convict the appellant, secondly, that the learned trial Judge erred in allowing the dock identification of the 2nd Appellant, under the circumstance.

[45] The 2nd Appellant, referring to the transcript of the trial on day one (paragraphs 57, 58 and 60) on the cross-examination of PW1, PW1 said:

(a) When this man approached him, they had a conversation when the other man pulled out a knife from him.

(b) He blacked out and could not remember anything after the knife was pulled out of him.

(c) He denied he tussle with the other man before he ran away from him and jumped off the bridge.

(d) He denied that he resisted arrest.

(e) He said that when he regained consciousness, he saw someone soaking him in the river and he admits that he did not see the person who was soaking him in the river.

[46] The 2nd Appellant submits that, when asked about the lighting on the bridge, PW1 said that it was dark, and he could not identify the other person. He submits that according to the transcript from day one of the trial, at paragraph 43, the complainant could not identify who attacked him on that night, because the place was too dark. That the complainant

identified the places where he was attacked, that is on top of the bridge and the old road to clarify the bridge incident and the incident behind the bus stop. That witness Lilieta in her evidence said that although she could see what was happening behind the bus stop from the streetlight and moon light, she was not able to identify the officers except one. The victim was kicked and punched and when they brought him (presumably the complainant) to the vehicle, they made him sit behind the twin cab. She saw one came and slapped him but do not know who it was. In cross-examination, Lilieta admits that when the officers came in the morning, she was sitting at the bus stop, she only saw the driver and talked to him. She was not able to say which of the accused were sitting at the back tray of the vehicle neither she could say who was sitting inside the vehicle.

[47] On Ground 2, the 2nd Appellant alleges that the trial Judge submits that the learned Judge erred in law and in fact when she allowed dock identification of 1st and 4th Appellant/Accused 1 and 4. In the absence of identification first held particularly when prosecution witnesses only knew of their names but were unable to match the names to the person until they attended the court case.

[48] The Respondent submits that in several decisions of the Board of the Privy Council, it was held that Judges should warn the jury on the undesirability in principle and danger of a dock identification, as in: **Aurelio Pop v Queen** [2003] UKPC 40; **Holland v H M Advocate** [2005 SC(PC) 1; **Pipersburg and Another v The Queen** [2008] UKPC 11; **Tido v The Queen** [2012] UKPC 12. In **Naicker v State** CAV0019 of 2018; 1 November 2018 [2018] FJSC 24, a case where dock identification evidence was held but the trial has not given any Turnbull directions, the Supreme Court had discussed a complaint arising from the dock identification and seemingly followed the pronouncements by the Privy Council. The Court said:

> *"The danger of dock identification (by which is meant offering a witness the opportunity to identify the suspect for the first time in court without any previous identification parade or other pre-trial identification procedure) have been pointed out many times. The defendant is sitting in the dock, and there will be a tendency for the witness to point to him, not because the witness recognizes him, but because*

the witness knows from where the defendant is in court who the defendant is, and can guess who the prosecutor wants him to point out. Unless there is no dispute over identity, and the defence does not object to dock identification, it should rarely, if ever, take place. If it takes place inadvertently, a strong direction is needed to the assessors to ensure that they do not take it to account."

[49] On Ground 3, the 2nd Appellant alleges that the learned trial Judge erred in law and in fact when she failed to consider the discrepancies and inconsistencies in the evidence of the prosecution witnesses which created doubt in the prosecution case. The 2nd Appellant submits that the evidence of PW 10 (Sunia Naraikaba) and PW 8, if accepted, should account for serious injuries, but the medical evidence did not support the evidences of the amount of slapping, kicking, assault etc. of the complainant by the prosecution witnesses. Additionally, with the lighting conditions and different versions of the acts that took place on the day in question, there is no corroboration in these witnesses evidence and these inconsistencies should create a doubt to the learned Judge or any reasonable tribunal on the credibility of the witnesses who gave evidence for prosecution.

[50] The 2nd Appellant submits that the Judge had rightly acquitted him for the initial charge of assault causing actual bodily harm but the learned Judge is wrong in convicting him of the offence of common assault asking; Why might a Judge reduce charges to general assault if more severe charges like manslaughter, intent to cause grievous harm, or murder were dropped, and how it could be argued that all charges should be dropped based on the evidence.

[51] The 2nd Appellant submits that, as part of the Eastern Division Taskforce Team (EDTT) and, it's likely because the prosecution couldn't prove the necessary elements for those charges. Was convicted of common assault under the joint enterprise doctrine. The key evidence against him included the presence at the scene and participation in the group's actions, but there was no direct evidence against him physically harming the victim.

[52] If the more severe charges were dropped, it's likely because the prosecution couldn't prove the necessary elements for those charges.

[53] Why would the learned Judge step the charges down to general assault? Common assault under the Crimes Act 2009 (section 274) does not require proof of injury, only unlawful physical contact or threat thereof. Since Mr Nagata's involvement was through joint enterprise, even without direct physical acts, his participation in the groups unlawful purpose could suffice for a common assault charge. The Judge might argue that, while he did not commit the more severe acts, his presence and participation in the group that did so make him liable for the lesser charge.

[54] In arguing that the 2nd Appellant should not be convicted of common assault, the 2nd Appellant submits that, the following points need to be considered that all charges should be dropped, the defence would need to challenge the evidence linking Mr Nagata to any unlawful acts. These include:

1. Lack of direct involvement-No witness saw Mr Nagata assault the victim. The prosecution case relies on joint enterprise, but there is no evidence that he shared the intention or participated actively in the act.

2. No proof of common intention- Under section 46 of the Crimes Act 2009, joint enterprise requires a common intention to prosecute an unlawful purpose. The 2nd Appellant's role was merely peripheral (e.g. merely being present without active participation); thus, the 2nd Appellant did not share that common intention with others involved as there was no evidence offered by the prosecution to support it- he might not share that common intention.

3. Insufficient evidence of common assault- still requires some unlawful contact or threat. There was no evidence that the 2nd Appellant made any contact or threat – even under a joint enterprise, and so the charge cannot be sustained.

4. Contradictions in witness's testimony- all the witnesses gave inconsistent accounts of the events of that evening and could not reliably identify the 2nd Appellant- which could undermine the prosecution case.

5. Medical evidence not linking to Defendant- The injuries were caused by other members of the group and there is no evidence that the 2nd Appellant contributed to those injuries. Hence, it weakens the case against him,

[55] In conclusion, the 2nd Respondent submits that, the prosecution evidence is circumstantial and based on unreliable testimony; therefore the 2nd Appellant argues reasonable doubt. He also submits that he had no prior intent, was following orders, and unaware of the group's unlawful intention, (if there was any), lacking the mens rea required for any charges. Therefore, the 2nd Appellant submits that he has arguable grounds.

(E) Respondent's Reply to 2nd Appellant's case.

[56] The Respondent relied on its written submissions which Counsel had reinforced in oral submissions at the hearing. In reply to arguments in support of Ground 1, the Respondent relies on **Naicker v State** (supra) which was also quoted by the 2nd Appellant-see paragraph [48] above, where the Supreme Court at paragraph [29] of the judgment stated:

*"…A related criticism is that the Judge did not give the jury what has come to be known as the Turnbull direction-so named after the judgment of the English Court of Appeal in **R v Turnbull** [1977] QB 224.Where the case depends wholly or substantially on the correctness of someone's identification of the defendant, Turnbull requires the judge to(i) warn the Assessors of the special need for caution before convicting on the basis of that evidence,(ii) to tell the assessors what the reason for that need is,(iii) to inform the assessors that a mistaken witness can be a convincing witness and that a number of witnesses can be mistaken,(iv) to direct the assessors to examine closely the circumstances in which each identification was made,(v) to remind the assessors of any specific weaknesses in the identification evidence,(vi)to remind the assessors(in a case where such a reminder is appropriate) that even in the case of the purported recognition by a witness of a close friend or relative, mistakes can occur,(vii) to specify for the assessors the evidence capable of supporting the identification evidence, and (viii) to identify the evidence which might appear to support the identification but does not in fact do so…."*

[57] The 2nd Appellant submits that, he was indicted with the 1st Appellant and two others for one count of assault causing actual bodily harm (Count 3), in relation to the offending that occurred at the back of the bus stop at Naqia. Based on the evidence led by the prosecution, the complainant (Inoke Lagicere) gave direct evidence after being revived from the river, he was taken up the hill and when they got to the old road, the people there punched him on his cheek and kicked him on his thigh and rib cage while he was on the ground, he confirmed that he was attacked by 4 male officers, the complainant could not identify his assailants. The Respondent submits that the Turnbull test was not required to be established by this witness.

[58] To establish the 2nd Appellant's identification, the prosecution had relied on circumstantial evidence of Sanaila Waliku who confirmed that the 2nd Appellant and two others ran towards the bus stop and when they returned, he saw that they returned bringing the complainant. With the further evidence of Lilieta Maraivalu evidence she gave circumstantial evidence that she saw officers punching and kicking the complainant behind the bus stop, she noticed one of the police officers was wearing police pants and t-shirt was punching and kicking the complainant and the others were punching him. She could not identify the officers, hence Turnbull requirement couldn't be established for this witness either, so this argument is baseless.

[59] Witness Litia Ravutia's evidence was also circumstantial evidence and through Sanaila Waliku's circumstantial evidence, who knew the 2nd Appellant and his accomplices for 3 to 6 hours and had known him from Tavua. The said witness identified the 2nd Appellant and the trial Judge accepted that evidence as reliable to establish the identification of 2nd Appellant.

[60] Additionally, the prosecution also tendered the 2nd Appellant's Record of Interview (ROI) as an exhibit in this case. Significantly, Q & A 182 to 194, the 2nd Appellant places him at the scene with the complainant and the other officers but denies the complainant's claim on this count. Therefore, based on the circumstantial evidence mentioned above, with tendered ROI, the trial Judge was satisfied beyond reasonable doubt that the Prosecution had led sufficient and reliable evidence to establish the 2nd Appellant's identification

without the need to establish the Turnbull requirement. Therefore, any direction on the Turnbull principle is baseless. Hence, there is no real prospect of success in this ground and it must be dismissed.

[61] With respect to Ground 2, the Respondent submits that Counsel must focus his submissions only on his client. The 2nd Appellant fails to substantiate his arguments in support of this ground. The Respondent submits that from the judgment of the High Court, before the trial Judge could establish that the identification of the 2nd Appellant, it had relied on the evidence of Sanaila Nacola at paragraphs 28 to 40 of the judgment, who gave direct and circumstantial evidence, he confirmed spending more than 3-6 hours with the 2nd Appellant and other officers and he was able to identify the 2nd Appellant in Court. At this stage, we do not have the benefit of the trial transcript to confirm whether defence made any objection when the State Counsel had dock identify the 2nd Appellant. However, from the trial Judge's analysis on this count (at paragraphs 106 to 128 of the judgment), the trial Judge was satisfied that the 2nd Appellant was one of the officers that had assaulted the complainant as alleged in Count 3. This ground is frivolous and without merit and must be denied.

[62] With respect to Ground 3 of the appeal against conviction, the Respondent submits that he 2nd Appellant had introduced another ground in paragraph 22 of its written submissions, which is:

> *"That the learned Judge erred in law and in fact when she failed to consider the discrepancies and inconsistencies in the evidence of the prosecution witnesses which created doubt in the prosecution case."*

[63] With respect to the 2nd Appellant's submissions on the discrepancies and inconsistencies in the evidence of PW10 and PW8, on how the complainant was assaulted, it is submitted that Pw10 Sunia Naraikaba's evidence is in relation to a different incident that occurred to him before the complainant was assaulted for Count 3, as explained in paragraph 50 of the judgment. The evidence of PW10 is not relevant to Count 3, however, it confirms that the complainant was assaulted (slapped) at the bus stop.

[64] That apart from the complainant's evidence, the court relied on the evidence of Lilieta Maraivalu to corroborate the complainant's evidence and quite right in its analysis. It was difficult for the trial Judge to convict the 2nd Appellant and his accomplices for Assault Causing Grievous Bodily Harm since the prosecution had failed to prove beyond reasonable doubt the injuries were caused by the assault behind the bus stop and this issue was discussed at length at paragraph 121 to 128 of the judgment, therefore, the 2nd Appellant and his accomplices were convicted of a lesser charge of common assault and by virtue of section 160 of the Criminal Procedure Act 2009 the trial Judge was permitted in law to convict the 2nd Appellant for a lesser offence although he was not charged with it. This argument under Ground 3 is baseless and must be denied.

[65] On the 2nd Appellant's argument that there was no direct evidence to prove the 2nd Appellant's involvement in this case, the Respondent submits that, the 2nd Appellant was jointly charged with three others for this Count. At paragraphs 106 to 128, the trial Judge made its analysis on the evidence that was led and Prosecution relying on the principle of joint enterprise and gave his direction on it at paragraphs 118 to 120.

[66] That from the evidence led, the complainant confirmed that four unknown officers had assaulted him, with Lilieta Maraivalu, Sanaila, Litia and IP Tawake's evidence the Prosecution was able to establish that the 2nd Appellant and his co-accused was behind the bust stop and also confirm that the four unknown officers were punching the complainant. The fact that the 2nd Appellant was part of the group assaulting the complainant, whatever unlawful act he inflicted on the complainant, he is equally liable with others. It is submitted that the direction on the principle of joint enterprise was flawless, hence this argument is baseless and it must be denied.

[67] In conclusion, the Respondent submits that, given the lack of any reasonable prospect of success on the amended grounds pursued in the conviction appeal, leave must not be granted and this appeal must be dismissed.

(F) Analysis

[68] This analysis has taken into consideration the judgment in this case including the sentencing order, the written and oral submissions on behalf of the 2nd Appellant, and the Respondent, the relevant statutory provisions and the law, including case law. It also considered the environment and circumstances of the alleged commission of the offences and the ground of appeal which focused on the Turnbull Test not being administered and dock identification, and the application of the doctrine of joint enterprise.

[69] It is emphasized that both the Appellants were found guilty of Common Assault (under Count 3) after the learned trial Judge was not satisfied beyond reasonable doubt that the prosecution has proven that the Appellants were guilty of the serious charge of Assault Causing Actual Bodily Harm contrary to section 275 of the Crimes Act 2009. Although the Turnbull test apply only in cases of trial by jury, and in Fiji on trial y assessors, the 2nd Appellant submits that the test is also applicable in the trial by a judge alone as in this case. The test is applicable where a case depends wholly or substantially on the correctness of someone's identification of the defendant/accused. The test was established in the case of the same name **R v Turnbull** (supra), and its elements are stated in the quotation at paragraph [36] above.

[70] In my view the test is appropriate to be applied in this case, in the context of the learned trial Judge to direct herself to the requirements, as in this case, it appears that in the identification of both the 2nd and 1st Respondent, the prosecution and the learned trial Judge had depended substantially on Sanaila Waliku's evidence, a witness who had spent around 3 to 6 hours with them and the other accused on the day the offences were allegedly committed. The learned Judge had not applied the test and it does not feature in the judgement as a relevant issue in the identification of the Appellants, especially in the situation where the complainant was not able to do so himself-see paragraph [26] above on the inability of the complainant and witness Lilieta to identify who slapped the complainant behind the bus stop.

[71] On ground 2, the 2nd Appellant had referred to several decisions of the Board of Privy Council (at paragraph [28] above, and submits it was held that Judges should warn the

jury on the undesirability in principle and danger of a dock identification. The pronouncements are applicable in Fiji as applied in **Naicker v State** (supra). The learned trial Judge could have considered the dangers of dock identification in the light of the caution expressed in these cases in the absence of assessors, as the sole and ultimate judge of facts.

[72] There were inconsistencies in the prosecution evidence as alleged by the 2nd Appellant which allegations could only be verified with the availability of the High Court Record, as the 2nd Appellant raises in addition raised the following issues, which could be verified when the Court Record is available: Lack of direct involvement as there was also no direct evidence against the 2nd Appellant's participation in the so called joint enterprise; No proof of common intention; insufficient evidence of common assault, contradictions in witness's testimonies, Medical evidence does not link the 2nd Appellant to have contributed to the injuries. Finally, that the prosecution's evidence was largely circumstantial as opposed to direct evidence.

[73] In consideration of the above discussion, and having considered the Respondent's case against the 2nd Appellant, I am of the view that Grounds 1, 2 and 3 advanced by the 2nd Appellant have merit. The grounds are arguable.

Conclusion

[74] The 1st Appellant has raised issues directly relevant to the evidence under which, he was found guilty and convicted. These are issues that need to be looked at closely with the benefit of the High Court Record of its proceedings. It is the same with the situation of the 2nd Appellant on count 3 and he has also raised issues on identification and joint enterprise that need to be considered when the High Court Record of the trial is available.

Order of Court

1. *The 1st Appellant's application for leave to appeal against conviction is allowed.*
2. *The 2nd Appellant's application for leave to appeal against conviction is allowed.*

Hon. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL