IN THE SUPREME COURT OF FIJI ISLANDS
AT SUVA

CRIMINAL APPEAL NO. CAV 0005 of 2011
(Fiji Court of Appeal No. AAU0030 of 2008)

BETWEEN : **LOLE VULACA**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon Justice Saleem Marsoof, Judge of Supreme Court**
Hon Justice Sathyaa Hettige, Judge of Supreme Court
Hon Justice Suresh Chandra, Judge of Supreme Court

Counsel : **Mr. S. Sharma for the Petitioner**
Ms. S. Puamau for the Respondent

Date of Hearing : **Thursday 19th August 2013**

Date of Judgment : **Thursday 21st November 2013**

JUDGMENT OF THE COURT

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[1] The Petitioner, Lole Vulaca, has filed this application seeking review of the decision of this Court dated 21 August 2012, by which this Court refused special leave to appeal against the decision of the Court of Appeal which had affirmed his conviction for murder along with that of his co-accused Rusiate Korovusere.

[2] Seven persons including the Petitioner, who was the 1st accused, and the said Korovusere, who was the 4th accused, were jointly charged with the murder of Tevita Malasabe, contrary to Sections 199 and 200 of the Penal Code (Ch.17), and the 8th accused, was charged with being accessory after the fact to the said murder, contrary to Section 388 of the Penal Code (Ch.17) before the High Court. After trial, the

Petitioner and Korovusere were convicted for murder and sentenced to life imprisonment, while the 2nd, 3rd, 5th, 6th and 7th accused, who were also charged with murder on the basis of joint enterprise, were acquitted. The 8th accused was convicted as charged as an accessory after the fact to murder, and sentenced to 2 years' imprisonment.

[3] The appeal lodged by the Petitioner, the 4th accused and the 8th accused to the Court of Appeal was dismissed by a majority decision of the Court of Appeal (Goundar J. and Temo J, with Inoke J. dissenting) dated 29th August 2011. As already noted, the application for special leave to appeal to the Supreme Court filed by the Petitioner, the 4th accused and the 8th accused was dismissed by the unanimous judgment of this Court dated 21 August 2012 (Hettige JA., Sundaram JA., and Ekanayake JA.,) as they did not succeed in getting past the threshold requirements for special leave.

[4] However, the 4th accused Rusiate Korovusere, succeeded on his application for review of the decision of the Supreme Court, when by an unanimous decision of this Court in *Korovusere v State* [2013] FJSC 2; CAV0005.2011 dated 24th April 2013 (Marsoof JA., Chandra JA., and Calanchini JA.,), his conviction and sentence for murder was quashed, and a conviction on the count of accessory after the fact in terms of section 388 of the Penal Code was substituted in its place. His life sentence was also reduced to one of two years' imprisonment, and as he had by then served that sentence, the Court ordered that he be released forthwith.

Jurisdictional Basis of Review

[5] Applications may be made to this Court for the review of its own decisions in terms of section 8(5) of the Administration of Justice Decree, 2009. This section provides that "*The Supreme Court may review any Judgment, pronouncement or order made by it*". The language used is identical with the language of section 122 (5) of the Constitution, which was abrogated by the Amendment Act No. 14 of 2009.

[6] It is settled law that the power of an apex court to revisit its own decisions has to be exercised sparingly and in exceedingly exceptional circumstances in order to avoid irremediable injustice. As was observed by the High Court of Australia in *State Rail Authority of New South Wales v. Codelfa Constructions Propriety Limited* (1982) 150 CLR 29:

> *"...it is a power to be exercised with great caution. There may be little difficulty in a case where the orders have not been perfected and some mistake or misprision is disclosed. But in other cases it will be a case of weighing what would otherwise be irremediable injustice against the public interest in maintaining the finality of litigation. The circumstances that will justify a rehearing must be quite exceptional...."*

[7] In *State v Mototabua* [2012] FJSC 14; CAV0005.2009 (9th May 2012), it was held that on a plain reading, there is no limitation of the application of Section 8(5) of the Administration of Justice Decree of 2009. This view was endorsed in *Li Jun v State; Tan Lu Guang v State* [2012] FJSC 7; CAV0017.2007S (9 May 2012). However, it has been stressed by this Court in *Mototabua, supra,* that its power to review its own decision could only be exercised in "truly exceptional circumstances" or to "avoid irremediable injustice". The application for review was dismissed in that case as the application did not satisfy these requirements that were necessary to be established for review.

[8] In *Prasad v State* 2011 FJSC 13; CAV0007.2009 (19th August 2011) it was stated that the section 8(5) review should never be a means of re-opening a case to rehearse submissions already decided upon. What represents truly exceptional circumstances may not be easy to define, but would include the discovery of matters showing that a substantial miscarriage of justice has occurred, and proof to the Court that it had previously acted under a misapprehension of the facts or the relevant law.

[9] Such exceptional circumstances were found to exist, for instance, in *Reg v Bow Street Magistrate ex parte Pinochet (No 2)* [2000] 1 AC 119(HL), when the House of Lords set aside its own previous decision in that case because of the ostensible bias of a member of the previous Appellate Committee, and in *Reg v Hodgson* [2009] EWCA Crim 490, when the English Court of Appeal set aside its own decision to refuse leave to appeal against the conviction and went on to quash the conviction of the applicant for murder entered twenty seven years before, on the basis of new found DNA evidence which cleared him from guilt.

The Salient Facts

[10] It is necessary for the purposes of this review to set out in brief the facts of this case. On 4th June 2007 at 11.30 pm, a team of Police officers attached to the Valelevu police station were instructed by the 8th accused, Sgt. Pita Matai, to arrest the deceased, Tevita Malasebe, in connection with an incident of robbery with violence and unlawful use of a motor vehicle, in which $12,000 being wages of the labourers of Golden Manufacturers in Valelevu Industrial area was stolen.

[11] The team deployed by the 8th accused to investigate the aforesaid incident was led by the Petitioner, Lole Vulaca and included the 2nd to the 7th accused. The team left in three vehicles to arrest the deceased, one of which was driven by the Petitioner. The Petitioner, accompanied by the 2nd and 3rd accused, entered the house of the deceased and arrested him.

[12] There was evidence that when the team returned to Valelevu police station, the Petitioner took the deceased straight into the crime office, without going through the charge room. There was no entry in the station diary of the arrest of the deceased, nor

was he locked up in the cell to await interview, a procedure followed by the police when arresting suspects.

[13] The mother of the deceased as well as some of the police officers attached to the Valelevu police station heard sounds emanating from the direction of the crime office from the time the deceased Malasebe was brought into that office at around 1 am on 5th June 2007 which led them to believe that someone was being beaten up within it, which sounds intensified towards morning. At around 6.45 am, Malasebe was seen lying motionless on the floor of the crime office.

[14] The 8th accused, Sgt. Pita Matai, who came to the police station in the morning, directed the deceased to be taken to the hospital and ordered to clean the crime office. The 4th accused was seen cleaning the crime office of the faeces and urine on the floor, wearing hand gloves. Some of the witnesses had seen the deceased being loaded into the back of a twin cab by the 2nd and 6th accused, while the Petitioner, Lole Vulaca, was also there. Vulaca drove the vehicle to the hospital with Korovusere seated next to him in front, and the 2nd and 6th accused seated at the back with the deceased Malasebe.

[15] The deceased was taken into the hospital on a trolley, and on examination pronounced dead. According to the pathologist, the deceased had died of shock and internal haemorrhage, due to multiple bruises caused by multiple blunt impacts. According to the staff nurse working in the hospital, the Petitioner and the 4th accused had told the hospital authorities that the deceased had been lying somewhere on the street.

The Trial

[16] The prosecution of the several accused who were charged with murder or accessory after the fact to murder, was entirely based on circumstantial evidence, and it was the prosecution case that the 1st to 7th accused had formed a joint enterprise to assault Malasebe while he was in custody. A large number of police officers and a few lay witnesses including the mother of the deceased, a pathologist and hospital staff, testified at the trial.

[17] Since the main focus of the submissions of learned Counsel for the Petitioner at the review hearing was on the adequacy of directions on the question of joint enterprise, it is useful to look at the summing up in some detail. In her summing up, the learned trial judge (Shameem J.) acknowledged the need to direct the assessors on circumstantial evidence and did so direct the assessors, in characteristically clear and concise language. In particular, the assessors were directed as follows:-

"Therefore, with circumstantial evidence you must look at all the evidence together and ask yourselves whether the only reasonable inference you can draw from the evidence is the guilt of the accused. You must ask yourselves whether there can be any other explanation for the evidence which is also consistent with the accused's innocence. That is the law on circumstantial evidence."

[18] The learned trial judge also gave detailed directions on joint enterprise as defined by the Penal Code. The assessors were instructed that in law, the person who actually delivers the fatal blow in a murder case, is not the only person who is guilty of the murder. The assessors were specifically told that "when two or more persons get together and form a common intention to do something unlawful together and in the course of doing that unlawful act, another offence is committed which is a probable consequence of the planned offence, then each of those who are part of the plan is also guilty of the resulting offence, even if he or she did not do the act which actually constitutes the offence."

[19] After giving the assessors examples to explain the application of the concept of common intention, which is also described as joint enterprise, the trial judge specifically instructed the assessors as follows:-

"In this case the prosecution says that all accused persons were part of a common intention to bring Tevita Malasebe to the Valelevu police station to assault him prior to his interrogation. The prosecution's case is that all the accused either actively assisted in this plan or did nothing to stop the assault which, as police officers, they had a duty to do in law, and that the death of the deceased as a result of the assault was a probable consequence of that planned assault for which each accused 1 to 7 must be responsible for. In considering whether or not there was a joint enterprise involving each accused in this case, ask yourselves:

1) Was there a joint common intention to bring Malasebe to the station to assault him?
2) Was each of the accused in the dock party to that common intention?
3) Was the death of Malasebe as a result of the assault, a probable consequence of the assault?

In considering these questions, you may look at all the circumstances of the case as led in the evidence."

[20] The assessors were of the opinion that the Petitioner and the 4th accused were guilty of the charge of murder on the basis of joint enterprise, and the 8th accused guilty of the charge of accessory after the fact to murder. The assessors were also of the opinion that the 2nd, 3rd, 5th, 6th and 7th accused, were not guilty of murder. The learned trial judge (Shameem J.), in her reasoned judgment dated 22nd April 2008, agreed with the finding of the assessors, and observed as follows:-

"The 1st accused [Lole Vulaca] led the raid on the deceased's house. He spoke the words to the mother of the deceased which showed that he knew there was a plan to assault the deceased. He knew and did not prevent that assault. Further from his conduct thereafter, he was at the station for a period of time, and the next morning he conveyed the deceased to hospital. His conduct at the hospital was consistent with the consciousness of guilt. For these reasons, I accept the unanimous decision of the Assessors on this count for the 1st accused and convict him accordingly.

The evidence against the 4th accused also indicated knowledge of and complicity with, the assault in the crime office. He was in the briefing meeting, the escorting party and in the station while the deceased was being assaulted. The unanimous opinions of the Assessors are in accordance with the evidence. In particular the majority opinion seems to be that the evidence of participation in the joint enterprise came not just from the arrest and escort of the deceased, but from a continuing course of conduct that night by the 1st and 4th accused. I accept their opinions and convict the 4th accused accordingly.

In relation to the 2nd, 3rd, 5th, 6th and 7th accused, I accept that the evidence of their complicity in a joint plan to assault the deceased is not strong. Although the 2nd accused was involved in the conveying of the deceased to the hospital, and in the initial escort, I accept that there is reasonable doubt as to his complicity in the unlawful assault in the crime office.

In relation to the 3rd, 6th and 7th accused there is even less basis for drawing an inference of guilt. In relation to the 5th accused, I accept that he was not in the arresting party and that he played no direct role in the custody of the deceased in the crime office.

As such, although I am satisfied beyond reasonable doubt that the deceased died as a result of sustained and prolonged police assault in the crime office in the night of the 4th and 5th of June 2007, and that the assaults were administered with either intention to cause grievous bodily harm or indifference as to causing grievous bodily harm, I accept that two of the three Assessors have a reasonable doubt about the involvement, complicity and knowledge of the 2nd, 3rd, 5th, 6th and 7th accused. Their findings are consistent with the evidence and with my summing up. I concur and acquit the 2nd, 3rd, 5th, 6th and 7th accused."

[21] On 23rd April 2008, the learned trial judge sentenced the Petitioner and the 4th accused to life imprisonment without fixing any minimum term, and the 8th accused to a term of two years imprisonment. Explaining her reasons for not fixing a minimum term of imprisonment for the Petitioner and the 4th accused, the learned trial judge observed as follows:-

"Lole Vulaca and Rusiate Korovusere, you are both convicted of the murder of Tevita Malasebe, on the 4th and 5th of June 2007. The Penal Code provides for only one sentence for murder and that is life imprisonment. However I have a discretion to fix a minimum term which you must serve before you are entitled to parole.

The murder of Tevita Malasebe was a most reprehensible event for Fiji's Police Force. He was assaulted repeatedly in the Valelevu crime office from 1 am to about 4.30am on the 5th of June 2007. The pathologist found evidence of assault with wooden planks, and torture marks on the soles of the feet. He said that Malasebe must have died a most painful death. The tragedy was that he was killed by those who are entrusted by us all, to preserve the law.

I would accede to the prosecution's request for a minimum term except for one factor. The evidence against you was that of secondary offenders, that is, that you were part of a joint enterprise to assault Malasebe. There was no evidence that either of you inflicted any of the assaults yourselves. It is impossible in these circumstances to apportion responsibility to either offender.

For that reason I will not set a minimum term for either of you. You are each sentenced to life imprisonment."

The Appeal to the Court of Appeal

[22] The appeal of the Petitioner and the 4th accused against their conviction and sentence for murder was considered by the Court of Appeal despite the remarkable vagueness noted by that court in regard to the grounds of appeal on which the appeal was based. The grounds considered by the Court of Appeal included the allegations that the learned trial judge inadequately directing or misdirecting the assessors regarding (a) the charge of murder, (b) on the charge of accessory after the fact to murder, (c) the law on circumstantial evidence, (d) the law on joint enterprise, and (e) the significance of the conflicting evidence of prosecution witnesses.

[23] For the purposes of considering the Petitioner's application for review, it is noteworthy that no submissions were made before the Court of Appeal on behalf of either the Petitioner or the 4th accused Korovusere in regard to the so called "cut-off point" or withdrawal from the joint enterprise. Goundar J. (with whom Temo J concurred) considered in paragraph 37 of his judgment dated 29th August 2011, the summing up of the learned trial judge on the question of the alleged inadequacy of directions and / or misdirections relating to the law on joint enterprise, and noted in paragraph 38 of the judgment the defence position that "the accused were not at the scene, were not part of any join t enterprise and that all the evidence relied upon by the prosecution was done openly and not with any intent to hide evidence." The Court concluded in paragraph 39 of the judgment that-

"The assessors were clearly directed that they had to be satisfied that the death of the deceased was a probable consequence of a planned assault on him in which the first and the second appellants participated. In our judgment the direction on joint enterprise was adequate and was a correct statement of law. This ground fails."

[24] In paragraph 9 of a strongly worded dissent, Inoke J drew attention to the learned trial judge's sentencing remarks quoted in full in paragraph 31 of this judgment, and emphasised the statement of the learned trial judge that although the Petitioner and the 4th Defendant were part of a joint enterprise to assault the deceased, there was no evidence that either of them inflicted any of the assaults themselves. The learned judge noted that "it is impossible in these circumstances to apportion responsibility to either offender."

Application for Special Leave to Appeal to the Supreme Court

[25] The application of the Petitioner for special leave to appeal against the aforesaid judgment of the Court of Appeal dated 29th August 2011, was argued before this Court on 9th August 2012. The application was based on several grounds such as (a) the acceptance by the trial judge and the majority of the Court of Appeal of the alleged inconsistent verdict of the assessors, (b) inadequate direction on joint enterprise, (c) the alleged unfair directions of the learned trial judge, (d) the failure of the Court of Appeal to assess the evidence, and (e) the prejudice caused to the Petitioners by inadequate or misdirection on joint enterprise which has resulted in the inconsistent verdict of the assessors.

[26] In a unanimous decision dated 21st August 2012, the Supreme Court (Hettige JA., Sundaram JA., and Ekanayake JA.,) refused special leave to appeal on the basis that the application of the Petitioner and the 4th accused did not meet the "threshold requirement for the grant of special leave to appeal".

[27] This Court emphasised in paragraphs 17 of its judgment that the deceased was not taken to the charge room where the arrested suspects were normally brought for registration and to lock in the cell but was taken to the crime office which was also situated in the same police station, and concluded that-

"This act demonstrates that the accused who were in the said investigation team had acted with the common intention of committing an unlawful act and had brought the deceased to the crime office."

[28] In paragraphs 19 and 20 of its judgment, Court noted the severe nature of the injuries on the body of the deceased, which were all caused by the assaults that took place while he was detained in the Valelevu police station from midnight of 4th June to 6 am on 5th June in the crime room of that station. Court also noted that death resulted,

according to the pathologist who examined the body in the morning, from "shock and internal haemorrhage, due to multiple bruises as a complication of multiple blunt impacts."

[29] This Court then dealt with the question of joint enterprise in paragraphs 22 to 23 of its judgment, which are quoted below in full:-

> *"22. There was evidence to show that out of the 1st to the 7th accused several of them were physically present in and around the crime room that night. The 1st and the 4th accused were police officers against whom there is direct evidence that they participated in the arrest and brought the deceased to the police station, they were seen in the police station moving in and out of the crime room on that night. They were seen tired in the morning. Finally they took the deceased to the hospital and told the nurse on duty that they picked this person on the road and they were instructed to take him to the hospital.*
>
> *23. Would the above evidence be sufficient for a panel of reasonable assessors, properly directed to find the 1st and the 4th accused guilty for the murder of the deceased even if they were charged separately? The fact that the other accused were acquitted by the assessors only indicate that one or more of the ingredients of the charge framed against those accused was not proved beyond reasonable doubt."*

Korovusere v State

[30] It is in this backdrop that the application for review of the aforesaid judgment of the Supreme Court filed by the 4th accused Rusiate Korovusere, has to be considered. The Petitioner has relied heavily on the decision of this Court in *Korovusere v State* [2013] FJSC 2; CAV0005.2011 (24th April 2013), in which the conviction of his co-accused was set aside.

[31] The Supreme Court (Marsoof JA., Chandra JA., and Calanchini JA) in its unanimous judgment dated 24th April 2013 considered a submission made by the Petitioner Rusiate Korovusere, based on his alleged withdrawal from the joint enterprise prior to the commission of murder, which he described as the "cut-off point". Although no such submission had been made on behalf of any of the accused at any stage in the proceedings in the High Court, Court of Appeal or the Supreme Court, the Supreme Court considered the submission to avoid the perpetration of a miscarriage of justice.

[32] In paragraph 23 of the judgment of Chandra JA., reference was made to the sentencing remarks of the learned trial judge quoted fully in paragraph [21] of this judgment, wherein the learned trial judge in explaining her reasons for showing leniency towards the Petitioner and the 4th accused by not fixing a minimum term of imprisonment, stressed that there was no evidence that either of them had inflicted

any of the assaults on the deceased themselves, and that therefore, it is "impossible in these circumstances to apportion responsibility to either offender."

[33] In *Korovusere,* this Court considered some of the evidence that suggested that the 4th accused Korovusere had at a certain point before the commission of the offense of murder, effectively withdrawn from the joint enterprise. In particular, Chandra JA, at paragraph 24 of his judgment emphasised the paucity of evidence regarding the presence of the 4th accused Korovusere within the crime room, except of a brief period of about 30 minutes, during the period the deceased was kept there, and in particular the evidence that he was seen by the mother of the deceased seated on a bench with two other officers in front of a closed door outside the crime room at around 1.00 a.m. and his subsequent conduct of coming out of the crime office and whispering something to the officers at the charge room.

[34] This Court observed that the aforesaid facts, viewed in the light of the sentencing remarks of the learned trial judge pertaining to the reasons for not fixing a minimum prison term with respect to the Petitioner and the 4th accused, brings about a situation which necessitated the consideration of the continuation of the petitioner's participation in the joint enterprise if there was any. In paragraph 25 of its judgment, the Court asked whether the Petitioner had cut himself off or withdrawn from the joint enterprise at any stage. This is the ground that is now being urged by the present Petitioner as did the 4th accused in his successful application for review, which point had not been considered by the High Court, by the Appeal Court and also by the Supreme Court in their decisions already outlined.

[35] This Court in *Korovusere* was mindful of the fairly comprehensive summing up of the learned trial judge on the question of joint enterprise, which it fully quoted in paragraph 26 of its judgment, but it went on to observe in paragraph 27 as follows:-

> *"[27] The above is a fairly comprehensive disposition regarding joint enterprise. But the position of any one of the perpetrators moving out of the crime scene which necessitates the consideration of a cutoff point or withdrawal from a joint enterprise has not been addressed. In the circumstances of the case especially regarding the 4th accused, it was necessary to consider that position. In that respect the summing up was inadequate in view of the fact that the 4th accused had been seen only at the time of the arrest, thereafter outside the crime office during the period that the deceased was inside the crime room and still alive, and in the morning again seen outside the crime office when the deceased's body was loaded into the vehicle to be taken to hospital and when the body was in the hospital. In these circumstances there should have been a direction to the Assessors to consider whether the Petitioner would have been a participant in the joint enterprises and continued to be so throughout the period that the deceased was being beaten up, even if it had been considered that he was with the other perpetrators at the commencement and during the scope of the joint enterprise."*

[36] In paragraph [28] of its judgment this Court considered the law on the subject of withdrawal from joint enterprise, and stressed in paragraph [29] that where there is evidence of withdrawal by party to a joint enterprise, the decision regarding same should be left to the Assessors and "therefore there has to be a direction to that effect where the evidence would be suggestive of such withdrawal."

[37] The Supreme Court in all the circumstances of the case felt that given that there was some evidence to suggest that the 4th accused Korovusere's conduct manifested a state of withdrawal from the joint enterprise, the failure on the part of the trial judge to direct the assessors on the question as to whether there was an effective withdrawal from joint enterprise, justified the exercise of its review power in terms of section 8(5) of the of the Administration of Justice Decree, 2009, and that Court accordingly set aside the conviction and sentence of the 4th accused for murder and substituted in its place a conviction on the count of accessory after the fact of murder in terms of section 388 of the Penal Code and sentenced him to two years' imprisonment with effect from 23rd April 2008. Since the 4th accused had already served that period in prison, Court also directed that he should be released forthwith.

[38] The exceptional circumstance that resulted in the quashing of the conviction of the 4th accused on review in *Korovusere v State, supra,* was the failure of the trial judge to direct the assessors on the question whether there was an *effective withdrawal* by the said accused from the joint enterprise to assault the deceased while he was held at the Valelevu police station, prior to the actual commission of the offence. As this Court observed in paragraph 38 of its judgment in *Korovusere*, the omission on the part of the trial judge "has caused serious prejudice to him (the 4th accused) and would amount to a miscarriage of justice if his conviction for murder is allowed to remain."

Sufficiency of Evidence of Withdrawal from the Joint Enterprise

[39] Mr. Sharma, who appeared for the Petitioner in this application for review, has submitted that the position of his client is similar to that of Rusiate Korovusere, who succeeded in his review application in having his conviction for murder quashed. It is common ground that it was due to the existence of sufficient evidence that Rusiate Korovusere had effectively withdrawn from the joint enterprise prior the commission of murder of Tevita Malasabe that he was able to persuade this Court to have his conviction for murder set aside, and Ms. Puamau, who appeared for the Respondent, has contended that the position of the Petitioner was materially different from that of Korovusere, as there was absolutely no evidence to suggest that the Petitioner had withdrawn from the joint enterprise prior to the murder. It is therefore crucial for the purposes of this application, to examine the role played by the Petitioner in the arrest and death of Malasabe, who died while in police custody.

[40] Mr. Sharma has also submitted at the hearing of this application for review that the arrest of the deceased, Tevita Malasabe, was effected according to law, and that all proper procedures were followed by the Petitioner in making the arrest and handing over the deceased for questioning to Sgt. Pita Matai, who had in turn entrusted him for questioning to another officer, Mosese Kalidole. Mr. Sharma has further contended that having thus discharged his responsibility, the Petitioner had gone out in the vehicle assigned to him to pump fuel, and on his return to the station, after completing the running sheet of the vehicle, he had handed over the keys to the 4th accused Korovusere and gone off duty to get some rest. Thereafter, he was seen in the station only the next morning, when it transpires in evidence that he was directed by Sgt. Pita Matai to take the deceased to the hospital, which positions have been contested by Ms. Puamau in the course of her submissions.

[41] It is convenient to first deal with the aspect of lawfulness and propriety of the arrest and detention of the deceased, Tevita Malasebe, before looking at the question of withdrawal. In this context, it is important to note that the Petitioner, Lole Vulaca, had been part of the small team of CID officers detailed to investigate an incident of robbery with violence and unlawful use of a motor vehicle, which took place on 31st May 2007, in the course of which $12,000, being wages of labourers of the Golden Manufacturers in Valelevu Industrial area, was stolen. A significant fact that emerges from the records of the caution interviews of the Petitioner and the 8th accused Sgt. Matai, is that it was the Petitioner, who first got information that one Jone Savuicole was drinking beer at Ritz Cafe in Suva and was also buying drinks for other people in a suspicious manner. Acting on this lead, the 8th accused Sgt. Pita Matai, who was in charge of the said investigation, sent a Police party to the Ritz cafe to arrest Jone Savuicole, who ultimately revealed not only his own involvement in the said incident but also the names of the other participants in the venture which included that of the deceased Tevita Malasebe. It was only after all efforts to locate the suspects disclosed by Jone Savuicole failed that a team led by the Petitioner was deployed to arrest the deceased Tevita Malasebe on 4th June 2007.

[42] The mother of the deceased, Anisa Nakuila Solivolili, has testified at the trial regarding the manner in which her son was taken into custody on 4th June 2007 just after 11.30 pm. Of the seven officers in the team of policemen, it was the Petitioner, Lole Vulaca, who took the lead in the arrest. Solvolili has testified that the Petitioner entered her home with two other officers, the 2nd and 3rd accused, and had asked for her son, Tevita Malasabe. The Petitioner had indicated that they would "take him to the station and have a discussion." When the witness Solivolili, had insisted in knowing why they were taking her son, the Petitioner had said, "It's just a small thing, I'll take him and bring him back".

[43] Solivolili has also stated in evidence that when she expressed her intention to accompany her son to the station, the Petitioner had said - "Do not worry about

anything. I'll take him quickly and bring him back so stay here." She has testified that then her son came to the door where the Petitioner was standing, and the Petitioner told the next man to handcuff her son. When the rest of the team deployed to arrest the deceased took him out of the house handcuffed, the Petitioner was still standing at the door, and the mother asked him – "Why did they handcuff him?" To that question, she had no response from the Petitioner, who then left her house saying that he was going to follow the others quickly to see that they do not assault the deceased.

[44] There is evidence that three vehicles were deployed for the said arrest, and that the Petitioner drove one of them. However, the deceased, Tevita Malasebe, was taken to the Valelevu police station in one of the other vehicles driven by Constable Matai. It appears from the testimony of Mosese Kalidole, a Police Officer of 18 years experience who had been detailed to interview the deceased the next morning, that he had seen the officers who had proceeded to arrest the deceased arrive at the police station, and saw the Petitioner come out of the vehicle he drove and go into the crime office with the deceased who alighted from another vehicle. Most significantly, Kaliode has testified that the deceased was not taken to the charge room for the station orderly to enter his arrest in the station diary and to lock him up in the cell to await interview, a procedure usually followed by the police when arresting suspects.

[45] Later in the night, the deceased's mother Anisa Nakuila Solivolili, arrived at the Valelevu police station with her other two sons, and saw WPC Sesenieli Cagi, who was the station orderly in charge of the charge room along with WPC Karti Karishma and Cpl. Epeli Sesenieli Cagi has testified at the trial that it was her responsibility to record the movements of all those who had called in at the station and those who had left the station. She stated that upon the arrival of Solivolili with her two sons, she "asked around" to verify whether the deceased had been brought to the station that night as there was no entry of the arrest in her records, and found that there was no trace of him. She sent one of the Indian female officers to check whether he was anywhere in the police station, and when the latter returned with a negative response, asked Solivolili to check for her son at the Central police station. Solivolili, in her testimony has stated that she did not take this advice, and remained at the Valelevu police station because she was convinced that he must be there.

[46] In these circumstances, we have difficulty in accepting the submission of Mr. Sharma that the arrest of the deceased, Tevita Malasebe, was effected in accordance with the law and that all applicable procedures were followed by the Petitioner in making the arrest and handing over the deceased for questioning to Sgt. Pita Matai, and through him to Mosese Kalidole, who was to interview him the next morning. It is significant that Kalidole himself has testified that the deceased Malasebe was brought in to the station and taken directly into the crime office, by-passing standard procedure of taking him to the charge room to record his arrest, and that he went off duty thereafter

on a direction by Sgt. Matai, return to the station the next morning to interview Malasebe. We are of the opinion that had the Petitioner, Lole Vulaca, acted lawfully in recording the arrest of Malasebe as required by law and the salutary practice applicable in regard to such arrests, the death of Malasebe in police custody would, in all probability, have been averted.

[47] Having said that, we may now turn to the main thrust of the submissions of Mr. Sharma, which was that, as far as the Petitioner, Lole Vulaca, was concerned, there was sufficient evidence manifesting his intention to effectively withdraw from the joint enterprise prior to the murder of Malasebe, and that in those circumstances, it was incumbent on the trial judge to have directed the assessors on the question of withdrawal from the joint enterprise. It must be stated at the outset that these submissions of Mr. Sharma were not very consistent with his other submission that the Petitioner had no part in any joint enterprise to assault the deceased Malasebe while in police custody, in which event, no question of withdrawal from the joint enterprise could ever arise. The High Court convicted the Petitioner as well as his co-accused Rusiate Korovusere for murder on the basis of joint enterprise, a finding that has not been overturned by the Court of Appeal or the Supreme Court on appeal, and in *Korovusere v State, supra,* the conviction of Rusiate Korovusere for murder was quashed only on the basis that he had effectively withdrawn from the joint enterprise to hurt Malasebe prior to the commission of the murder. In any event, we are convinced that the conduct of the Petitioner as outlined in the preceding paragraphs, clearly shows that he was part of such a joint enterprise.

[48] Accordingly, it is obvious that the Petitioner could succeed in this application for review only if he can show that there was sufficient evidence of his timely and effective withdrawal from the joint enterprise. Mr. Sharma has contended that having lawfully arrested Tevita Malasebe, the Petitioner had discharged his responsibility by handing him over to Sgt. Pita Matai, after which he went back to the vehicle assigned to him and took it out to pump fuel, and on his return to the station had after completing its running sheet, handed over its keys to the 4th accused Korovusere and gone off duty to go home and take some rest. However, apart from the testimony of WPC Saleshni Devi who stated in evidence that sometime after midnight she saw the Petitioner sitting in one of the Police vehicles at the time the mother and brother of Malasebe were in the charge room inquiring about Tevita Malasebe, Mr. Sharma was not able to point to any evidence that supported his position that the Petitioner had left the Valelevu police station to go home, and took no part in the sustained attack on the deceased Malasabe throughout that night. In particular, no official records were produced as evidence of the time at which the Petitioner signed off duty at the station.

[49] Ms. Puamau, who strongly contested the position that the Petitioner had left the Valelevu police station sometime after midnight, has also stressed that there was ample evidence to show that the "softening up" process consisting of assaults

commenced no sooner the deceased, Tevita Malasebe, was taken into the crime office, where he was subjected to systemic physical abuse throughout the night, which intensified towards early morning, resulting in death. Ms. Puamau also emphasized that the Petitioner, Vulaca, had always denied that he was part of the joint enterprise to assault the deceased, and had never asserted at any stage of the trial that he had effectively withdrawn from the joint enterprise, as opposed to Rusiate Korovusere, who never contested the existence of the joint enterprise or asserted that the process of arresting the deceased was lawful, and had succeeded on his review application to this Court on the basis that he had effectively withdrawn from the joint enterprise towards midnight.

[50] Ms. Puamau's position is amply supported by evidence. Malasebe's mother Solivolili has testified that at about 1 am on 5th June 2007, while she was in the Valelevu police station looking for the deceased, she heard some noises, which she described as sound of rumbling, shuffling or rustling coming from the crime office, and she asked the Police officer at the desk at the charge room whether they were assaulting her son, only to be told that it was the sound of LTA officers walking along the corridors upstairs. The testimony of Solivolili has been corroborated by WPC Saleshni Devi and WPC Sesenieli Cagi. The former testified that around midnight, she saw a lady (Solivolili) come to the station with two boys, and the lady was crying. The latter, who was the station orderly in charge of the charge room, as already noted, has stated in evidence that when Solivolili came to her counter, she had attempted to verify whether the deceased had been brought to the station, and found no trace of him. Both these officers have also testified that they heard someone cry, and it was the testimony of WPC Cagi that at 2 am while she was in the charge room she heard some yelling from the crime room and later on but before 3 am, she saw a bold headed civilian policeman carrying a blue mattress into the crime room.

[51] WPC Karti Karishma who also testified at the trial stated that she too heard someone crying inside the crime office after Solivolili and her sons had left the police station. She stated that she saw the 7th accused come into the charge room and go into the cell, taking with him a prisoner's mattress from the charge room. She clarified that if someone had entered the crime office through the external door to the crime office she would not have known that they had done so. Special Constable Ritesh Lal, stated in evidence that he had after completing a night round checking on men deployed on duty outside the Valelevu police station, returned to the station in the early hours of 5th June 2007, and was sitting in his vehicle behind the charge room at around 3.00 am or 4.00 am when he heard a noise, that sounded like someone saying, *"weilei"*. He walked behind the charge room towards the back of the station, and noticed that the noise came from the left of the Station where the crime office and bure were. He said that it was a man's voice, and the crying went on for about 10 minutes. He said that he again had to go away to check on the duty men with his corporal at 4.30 am, and that when he walked behind the crime office, one officer came out of the door which had

been locked. As he was new to the station, he did not know him. When he asked him about the noise, he asked him to go to the other side of the station.

[52] It is also in evidence that when constable Pita Qiolevu happened to walk past the charge room towards the main road between 4.00 am and 4.30 am on 5th June 2007, he heard some crying at the corner of the crime office. He has further testified that, the crying was loud, and that he heard clearly the words "Officer please let me live" repeated several times. According to him, the voice was a male voice, and he had reacted by asking about it from DC Jone, who was standing opposite the crime office, but the latter said nothing in reply. No one else was around. Under cross-examination he admitted that the noise was unusual and that it signaled something unlawful.

[53] Several witnesses have also given evidence at the trial about what they saw and heard in the morning of 5th June 2007, after sun rise. WPC Taraivini Vusoni has testified that when she walked from her quarters situated within the police station complex towards the station to take a phone call prior to going to her tribunal, she saw the door of the crime office ajar and was able to see within it a Fijian male lying on the floor on a blue tarpaulin mattress. WPC Maca Baleinaloto, as well as Koresi Wainiqolo, who was serving extra-mural punishment at the Valelevu police station, stated in evidence that they had seen a body being loaded into a white colour twin cab at approximately 7 am. WPC Maca Baleinaloto identified the two police officers who loaded the body into the twin cab as the 2nd accused and the 6th accused.

[54] It is important to take note of what Zarif Ali, who was also serving extra-mural punishment, has testified in regard to the state of the crime office in the morning of 5th June 2007. His testimony was that when he went to the crime office to sweep its floor, he saw human faeces and human urine on the floor. It is significant that he has further testified that when, after cleaning the windows of the crime office as directed, he was standing outside somewhere near the mango tree, he saw the 4th accused, Korovusere, wearing gloves cleaning the floor of the crime office, but it is clear from the evidence that Korovusere did so on the orders of Sgt. Pita Matai. Jim Qalau, who was also serving his extra-murals, disclosed in evidence that when he was engaged in raking leaves behind the police station on the morning of 5th June 2007, he saw the Petitioner, Lole Vulaca, lying down in the bure. He had wished him a good morning to which Vulaca had responded, but continued to sleep. Qalau has further testified as follows: "I saw him and it was as if he had been awake all night and he wanted to lie down. Then I went to rake the leaves outside." This is a significant piece of evidence in the context of the paucity of evidence regarding the whereabouts of the Petitioner prior to being seen in the process of loading the body of the deceased in a van which he drove to the hospital.

[55] It transpires from the evidence that on the orders of the 8th accused Sgt. Pita Matai, the deceased was loaded onto a twin cab by 2nd and 6th accused, and the cab was

driven by the Petitioner, Lole Vulaca, with the 4th accused Rusiate Korovusere seated with him in front, and the 2nd and 6th accused seated at the back. The deceased was taken into the Colonial War Memorial Hospital on a trolley, and it is in evidence that the police officers were acting as if they were handling a dead body, and the body was 'thrown' onto the tray without the care that would have been shown to a very sick person. It is significant to note that the deceased was pronounced dead upon arrival at the hospital. Post mortem examination revealed that the deceased died of shock and internal hemorrhage, due to multiple bruises as a complication of multiple blunt impacts.

[56] The conduct of the Petitioner at the hospital is also of some significance in a case based entirely on circumstantial evidence. Emi Ua Raceba, who was a nurse working at the triage section of the hospital, has stated in evidence that when the deceased was brought in, she recognised Lole Vulaca, and was told by another nurse that the second police officer who was with him was Rusiate Korovusere. She said that when she asked where the man had been brought from, Lole Vulaca told her that they had been directed to bring him to hospital, and that the man had been on his way to attend court that morning when he passed out. They did not tell her the man's identity and she had to call the Valelevu Police Station to find that information for herself. The conduct of the Petitioner, Lole Vulaca, was strange, to say the least.

[57] Some insights into what happened that morning of 5 June 2007 can also be gained from the testimony of Inspector of Police, Ramasibana Navunicagi, who arrived at the Valelevu police station at 7 am to prepare for a briefing to Assistant Superintendent of Police, Tokowara Parker, who was scheduled to arrive later. At 8 am, the 8th accused, Sgt. Pita Matai told IP. Navunicagi that they had brought in a suspect named Tevita Malasebe, who had to be taken to the hospital with breathing difficulties. ASP Tokowara Parker has stated in evidence that when he visited the Valelevu police station on the morning of 5th June, he was informed that Tevita Malasebe had been brought into the station that morning in connection with an incident of robbery with violence, and he asked IP Ramasibana to process the case. At about 10 am, he was informed by Ramasibana that Malasebe had been taken to hospital, and later on he was informed that he had died on arrival at the hospital. ASP., Parker testified that after hearing of the death of Malasebe, he proceeded to the hospital, and saw the body of Malasebe, and that in his presence, Malasebe's mother and one of his brothers had identified Rusiate Korovusere, who was to be seen there, as one of the officers who had taken her son away the night before.

[58] While there is overwhelming evidence that between mid-night of 4th June and the morning of 5th June, Malasebe was subjected to sustained and brutal assaults resulting in his untimely death within the crime office of the Valelevu police station, none of the witnesses whose testimony was adverted to in the preceding paragraphs, was able to say who were in the crime office besides the deceased Tevita Malasebe during the

aforesaid period, and in particular, whether the Petitioner was there at any time when desperate cries of a man being beaten up emanated from the crime office.

[59] Mr. Sharma has insisted that the Petitioner did not step inside the crime office having brought Malasebe into it under his personal custody, as he had discharged his responsibility when he arresting him and handed him over to Sgt. Pita Matai at or near the crime office. It is clear that the assessors and the trial judge did not believe the version of the Petitioner that he never entered or was inside the crime office, possibly because of the many infirmities in it. In particular, it is hard to believe that a man who had given the mother of Malasebe the assurance that the deceased will not be subjected to assault while in the police station, would have taken him to the crime office without first recording his arrest in the station diary kept in the charge room, or keep away from the place where he was detained. Furthermore, if as Mr. Sharma asserted, the Petitioner had left the police station to go home at mid-night as he wanted to rest, why did he appear in the morning so tired and sleepy, and wanting to catch up on sleep? It is inconceivable that a man who was oblivious to what happened at the crime office as Mr. Sharma wants us to believe, would lie to the hospital staff that the deceased had died on his way to court that morning.

[60] With all these questions looming large, the primary issue for determination in this review application is whether there is evidence of the Petitioner effectively withdrawing from the joint enterprise prior to the commission of the murder. In this context, it is necessary to note that the principles of law applicable to withdrawal from joint enterprise have been nicely summarized in paragraph 28 of the judgment of Chandra JA., in *Korovusere v State* [2013] FJSC 2; CAV0005.2011 (24th April 2013). It would suffice if we quote the following *dictum* of Sloan J.A. in *R v Whitehouse* [1941] 1 W.W.R.112 (Court of Appeal of British Columbia), which has been approved in several subsequent judicial decisions, as noted in the said paragraph:-

> *"After a crime has been committed and before a prior abandonment of the common enterprise may be found by a jury there must be, in my view, in the absence of exceptional circumstances, something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of that crime. I would not attempt to define too closely what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. That must depend on the circumstances of each case but it seems to me that one essential element ought to be established in a case of this kind: where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate from the contemplated crime to those who desire to continue in it. What is 'timely communication' must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or*

otherwise, that it will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw."

[61] It is trite law that mere repentance without any action is insufficient to negative criminal liability of a party to a joint enterprise. It is essential that there must be clear physical manifestation of the intent to withdraw, so as to break the chain of causation. Courts have universally insisted on "unequivocal communication" (*R v Rook* (1997) Cr. App. R. 327) "unequivocal notice" (*Gauthier v The Queen* 2013 SCC 32) or "affirmative action" (*Smith v. United States* 568 U.S. 133 S.Ct. 714 at 720 (2013) on the part of the withdrawing participant sufficient to indicate to all other offenders, that he or she will not lend any further support to achieve the objective of the joint enterprise.

[62] Sufficient evidence of the physical and mental elements of withdrawal from joint enterprise was found to exist in the case of Rusiate Korovusere, which resulted in his conviction for murder being quashed by this Court on review in *Korovusere v State, supra,* and the sentence of imprisonment for life passed on him for murder being reduced to two years' imprisonment for the lesser offence of being accessory after the fact. We have attempted to summarise in the preceding paragraphs, all material evidence relating to the role of the Petitioner, Lole Vulaca in the joint enterprise, for the purpose of examining whether from this evidence it is possible to discern any manifestation of effective withdrawal from the joint enterprise, and we were able to find none. In these circumstances, the trial judge's failure to direct the assessors on the question of withdrawal would not in any way prejudice the Petitioner, as there was absolutely no evidence that even remotely suggested that the Petitioner had the intention of withdrawing from the joint enterprise and that he had manifested his intention in positive action.

[63] It is clear from the medical evidence that the deceased Tevita Malasebe suffered a painful death at the hands of certain police officers of the Valelevu police station who subjected him to sustained and brutal assaults between midnight of 4th June 2007 and the morning of 5th June 2007. The post mortem examination conducted on the deceased revealed that he had died of shock and internal hemorrhage, due to multiple bruises as a complication of multiple blunt impacts. According to the pathologist who testified at the trial, there were 38 external injuries of bruises, aberrations and hand cuff abrasions. There were two imprint abrasions on the back. He listed 16 internal injuries of extensive hematoma, fractured ribs (the 6th, 7th, 8th and 9th) and large areas of hematoma over the abdominal wall, and over the right and left feet. The pathologist has testified that the injuries found on the deceased were suggestive of blunt trauma leading to systematic shock.

[64] This was a typical case of police assault not involving the use of weapons of any kind or any change in the scope of the common design which rendered the joint enterprise

fundamentally different from what was originally contemplated. Hence, complex questions of the kind that had to be dealt with by the House of Lords in decisions such as *R v Powell (Anthony) and English* (1999) 1 AC 1 and *R v. Rahman* [2008] 3 WLR 264 do not arise for decision in this case, and the only question is whether there was effective withdrawal from the joint enterprise on the part of the Petitioner, and there is absolutely no material in this case to conclude that the Petitioner, Lole Vulaca, had formed any intention to withdraw from the joint enterprise to assault the deceased or that he had effectively manifested such intention in his actions prior to the commission of the murder. In our view, in these circumstances, the application for review has to be refused.

[65] However, before parting with this judgment, we wish to deal with the question of consistency of verdicts in the context that the 2nd to 3rd accused and the 5th to 7th accused, who were charged along with the 1st and 4th accused for the murder of Tevita Malasebe, were acquitted after the High Court trial, and the conviction of the 4th accused, Rusiate Korovusere, was quashed by this Court on review. It is clear from the evidence led at the trial outlined by us in the preceding paragraphs of this judgment, that the facts and circumstances relating to the Petitioner, Lole Volaca, differed from those relating to the 2nd to 3rd accused and the 5th to 7th accused, who were acquitted in the High Court after trial, and it is necessary to stress that, as this Court did at paragraph 23 of its judgment in *Vulaca v State, supra,* which has been quoted in full at pargarph 29 of this judgment, that the fact that the said accused were acquitted by the assessors, only indicate that "one or more of the ingredients of the charge framed against those accused was not proved beyond reasonable doubt."

[66] A related question that arises in these circumstances is whether it is open for this Court, when exercising its powers of review in terms of section 8(5) of the of the Administration of Justice Decree, 2009, to uphold the conviction of the Petitioner on the basis of joint enterprise, when the conviction of his co-accused, Rosiate Korovusere, was quashed after review. In this context, it is important to bear in mind that the basis of liability is joint enterprise, and as this Court observed at paragraph 24 of its judgment in *Vulaca v State, supra,* there is –

> *" .....no primary offender in this case like in the case of an offence of aiding and abetting. All the accused are equally liable to the commission of murder of the deceased as they were charged for committing this offence in a joint enterprise. In these circumstances there cannot be any inconsistency in the verdict of the assessors in this case."*

[67] As was observed by the High Court of Australia in *Mackenzie v R* (1996) 190 CLR 348, at 366-7 [Gaudron, Gummow and Kirby JJ], the test that is applied in dealing with questions of inconsistent verdicts, "is one of logic and reasonableness." In the course of its judgment, the High Court of Australia cited a passage in an unreported judgment of Devlin J. in *R v Stone* (13 December 1954), to the effect that an accused

who asserts that two verdicts are inconsistent with each other, "must satisfy the court that the two verdicts cannot stand together". This, the Petitioner has clearly failed to do.

[68] This Court has held on review that Rusiate Korovusere was gravely prejudiced by the absence of a direction to the assessors on the question of withdrawal from joint enterprise where there was some evidence suggestive of withdrawal, making it incumbent for the trial judge to make a detailed direction on that point, whereas in the case of the Petitioner, Lole Vulaca, this Court has not been able to find any evidence suggestive of withdrawal from joint enterprise, and on the other hand there is overwhelming evidence that establish his guilt beyond reasonable doubt.

Conclusions

[69] For the reasons set out fully in this judgment, we are firmly of the view that the Petitioner's application for review should be dismissed, but in all the circumstances, without costs.

Hon. Mr. Justice Saleem Marsoof
Justice of the Supreme Court

SUPREME COURT OF FIJI SUVA

Hon. Mr. Justice Sathyaa Hettige
Justice of the Supreme Court

Hon. Mr. Suresh Chandra
Justice of the Supreme Court

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