IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION: CAV 0015 OF 2022
[Court of Appeal No: AAU 6/2016]
High Court No: HAC 89/2010]

CRIMINAL PETITION: CAV 0016 OF 2022
[Court of Appeal No: AAU 48/2016]
High Court No: HAC 89/2010]

CRIMINAL PETITION: CAV 0017 OF 2022
[Court of Appeal No: AAU 7/2016]
High Court No: HAC 89/2010]

CRIMINAL PETITION: CAV 0018 OF 2022
[Court of Appeal No: AAU 97/2016]
High Court No: HAC 89/2010]

CRIMINAL PETITION: CAV 0019 OF 2022
[Court of Appeal No: AAU 166/2015]
High Court No: HAC 89/2010]

BETWEEN : **SIRELI LILO**
EPARAMA TAMANIVAKABAUTA
ILIESA VAKABUA
ILIVASI NAVUNICAGI
RAFAELE NOA

Petitioners

AND : **THE STATE**

Respondent

Coram : The Hon. Mr Justice William Calanchini, Judge of the Supreme Court
The Hon. Mr Justice Terence Arnold, Judge of the Supreme Court
The Hon. Madam Justice Lowell Goddard, Judge of the Supreme Court

Counsel: Mr M. Fesaitu and Mr T. Varinava for Ilivasi Navunicagi
Remaining Petitioners in Person
Ms S. Naibe and Ms R. Uce for the Respondent

Date of Hearing: 5 June and 14 June, 2024

Date of Judgment: 29 August 2024

JUDGMENT

Calanchini, J

Introduction

[1] This is the final Judgment in these five Petitions. An interim judgment had been delivered on 25 April, 2024 [2024] FJSC 4. The orders made by the Court in that Judgment included allowing the appeal against sentence brought by Iliesa Vakabua whose sentence was reduced to 9 years 3 months with a non-parole term of 8 years. He has since been released, having served the non-parole term. The hearing of the petitions filed by the remaining four Petitioners for leave to appeal against convictions was adjourned part heard to the June session of the Court. Directions were also given for the remaining Petitioners to expedite the hearing of the applications to abandon their sentence appeals in the Court of Appeal.

[2] It was the need to make two further orders in that Judgment that required the part heard adjournment of the petitions. First, an order was made that Ilivasi Navunicagi's "*Application for Fresh Evidence*" be listed for hearing on the adjourned date in June. That application had not been determined by the Court of Appeal during the hearing on 2 February 2022 nor was there any reference to the application in the Court's judgment delivered on 27 May 2022. It was considered more expedient and in the interests of justice for this Court to consider the application rather than send the application back to the Court of Appeal. A similar application by Eparama Tamanivakabauta had been dismissed without any considered analysis.

[3] The second reason for adjourning the Petitions as part heard was on account of what can only be described as an inexcusable shortfall of relevant documents in the appeal record. In particular, but not limited to, was the absence of most of the exhibits that had been admitted into evidence at the trial in the High Court. The transcripts of the *voir dire* hearing and the trial revealed that the petitioners' caution interviews and charge statements were tendered and marked as exhibits in both proceedings. At the trial both the Fijian (typed) and English (typed) versions of each petitioner's caution interview and charge statement were tendered by witnesses for the prosecution and marked as such. However not one of those documents with the appropriate exhibit marking or notation was reproduced in the appeal record. The documents that were included were not marked as exhibits. The limited number of documents that were included in the record are listed in paragraph 37 of the Interim Judgment. It is clear that the Court of Appeal was at a similar disadvantage. The Registry was subsequently able to locate copies of some missing exhibits.

The Facts

[4] The facts are stated in some detail in this Court's interim Judgment. It is only necessary to reproduce a brief outline in this judgment. At about midnight on 21 August 2010 the five petitioners assembled outside the victim's compound. All five had been drinking alcohol earlier in the evening. They climbed over the fence and entered the compound. Eparama subsequently entered the house through a window and opened the door for the others to proceed into the house. Iliesa was then directed to go outside and stand at the compound gate to act as a look out. The other four petitioners went from room to room removing various items belonging to the occupants. It soon became apparent that the house was occupied. The prosecution alleged that Ilivasi Navunicagi strangled the victim, assisted by Eparama and Sireli. The victim, John Leonard Dass, was 71 years old at the time of his death. The offences occurred in Lautoka.

[5] The Post Mortem Report stated that the cause of death was Asphyxia as a consequence of manual strangulation. The report stated that there were multiple scratch abrasions on both

sides of the neck consistent with nail marks indicating that pressure had been exerted on the neck of the deceased with hands. At the trial the pathologist stated that, based on his experience as a forensic pathologist, the deceased had been strangled by one person using both hands. In his opinion the strangulation was not accidental but that force had been deliberately applied to the deceased's neck.

[6] The Petitioners were each charged with one count of murder alleging that they between 21 and 22 August 2010 murdered John Leonard Dass (under section 237 of the Crimes Act 2009). They were also each charged on one count of aggravated robbery alleging that between 21 and 22 August they, in the company of each other, robbed John Leonard Dass of property to the total value of $3,790.00, (under section 311(1)(a) of the Crimes Act).

The Trial

[7] Apart from Rafaele Noa the petitioners challenged the admissibility of their caution interviews and charge statements on the basis that admissions contained therein were not voluntary admissions. Having heard the evidence from the prosecution witnesses and four of the petitioners the learned trial Judge admitted the statements into evidence. Although claiming to have complained about Police assaults, none of the petitioners present at the trial who challenged the admissibility of their out of court admissions, could identify in the record any complaint having been made or refer to any medical report in respect of those alleged assaults. There is an explanation for the absence of any recorded complaint in the appeal record in the case of Eparama Tamanivakabauta. That explanation is considered later in this judgment. It must be noted that Ilivasi Navunicagi's caution statement and charge statement were admitted into evidence in his absence. This was on the basis of the unchallenged evidence from the prosecution witnesses. Ilivasi had absconded some two years earlier and the trial Judge had ruled that the trial would proceed in his absence.

[8] The findings that the admissions in each caution interview and charge statement had been made voluntarily were based on evidence that was before the Judge at the conclusion of

the *voir dire* proceedings. Furthermore, the same evidence at the trial resulted in the assessors and the trial Judge concluding that the out of court admissions had been made voluntarily.

[9] Ordinarily the record would speak for itself and in this case any challenge relating to the admissibility of that evidence would have been unsuccessful. However, subsequent to the trial, it became apparent that the trial judge had been denied the benefit of further material that should have been disclosed by the State.

Existence of additional material

[10] At the commencement of the *voir dire* at page 55 of the Supplementary Record of the High Court, the Prosecution informed the trial Judge that Sireli Lilo, Iliesa Vakabua and Eparama Tamanivakabauta had filed challenges to their alleged confessions. The State also informed the Court that Rafaele Noa was not challenging the confession but maintained that the admissions did not satisfy all the elements required for murder. More importantly, Counsel for the State also informed the trial Judge that Ilivasi Navunicagi had filed his *voir dire* challenge on 1 August 2013. At the same time, Counsel informed the Court that the State relied on Ilivasi's alleged confession *"to ground a possible conviction."*

[11] The Court Record clearly established that at no time had Noa, Sireli or Iliesa complained to either the Magistrate on 26 August 2010 or to the High Court Judge on 16 September 2010 or on any date thereafter prior to the trial about police violence, threats or intimidation. These three petitioners had appeared on 16 September 2010 before Madigan J in the High Court under case No: HAC 89 of 2010. On the other hand Ilivasi and Eparama first appeared before Madigan J in case No. HAC 119 of 2010 also on 16 September 2010. The note of that appearance before Madigan J can be found at page 80 of Ilivasi's Record of the Supreme Court. The note shows that Madigan J listed the matter for mention on 7 October 2010 and then asked Ilivasi about his leg. In response, both Ilivasi and Eparama had complained of police assaults in some detail.

[12] Madigan J's note of Ilivasi's response was:

"Assaulted by Police when arrested at Vatukoula Police Station.
Strike back Team 10 of them. Hit by a baton.
Have medical report Lautoka Hospital
Injuries broken leg and have injuries on right shoulder and 2 broken ribs."

[13] The second accused (Eparama) then stated:

"Broken leg shoulder
Hit by a baton. Strike back team at Vatukoula
10 officers
Not taken to hospital, asked to be taken."

Role of the State

[14] At this stage the point to note is that although Madigan J has not recorded who appeared on behalf of the State, it can be reasonably inferred from the Court Record that the State was represented when Ilivasi and Eparama appeared before Madigan J. At page 2 of the Supplementary Record of the High Court when Rafaele Noa, Sireli Lilo and Iliesa Vakabua appeared before Madigan J for the first time, also on 16 September 2010, the State is recorded as being represented by L. Sovau. In paragraphs 5 and 6 of an affidavit filed on behalf of the State on 10 June 2024 in the present appeal, the deponent states that:

> *"5. ... . criminal case number has been incorrectly entered by the Court because according to State records criminal file HAC 119/10 refers to a different accused, namely State –v- Vereniki Batikalou charged with attempted rape and robbery.*
>
> *6. . . . . this substantive application refers to HAC 89/10 and from the State record both the Applicant (Ilivasi Navunicagi) and his co-accused (Eparama Tamanivakabauta) first appeared before Justice Madigan at Lautoka High Court on 16 September 2010 and both complained of injuries, however there was no order by the Court for the issue or release of the Appellant's medical report. The Court only told State to note the same."*

[15] In closing submissions on the *vior dire*, the prosecution stated that *"None of the accused complained to the Magistrate and the High Court judge, on first appearance."* (P75). This was incorrect and raises the question of how the prosecution came to be making a submission that was factually erroneous on an issue of fundamental importance. Ilivasi and Eparama had complained to Madigan J on 16 October 2010.

[16] Obviously, a representative of the State would have been present at the mentions hearing before Madigan J and would have been aware of the allegations made by Ilivasi and Eparama. However, it is not clear whether those who were prosecuting them on the charges at issue here were aware of what occurred before Madigan J, given that the Judge's note was recorded against a different matter. I will return to the significance of this later in these reasons.

Verdicts and Sentences

[17] Following the trial before the Judge sitting with 3 assessors, each of the five petitioners was convicted on the count of aggravated robbery. Noa was convicted on the count of murder and sentenced to mandatory life imprisonment with a minimum term of 20 years to be served before a pardon could be considered pursuant to section 237 of the Crimes Act. On the aggravated robbery conviction Noa was sentenced to 13 years imprisonment. Sireli was found not guilty of murder but was convicted on the lesser charge of manslaughter. He was sentenced to a term of 4 years 4 months imprisonment on the manslaughter conviction and 14 years imprisonment with a non-parole term of 13 years on the aggravated robbery conviction. Iliesa Vakabua was acquitted in relation to both homicide offences. He was sentenced to 13 years imprisonment with a non-parole term of 12 years on the aggravated robbery conviction. Ilivasi Naivunicagi was sentenced to mandatory life imprisonment with a minimum term of 20 years to be served before a pardon could be considered on the murder conviction. On the conviction for aggravated robbery he was sentenced to 13 years imprisonment. Eparama Tamanivakabauta was sentenced to mandatory life imprisonment with a minimum term of 20 years to be served before a pardon could be considered on the conviction for murder. He was sentenced to

14 years imprisonment on the aggravated robbery conviction. In each case the sentences on counts 1 and 2 were ordered to be served concurrently to each other.

Absent Petitioner

[18] At the trial the Petitioners, except for Ilivasi Navunicagi, were represented by Counsel. Ilivasi was tried in his absence. The record indicated that he had appeared for the first appearance on 16 September 2010 before Madigan J and thereafter when called upon from 3 November 2010 until 27 September 2011. He re-appeared on 10 April 2012 and continued to appear or be accounted for until 30 October 2013 when a bench warrant was issued. He absconded from that time until after his trial which had concluded on 1 December 2015. The learned Trial Judge was satisfied that Ilivasi Navunicagi was aware that he was required to attend at the trial and had chosen not to attend. Therefore he would be tried in his absence in accordance with section 14(2)(h)(1) of the Constitution.

Court of Appeal Proceedings

[19] The Court of Appeal dismissed all five appeals against conviction. A summary of the Court's reasoning in respect of each petitioner's appeal against conviction appears in this Court's Interim Judgment delivered on 25 April, 2024 at [2024] FJSC 4 at paragraphs 16 – 28. The Court of Appeal dismissed Iliesa Vakabua's appeal against sentence. The remaining four petitioners had applied to abandon their appeals against sentence. Although a single Judge of the Court had directed that those applications be listed for hearing before the Court of Appeal at the same time as the hearing of the conviction appeals, there is no reference in the Court's judgment to those applications.

Court of Appeal confusion

[20] There are two further issues that need to be addressed. The first is the confusion that manifests itself in the Court of Appeal's judgment concerning the identity of the 4th accused at the trial as the 5th appellant in the Court of Appeal (Ilivasi Navunicagi) and the

5th accused at the trial as the 4th appellant in the Court of Appeal (Eparama Tamanivakabauta). There is a clear indication of that confusion at paragraph 109 in the Court's judgment where it is stated:

> *"In paragraph 28 of the summary up the Trial Judge observes that according to the prosecution version it was the 4th Appellant who strangled the deceased to death."*

[21] However, the 4th appellant in the Court of Appeal was Eparama whereas in the High Court trial Eparama was the 5th accused. At paragraph 28 of the summing up, the learned trial judge stated:

> *"According to the Prosecution, Accused No.4 (Navunicagi) strangled Mr Dass to death, and he was assisted by Accused No.5 (Eparama) and Accused No. 2 (Sireli Lilo)."*

[22] However, the Court of Appeal correctly considered the two grounds of appeal that were relied upon by Eparama in his appeal against conviction. In particular, the first ground of appeal raised by Eparama as 4th Appellant can only relate to him as the 5th accused as he complained that his co-accused (accused No.2) was convicted for manslaughter. Yet Eparama's complaint was to the effect that his role was similar to that of accused No.2 but was convicted of murder. The Court of Appeal has relied on paragraph 49 of the summing up where the trial judge noted that both the 4th accused (5th appellant) and 5th accused (4th appellant) had confessed to murder in charge statements.

Applications to lead fresh evidence

[23] The Court of Appeal also noted at paragraph 101 that Eparama had filed an application to adduce fresh evidence. That application was briefly referred to in paragraph 114 and dismissed without reasons.

[24] Although the Court of Appeal identified the sole ground for which Ilivasi Navunicagi as 5th Appellant had been granted leave to appeal, it is apparent that the Court did not consider Ilivasi's appeal against conviction for murder on the basis that as the 4th accused

he was alleged to have strangled Mr Dass to death. His conviction was as the principal offender and was not based on common purpose culpability under section 46 of the Crimes Act 2009. Surprisingly, the Court of Appeal did identify the 5th appellant as the 4th accused who was tried in his absence. Finally, there is no reference in the Court's judgment to an application to lead fresh evidence that was filed on 1 December 2021 by Ilivasi. It would appear that the application had been served on the State since reference to both applications is made in the State's written submissions filed before the hearing of the appeals in the Court of Appeal.

Supreme Court Proceedings

[25] Pursuant to section 98(4) of the Constitution an appeal from a final judgment of the Court of Appeal may not be brought to the Supreme Court unless the Supreme Court has granted leave to appeal under section 7(2) of the Supreme Court Act 1998. Leave to appeal must not be granted unless (a) a question of general legal importance is involved; (b) a substantial question of principle affecting the administration of criminal justice is involved; or (c) substantial and grave injustice may otherwise occur. It is for the Petitioners to establish that the Petitions satisfy one of the requirements specified before the appeal can be considered. In accordance with the Supreme Court's usual practice the hearing of the petitions for leave to appeal against conviction will, if necessary, be treated as the hearing of the appeal.

Preliminary issues

[26] There are two preliminary issues arising from the Petitions filed by the Petitioners. The first issue is the practice of raising grounds of appeal that were not considered by the Court at the hearing of the appeal. The second relates to grounds of appeal challenging the non-direction or inadequate directions to the assessors when no request for a re-direction was made by trial Counsel.

Raising new grounds of appeal

[27] The practice of raising new grounds in a petition for leave was considered by this Court in Tawadokai v State [2022] FJSC 13; CBV0008.2019 (29 April 2022). Keith J indicated at para. 13 that:

> *"_ _ _ The Supreme Court is very reluctant to allow new grounds of appeal to be argued in the Supreme Court for the first time. It may do so exceptionally if the new ground of appeal raises a pure issue of law on which no further evidence is necessary _ _ _."*

Again at para.14:

> *"I accept that the Supreme Court should allow a new ground to be argued if substantial and grave injustice might occur if the new ground was not considered."*

Non-directions and misdirections

[28] The practice of raising grounds of appeal in a petition that allege non-direction or inadequate direction has also been the subject of comment by the appeal courts in Fiji. This issue arises when trial counsel have not requested a re-direction when given the opportunity to do so by the trial Judge. The Court records show that trial counsel, representing the Petitioners, did not raise with the trial judge any of the complaints now being made, when the opportunity to request a re-direction was accorded to them after the summing up. In **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) Gates J observed at para.35:

> *"The raising of direction matters [by way of re-direction] in this way is a useful trial function and in following it, counsel assist in achieving a fair trial. In doing so they act in their client's interest. The appellate courts will not look favourably on cases where counsel have held their seats, hoping for an appeal point, when issues in directions should have been raised with the judge_ _ _."*

[29] In these proceedings I accept that the Petitioners cannot be said to have contemplated this course of action. Whether trial counsel should have sought either further directions or re-directions is a different issue.

The Petitions for leave

[30] Each Petitioner filed a timely petition for leave to appeal against conviction. The grounds of appeal in the Petitions filed by Ilivasi Navunicagi and Eparama Tamanivakabauta include the issue of their applications to lead fresh evidence. Given the significance of that issue, their petitions shall be considered first.

Ilivasi Navunicagi's Petition

Grounds of appeal

[31] In his Petition dated 30 May 2022 Ilivasi relied on the following ground:

> *"1. Didn't the Court of Appeal erred in law by not considering/or making any proper assessment to my fresh evidence of assault or injuries noted in the High Court Record, recorded by the Lautoka High Court Judge during my first appearance and complaint I made before him regarding the assault done by the Police Officers."*

[32] In a document dated 23 June 2022, two further grounds of appeal were also filed by the Corrections Service on 22 July 2022. These additional grounds raise issues relating (a) to the application of the rule of joint enterprise and (b) the absence of *"malice aforethought.*"

Joint Enterprise

[33] The first of these two grounds is misguided. This Petitioner was convicted on the count of murder as the principal offender. He was convicted on the basis that it was he who had

strangled Mr Dass to death. The culpability of the co-accused was to be determined by reference to the principle of joint enterprise (unlawful common purpose).

Absence of "*malice aforethought*"

[34] The second issue relating to what is described as the absence of malice aforethought is also misguided. Malice aforethought was a common law term and was regarded as an essential element of the offence to obtain a conviction for murder at common law. However, murder at common law has been replaced by the provisions of the Crimes Act. In paragraph 13 of his summing up the learned Judge correctly stated that, what is now termed as, the fault element is established if the prosecution establishes beyond reasonable doubt that the accused intended to cause the death of the deceased or was reckless as to causing the death of the deceased. The post mortem report together with the evidence given by the pathologist supported at the very least the conclusion that the petitioner was reckless as to causing death.

Fresh evidence application

[35] I return to the ground of appeal relating to Ilivasi Navunicagi's complaint that the Court of Appeal had not referred to, let alone considered, his application to lead fresh evidence. The application was supported by an affidavit sworn by Ilivasi Navunicagi and filed on 1st December 2021. A number of documents were annexed to the affidavit. The first exhibit is an extract from the Court record in Criminal case No. HAC 119 of 2010 where Ilivasi Navunicagi and Eparama Tamanivakabauta appeared before Madigan J on 16 September 2010 in the High Court at Lautoka, to which I referred earlier. It was not disputed that this was their first appearance after having been caution interviewed and made charge statements in the present matter. Although appearances were not noted, subsequent affidavit material filed by the State (on 10 June 2024) confirmed that the State had appeared before Madigan J on that day.

[36] On the same day in Criminal Case HAC.89 of 2010 the first three Petitioners appeared before Madigan J in the High Court at Lautoka. The State was represented and these three Petitioners appeared in person. There were no complaints of police mistreatment recorded by the Judge. They indicated to the Judge that they wanted Legal Aid representation. The matter was listed for further mention on 23 September, 2010.

[37] Both files were eventually consolidated under Criminal Case HAC 89 of 2010. However, for whatever reason, the Court extract in Criminal Case HAC 119 of 2010 (including Madigan J's note) never found its way into the file for Criminal case HAC 89 of 2010. It would appear that there were other files that the Court Registry had opened at about the same time involving the Petitioner Ilivasi Navunicagi, including Criminal Case HAC NO. 90 of 2010. In that matter Resident Magistrate Puamau on 14 September 2010 ordered:

> *"That the copy record of disposed case HAC 119 of 2010 for 16 September 2020 be prepared and served on Ilivasi Navunicagi, the contents of the records from that day containing complaints and observations by the learned Judge of the High Court."*

[38] Another document annexed to the affidavit was an extract from the Court record in Criminal Case HAC NO.91 of 2010. The extract records that on 14 September 2020 Resident Magistrate Puamau ordered:

> *"That the Superintendent of the Lautoka Hospital find and release a copy of Ilivasi Navunicagi's court ordered Medical Report for 16 September 2010 to the Police Prosecutions Office by or before 4 October 2020."*

[39] An earlier request dated 26 August 2020 had been forwarded on behalf of the Ilivasi Navunicagi by the Fiji Corrections Service to the Lautoka Hospital. In a brief letter dated 8 September 2020 the Hospital responded that:

"We confirm from our hospital records that the folder has been discarded."

It should be noted that the Hospital did not deny such a folder had existed but claimed that it was no longer in existence. It does not appear that the Hospital made or retained

"*soft copies"* of folders. It is not surprising that hard copies of patients' folders were no longer available after 10 years had passed.

[40] There was also a claim made by Ilivasi that he had received some medical treatment at that time at the Natabua Correction Centre. However there was no available material from the Corrections Office. The Corrections Office did not respond to the Petitioner's query.

[41] Ilivasi's application may not be properly described as one to lead "*fresh evidence*." There is a distinction between fresh evidence and new evidence. Fresh evidence is evidence which did not exist at the date of trial or which could not with reasonable diligence have been obtained or discovered for use at the trial. New evidence is evidence that could, with reasonable diligence, have been obtained or discovered for use at the trial. (See **BXJ –v- Western Australia** [2010] WASC 240 at paras. [17] – [18], [21]).

[42] The Court of Appeal may, if it thinks it "*necessary or expedient in the interests of justice"* receive fresh evidence under section 28 of the Court of Appeal Act 1949. In exercising that jurisdiction the Court of Appeal may also exercise any other powers for the time being exercised by the Court of Appeal on appeals in civil matters. Under Rule 22 of the Court of Appeal Rules the Court of Appeal (in civil appeals) had a full discretionary power to receive further evidence by affidavit provided that no such further evidence (other than evidence as to matter which occurred after the date of the trial) shall admitted except on special grounds.

[43] The documents exhibited to the Petitioner's affidavit are not evidence. They are documents from the Court record. Although not certified as true copies, the State has not raised any issue as to their authenticity. It follows that it was not necessary for the Court to consider the Petitioner's application to lead further evidence in relation to the copy of court record extracts. Furthermore, the fact that a Court extract relating to complaints of assault by Police was recorded in a different case file was not something of which the Petitioner could reasonably be expected to have had prior knowledge. It took the

intervention of a Resident Magistrate in 2020 for the material to be located and served on the Petitioner. In effect they were documents that were either not available to the Petitioner or were documents that he could not reasonably be expected to have located.

[44] Not only did the Court of Appeal fail to exercise its discretion, it failed to refer to Ilivasi's application in its judgment. It was an application that was properly before the Court. The matter comes before this Court as an error of law. Under section 14 of the Supreme Court Act 1998 this Court is possessed of all the powers vested in the Court of Appeal. In effect the application now falls for determination by this Court. It would be unrealistic to send the matter back to the Court of Appeal. The offences were committed in 2010. The trial took place in 2015. The Court of Appeal judgment was delivered in 2022. It would not be in the interest of justice to refer the application by Navunicagi back to the Court of Appeal when this Court may consider the application under section 14 of the Supreme Court Act.

[45] As mentioned earlier, the essential documents are not evidence per se. They may more readily be described as documents forming part of the public record. Although the Petitioner maintained that he had been assaulted by Police, he was, of his own record, absent from the trial. Even if he had been present, it is unlikely that he would have been in a position to identify how his complaint about the police assault could have been located in other court files. This knowledge was in the possession of the State. The State had been represented at Court on 16 September 2010 and had been directed by Madigan J to note the complaint.

The State's knowledge

[46] It is important at this point to say something about the State's knowledge of Ilivasi's allegations of police mistreatment as recorded by Madigan J. These allegations were not brought to the attention of the trial Judge at the time of the *voir dire*, or the assessors' attention at the trial, yet they were highly material to the issue of the voluntariness of Ilivasi's admissions. The State was aware of the allegations in the sense that there would

have been a State representative at the mentions hearing before Madigan J. What is uncertain, however, is whether the allegations were brought to the attention of the prosecutors involved in Ilivasi's trial in a timely way, given that Madigan J's note was recorded against a different file number.

[47] However, because there would have been a representative of the State present at the mentions hearing, the State (as a corporate entity) was aware of the allegations. Those involved in prosecuting Ilivasi in connection with the robbery and murder should have been informed of the allegations and should in turn have brought them to the attention of the trial Judge and, if necessary, the assessors. If the prosecutors in the present case did have timely knowledge of Madigan J's October 2010 note of the allegations, their failure to disclose it would be reprehensible, especially when viewed against the State's submission that no complaint had been made by Ilivasi at first appearance and the fact that the prosecution was relying on the confessions "*to ground possible convictions*".

[48] If, on the other hand, the prosecutors did not have timely notice of Madigan J's note, from Ilivasi's perspective the position remains the same. By its very nature, the extract from the HAC 119 file is a document that a trial judge would have been entitled to consider if it had been disclosed by the State. Regardless of Ilivasi Navunicagi's absence at the trial, the State was under a separate duty to bring the direction made by Madigan J to the attention of the trial Judge. The remaining material deposed to in Ilivasi's affidavit would not of itself, even if admitted into evidence, be of sufficient probative value to affect the outcome of this Petition.

[49] In my judgment, it is in the interests of justice for this Court to determine what is the effect of the material in case file HAC 119 as it relates to whether the alleged admissions made by Ilivasi in the charge statement should have been admitted into evidence. In other words, had the State brought to the attention of the trial Judge the note made by Madigan J concerning Ilivasi's complaints of police assaults, would it have been open to the Judge to conclude beyond reasonable doubt that the admission in the charge statement had been made voluntarily without some further inquiry having been made?

[50] Regardless of the nature of this material, it is still either fresh or new material. There is a distinction between fresh material and new material. This distinction usually applies to evidence. Although material from a court file, especially a written note made by a judge, is not evidence, its availability at the time of trial may be relevant. The material from court file HAC 119/2010 is material which could not with reasonable diligence have been obtained or discovered for use at the trial by Ilivasi. I have concluded that in the present case, the Petitioner's application relates to fresh material. Even if the Petitioner had been incarcerated for the whole of the period prior to his trial, he would have experienced great difficulty in attempting to locate the relevant extract from the court file. It is apparent that the relevant extract from the file HAC 119 of 2010 had never made its way into the correct court file of HAC 89 of 2010. There is evidence to suggest that Ilivasi knew of the existence of HAC 119 of 2010 and its contents. All other court appearances prior to the trial were recorded in file HAC 89 of 2010. He would not have been in a position to give instructions to his Legal Aid lawyer as to the whereabouts of his recorded complaint.

[51] If the trial Judge had been aware of Madigan J's note, there would inevitably have been a close examination of the background to it in the *voir dire* and, if necessary, at trial. That may or may not have led to the trial Judge making a finding of involuntariness, or to the Assessors putting the statements to one side on the ground that they were obtained by force. This Court is not able to ascertain whether Ilivasi's allegations had substance or not, given that they relate to events that occurred 15 years ago. In those circumstances, I consider that the Court is obliged to give Ilivasi the benefit of the doubt and to proceed on the assumption that the trial Judge would have ruled Ilivasi's statements to be involuntary.

Effect of Fresh evidence

[52] The issue for this Court is whether the fresh material located in the wrong file at the time of the trial involved a grave and substantial miscarriage of justice. Such a miscarriage of justice may be said to have occurred if *"the Court considers that there is a significant*

possibility that (the assessors) (and the trial Judge in Fiji) acting reasonably, would have acquitted the (Petitioner) if the new evidence had been before it at the trial." (See: **Gallagher –v- The Queen** [1986] 160 C.L.R. 392 at 399). Although the quoted text refers to "*new evidence*", there are also references in the text of the judgment to *"fresh evidence."* As I have concluded that the material sought to be relied upon was fresh material, the different terminology that appears in the High Court Judgment is of no consequence in this Petition.

[53] However, on the assumption that Ilivasi's admissions are excluded, I consider that, when the test is applied to the totality of evidence, it cannot be concluded that there is a significant possibility that the assessors, acting reasonably, would have returned opinions of "*not guilty*" in respect of Ilivasi Navunicagi. Although there was no direct evidence that it was Ilivasi who strangled Mr Dass thereby causing his death, there is, however, circumstantial evidence given by the first Petitioner Rafaele Noa at the trial. This evidence can be found at page 102 of the Supplementary Record of the High Court:

> *"Myself, Iliesa Vakabua and Eparama Tamanivakabauta entered the deceased's compound. We were instructed by Ilivasi Navunicagi who was already in the deceased's compound to enter into it. He told us to break into the house as it was empty and to look for money. He told us to do the above, before we reached the deceased's house. We climbed over the fence to get into the compound. There was a gate to the compound. It was closed and locked.*
>
> *It was dark outside and inside the house. There was no light on inside or outside. Ilivasi started breaking the shutters and mesh wire, took out 3 x louver (sic) blades and told Eparama to go into the house and open the door. I had nothing with me when I went into the compound. I saw nothing on others. We entered the deceased's house and Ilivasi went straight to rooms along the passage. I went through the door into the house.*
>
> *I went into the empty room. Ilivasi came to me and told me the house was occupied. I told him not to harm anyone. Ilivasi went to the deceased's room. I went into the room, took out the money and came out of the room to the sitting room. There was no light on. Before entering the house, I did not know there were people in the house. I later went to the kitchen. I roamed around in the kitchen. I did not see the owner of the house when inside the house. I heard the old man talking. I went to check on Ilivasi in the old man's room.*

I told Ilivasi not to do anything to the old man. He argued with me and threw a bottle at me. I heard him talking. I didn't see anyone else. I was in the old man's room for 2 seconds."

[54] There is further circumstantial evidence provided by Iliesa Vakabua who stated when re-examined by his Counsel that:

"Ilivasi told me he did something to the old man and we don't know whether or not he's alive. Our plan was to rob, not to kill."

It must be recalled that Iliesa Vakabua's (3rd accused and 3rd Petitioner) role was as a look out. He remained at the gate of the compound throughout the events that unfolded in the victim's house. He had been acquitted on the counts of murder and manslaughter. He was convicted on the count of aggravated robbery. His appeal against sentence has already been heard and he has since completed his sentence.

[55] When this evidence is read with the evidence in the post mortem report (that was tendered into evidence) and the testimony of the forensic pathologist, the only conclusion that follows is that Ilivasi, in doing "*something to the old man,"* had strangled the old man who died as a result of subsequent asphyxiation. There is no other reasonable explanation for the circumstances that would be consistent with Ilivasi's innocence. (See: **Naicker – v- The State** [2018] FJSC 24; CAV 19 of 2018 (1 November 2018) per Keith J at para. 32).

[56] Under cross examination, Rafaele Noa stated that:

"_ _ _he did not plan the robbery. I went into the room (photo No.7, Ex PE 27-1). I ransacked that room and searched for money. I heard him talking to Ilivasi. Old man was telling Ilivasi in an angry way to go away from his house. I told Ilivasi to come out of the old man's room and the threw a bottle at me _ _ _

I did not strangle the old man. I did not assist in the strangling of the old man. I did not see anyone strangle the old man. It is not possible that I know who strangled the old man."

Evidence given by Accused in their own defence

[57] The issue remains as to whether the evidence of the co-accused Noa and Vakabua can be relied upon as evidence against Ilivasi at trial. It has been a long established principle that when one co-accused who is called by the State gives evidence against another co-accused the trial Judge was required to warn the assessors that it was dangerous for them to rely on that evidence without corroboration. The same warning is not required when one co-accused gives evidence in his own defence and in doing so, gives evidence implicating other co-accused. The issue was discussed by the Court of Appeal in **R v Barnes and Richards** 27 Cr. App. R. 154. The Court of Appeal concluded that the rule applies only to witnesses called for the prosecution. The headnote accurately states the position at common law as follows:

> *"Where prisoners are tried jointly, and one of them gives evidence on his own behalf incriminating a co-prisoner, the prisoner who has given the incriminating evidence is not placed in the position of an accomplice, nor does the rule of practice with regard to the corroboration of an accomplice apply to such a case."*

[58] In **Cava v The State** [2015] FJSC 3; CAV 28 of 2014 (23 April 2015) this Court considered the judgment of the Court of Appeal in **R v Barnes and Richards** (supra) and noted that *"there is no rule of law which governs this technical area of the law with regard to corroboration of the co-accused's evidence given in his own defence."* (per Hettige J at para. 26). In the evidence given by Noa and Vakabua, they describe Ilivasi's involvement and also describe the extent of their own involvement. It was not a case of attempting to shift blame or guilt onto another accused with the aim of exonerating themselves. I see no reason for departing from the practice at common law as described by the Court of Appeal in **R v Barnes and Richards** (supra).

[59] Consequently the effect of the evidence considered as a whole is that the victim was strangled to death by Ilivasi Navunicagi as a result of the action described in the post mortem report. Even if Ilivasi did not intend to cause the death of Mr Dass when he

firmly put both hands around his neck, his conduct was reckless as to causing the death of the deceased.

Eparama Tamanivakabauta's Petition

[60] The Petitioner, Eparama Tamanivakabauta filed a timely petition seeking leave to appeal against his conviction for murder. In his Petition, two grounds of appeal were raised:

> *"(1) That the learned Court of Appeal Judges erred in law and in fact by failing to independently analyse the evidence or totality; failing to give independent or particular analysis to the law and evidence on inconsistent verdict and joint enterprise. Consequently such failure has given rise to a substantial miscarriage of justice for the Petitioner.*
>
> *(2) That the learned trial Judge and the learned Court of Appeal Judge erred in law and in fact by failing to analyse the Petitioner's "fresh evidence application, earlier during the trial and later during appeal, negating the voluntariness of the Petitioner's self-incriminating admission, thereby causing substantial and grave injustice to the Petitioner."*

[61] In a document filed on 27 March 2024 the Petitioner raised a third ground of appeal:

> *(3) That the learned trial Judge and similarly the learned Court of Appeal Judge did not consider the glaring fact that since the state relied on joint enterprise the findings of a lesser offence of manslaughter for accused 2 and 3 respectively ought to have been according to the petitioner in time with the superordinate (sic) Court authority in **Viliame Ragose Tiritiri –v- The State** (CAV 0028/2015, 23 June 2016) and by the margin of such error a substantial miscarriage of justice has occurred."*

[62] In his judgment the trial Judge stated his reasons for convicting this Petitioner (and Navunicagi) in paragraph 8 as:

> *"As for accused No.4 (Navunicagi) and No.5 (Eparama Tamanivakabauta) both accused in their charge statements admitted count No.1 and 2 of the information. _ _ _. I find that they voluntarily gave their confessions in the charge statements, and the same was given with their own free will and the confessions they made were true _ _ _."*

[63] In his summing up to the assessors the learned trial Judge directed the assessors' attention to the relevant part of the charge statement in these words:

"However, in his charge statement Accused No.5 admitted count No.1 (murder) and count No.2 (aggravated robbery) in question and answer 6 of Prosecution Exhibit No.24 (A) and 24(B)."

[64] In the Court of Appeal the Petitioner's appeal against conviction raised (a) the application of the principle of joint enterprise by the trial Judge and (b) his reliance on the confession alone in the caution interview to conviction, the count of murder. The Court of Appeal rejected both arguments. The Petitioner had also filed an application to adduce fresh evidence. The application was refused on the basis that *"it did not satisfy the criteria set out by the authorities mentioned in paragraph 81 above."*

[65] The Petitioner's ground 2 claimed that the Court of Appeal failed to analyse the application and as a result had failed to give reasons for the conclusion. Indicating that the application did not satisfy the criteria set out in four or five authorities does not constitute analysis or written reasons.

Application to lead fresh evidence

[66] This Petitioner had applied by Notice of Motion filed on 24 January 2022 for leave to adduce fresh evidence at the hearing of his appeal against conviction. The application was supported by an affidavit sworn by the Petitioner on 12 January and filed on 24 January 2022. The documents had been drafted and filed by the Legal Aid Commission. In paragraph 9 of the affidavit the Petitioner described the fresh evidence as the court record in HAC 119 of 2010 that "*indicates that the Appellant was indeed injured whilst in police custody which further bolsters his position at trial regarding the admissions in his caution interview and thereby questions the conviction."* In paragraph 10 the Petitioner described the difficulty in obtaining that material which was not available to him at the trial in HAC 89 of 2010 as it was from another court record.

[67] The observations made earlier in this judgment concerning the State's role in the *voir dire* proceedings and the trial apply equally here. Given the totality of the material before the trial Judge there were many issues upon which the trial Judge would have been greatly

assisted by submissions from Counsel. In this Petitioner's case there is an issue that would have caused the High Court some concern. In his evidence at the trial (P108 of the Supplementary Record) Eparama continually maintains that he was assaulted by Police and that his interview and charge statement admissions were not made voluntarily. He also stated in the third paragraph that: *"I did not report the slaps."* Under cross-examination at page 109 Eparama stated:

> *"I appeared in the Magistrates Court at Lautoka. I made no complaint to the Magistrate and I did not ask for a medical examination. In the High Court, I did not complain to the Judge about police misbehaviour on first call."*

It must be recalled that the first call was before Madigan J in the High Court at Lautoka on 16 September 2010 when he and Ilivasi Navunicagi both complained about Police violence and resulting injuries. That appearance was about 12 days after Eparama had made his charge statement. To add to the confusion in the *voir dire* proceedings under cross-examination Eparama stated that:

> *"When I first appeared in the High Court I made no complaint to Judge Madigan about Police misbehaviour."*

[68] It should be noted that the record of the proceedings in the High Court before Madigan J on 16 September 2010 consisted of a typed version of the trial Judge's notes. There has been no indication from either the Suva or Lautoka registries as to whether there was an audio recording of those proceedings.

[69] It is all too apparent that had the State disclosed to the trial Judge the existence of the complaints recorded by Madigan J in HAC 119 of 2010, these issues would not have arisen at all or would have been resolved.

[70] To some extent there are competing issues that need to be balanced by this Court in determining the application by both Eparama and Ilivasi Navunicagi. On the one hand there is the substantial probative value of the recorded complaints of police violence and injuries recorded by Madigan J on 16 September 2010 in HAC 119 of 2010. The affidavit

filed by the State on 10 June 2024 supports the claim by the two Petitioners that those complaints were made. On the other hand there is the delay in bringing this issue to the attention of the Courts. The State was aware that the complaints had been made and had failed to disclose the information to the trial Judge. Furthermore, the State's submissions at the *voir dire* were, as a matter of fact, misleading or more accurately described as wrong. There are a number of inconsistencies in the record concerning the issue of the complaints and the extent of the alleged injuries. If the extract from file HAC 119 of 2010 is regarded as being of sufficient probative value and had it been disclosed to the trial Judge, he could not, without further evidentiary material, have been satisfied beyond reasonable doubt that the admissions had been made voluntarily. As a consequence thereof the admissions would not have been admissible. If the alternative position is taken, then the admissions were correctly admitted into evidence.

[71] As I said earlier, I consider that the only fair way to deal with this is for the Court to proceed on the assumption that Eparama's admissions would have been excluded.

[72] As with Ilivasi Navunicagi, even if the admissions had been excluded and the trial had proceeded, there was sufficient indirect evidence to establish the case against Eparama Tamanivakabauta. In giving evidence in his own defence Rafaele Noa stated that at page 102:

> *"Myself, Iliesa and Eparama Tamanivakabauta entered the deceased's compound. We were instructed by Ilivasi Navunicagi, who was already in the deceased's compound, to enter into it. He told us to break into the house, as it was empty and to look for money. We climbed over the fence to get into the compound _ _ _ _*
> *It was dark outside and inside the house. There was no light on inside or outside_ _ Ilivasi _ _ _ told Eparama to go into the house and open the door."*

In cross-examination by Counsel for Eparama, Noa stated:

> *"Eparama entered the house through the window. He did not go to the old man's room. Eparama got $14 as his share."*

It is also clear that Rafaele Noa's evidence that Eparama had remained in the deceased's house until all the Petitioners had vacated the premises. He stated at page 103:

> *"I was in the house for 5 to 10 minutes. Outside the house, I went to a nearby ground. I saw Iliesa Vakabua as the look out. At the ground, we headed back to Rifle Range i.e. myself and ILiesa. I did not see the others. At Kenani Church, we shared the loots with Iliesa, Eparama and Ilivasi. Eparama and Ilivasi followed me."*

Eparama's culpability

[73] On account of his admissions as described by the trial Judge, Eparama was convicted on the count of murder. It would appear from the summing up and the judgment that Eparama was convicted as a principal offender. No official translation of the admission was available as the relevant exhibit could not be located. However, on the basis of the oral evidence at the trial to which reference has been made, the position is that Eparama was present in the house at the time that Mr Dass was strangled by Ilivasi. Unless there was an admission by Eparama that he was present in the room and assisted when Mr Dass was strangled then Eparama's culpability is that of a secondary nature under section 46 of the Crimes Act 2009. Section 46 is the provision that provides for culpability under the common purpose rule. Section 46 provides:

> *"46. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."*

Common Purpose

[74] There are two limbs to section 46. The first limb requires proof that the Petitioners formed a common intention with one another to prosecute an unlawful purpose. The second limb requires proof that in the prosecution of that unlawful purpose an offence was committed of such a nature that its commission was a probable consequence of such purpose.

[75] In his summing up to the assessors the trial Judge indicated that the prosecution case was that on 21 August 2010 the five Petitioners planned to break into John Leonard Dass's house at 32 Kamal Lane Natokowaqa, Lautoka and steal some money and properties. (P148). Initially, the unlawful purpose was burglary and stealing. Whether it was contemplated as part of the initial plan is not clear, but there was attached to this plan an obvious contingency. There was a possibility, if not a probability, that the house would be occupied at the time of breaking into the house. Although there were no outside or inside lights on, it did not follow that the house was unoccupied. The occupant or occupants may have been sleeping. At least some of the Petitioners knew that the owner conducted a small kiosk business from the house. Once it became obvious that the house was occupied, and that fact became known to the Petitioners then the unlawful purpose that was pursued thereafter by all the Petitioners became aggravated robbery.

[76] In the course of pursuing that unlawful purpose Mr Dass was strangled to death. The totality of the evidence established that it was Ilivasi who strangled the victim. The evidence does not establish beyond reasonable doubt that Eparama's culpability is that of a principal or primary offender in relation to the murder. A conviction for murder requires proof that Eparama as a secondary party contemplated and foresaw the probability of death in the execution of the planned unlawful purpose. That was not established beyond reasonable doubt by the evidence. This is especially so when it is accepted that the Petitioners were not armed. However, it is a different situation when the question is whether Eparama contemplated and foresaw the infliction of serious harm as a probable consequence of the common purpose. Once awoken, Mr Dass needed to be controlled so as not to raise any type of alarm about the offence that was in progress at the time. If necessary, measures contemplated would include the infliction of serious harm. That conclusion would have the effect of reducing Eparama's culpability to manslaughter.

Grounds of appeal

[77] The first ground of appeal in Eparama's Petition claims that the trial Judge:

a) failed to independently analyse the evidence in totality;

b) failed to give independent or particular analysis to the law and evidence on inconsistent verdict and joint enterprise.

[78] The principal evidence before the assessors and the trial Judge consisted of the tendered caution interviews and charge statements of each of the five Petitioners. The summing up indicated a detailed consideration of those out of court statements. However, the testimony of Rafaele Noa and Iliesa Vakabua at the trial was evidence against the other Petitioners.

[79] In relation to the complaint of failing to analyse the law and evidence on inconsistent verdicts and joint enterprise, it would appear that the Petitioner's concern is related to the different verdict for the Petitioner on count 1 (murder). The law on inconsistent verdicts was considered by this Court in **Balemaira –v- The State** [2013] FJSC 17; CAV 8 of 2013 (6 December 2013). In paragraph 21 Goundar J stated that:

> *"_ _ _ _ a conviction will only be set aside if the different verdicts brought by the jury are such that no reasonable jury, applying themselves properly to the facts, could have arrived at those verdicts."*

It is almost inevitable that when culpability is being determined under section 46 of the Crimes Act for multiple offenders, that there will be different verdicts on the same charge. There is no basis for concluding that the differing opinions of the assessors or the different verdicts of the trial Judge constitute inconsistencies that meet the stringent test spelt out in the **Balemaira** decision.

[80] On this ground of appeal it should be noted that Iliesa Vakabua was acquitted on the count of murder and manslaughter. Rafaele Noa and the Petitioner were both convicted on the count of murder. Sireli Lilo was convicted on the alternative count of manslaughter. These verdicts were consistent with the majority opinions of the assessors. On the evidence presented at the trial they were opinions and verdicts that were not unreasonable.

[81] The additional ground (3rd ground) was concerned with an argument relating to the Constitutional guarantee of equal treatment before the law. Again, this ground is raising the issue of the different verdicts for the same offence. Section 26(1) is in general terms providing a right to equal treatment, protection and benefit of the law. The remaining subsections of section 26 provide for specific cases where those rights are required to be acknowledge and applied. However, the right does not mean that multiple offenders charged with the same offence must always be regarded as equally culpable. The reasons for the different opinions and verdicts have been discussed at length in this judgment and do not need repeating. Eparama's culpability for the death of Mr Dass is established on the evidence to be manslaughter under sections 46 and 239 of the Crimes Act.

Rafaele Noa's Petition

[82] Rafaele Noa, along with the four other Petitioners was convicted on the count of aggravated robbery. He was sentenced to 13 years imprisonment. He was convicted on the count of murder and sentenced to mandatory life imprisonment, with a minimum term of 20 years before a pardon may be considered. His appeal to the Court of Appeal against conviction was dismissed. His application to abandon his sentence appeal is still pending in the Court of Appeal. Rafaele subsequently filed a timely petition for leave to appeal the final judgment of the Court of Appeal.

[83] In his Petition Rafaele raised seven grounds of appeal that actually consisted of nine grounds as ground 1 raised three separate objections. When the Petition came on for hearing in April 2024, the Petitioner indicated to the Court that he intended to proceed on grounds 3 and 4 and that he otherwise abandoned grounds 1, 2, 5, 6, and 7. The issues for this Court are:

Ground 3: That the learned trial Judge direction on the principle of joint enterprise was inadequate and devoid (*sic*).

Ground 4: Did the Court of Appeal approach its task by making an independent assessment before affirming with the verdict which is unsafe and unsatisfactory having regard to the totality of the evidence (*sic*).

[84] The Petitioner filed written submissions on about 25 March 2024 and further submissions on 27 March 2024. The State filed answering submissions on 4 April 2024. To the extent that the submissions are related to grounds 3 and 4 in the Petition those submissions will be considered as relevant to the question of leave and to the appeal itself if leave is granted.

[85] Given the submissions field by the Petitioner it is appropriate to clarify the basis upon which Rafaele's culpability had been established by the Prosecution. In his judgment at paragraph 9 the trial Judge noted that Rafaele had denied murdering Mr Dass in both his caution interview and his charge statement. In his evidence at the trial the Petitioner had again denied murdering Mr Dass. The Judge the observed:

> *"He can only be made liable for the murder of Mr Dass, on the principle of joint enterprise, and/or aiding and abetting the commission of murder. The three assessors had unanimously found Accused No.1 guilty of murdering Mr Dass, presumably on the principle of joint enterprise and/or aiding and abetting murder."*

[86] The learned Judge indicated that he agreed with the unanimous opinions of the assessors and convicted Rafaele on the count of murder. He was convicted on the count of aggravated robbery on his admissions in the out of court statements and his testimony at the trial. The reference to *"and/or aiding and abetting murder"* is somewhat surprising. In his directions to the assessors the trial Judge did not refer to or explain the circumstances under which section 45 of the Crimes Act imposed culpability for secondary participation including aiding and abetting.

[87] The Petitioner claims that the directions given to the assessors were inadequate and devoid. To some extent his complaint is based on a misunderstanding of the actual charge that was before the Court and also a misunderstanding of the nature of culpability under

the common purpose rule attaching secondary culpability under section 46 of the Crimes Act. In paragraph 5 of his submissions filed on 25 March 2024 the Petitioner claimed that the prosecution alleged *"that appellant with others murdered the deceased."* However the wording in count one did not include the words "*with others*." The charge was so worded as to leave open the possibility that culpability may be established, in respect of any one of the Petitioners, as a principal offender or as a secondary party under the unlawful common purpose rule.

[88] Under those circumstances it was appropriate for the trial Judge also to direct the assessors and himself on culpability under section 46 of the Crimes Act.

[89] The directions on what the trial Judge has referred to as "*joint enterprise*" are set out in paragraphs 22 and 23 of the summing up. In paragraph 22 the trial Judge has stated that "*each participant must be shown to have in contemplation the probability of infliction of serious harm on the deceased in the execution of the planned unlawful purpose."* Given that the charge related to murder in the execution of the common purpose, the direction was misleading. What was actually required was a direction to the effect that each participant must be shown to have contemplated the probability of death. It does not need to be established that the probability was death caused by strangulation. It is the contemplation of the probability of death is that which must be established. Although the Judge did not expressly refer to the count of murder, it can readily be inferred that the direction was for the purpose of guidance on count 1 being murder. The problem in this case is that the reference to "the contemplation of *serious harm*" is the fault element necessary for manslaughter under section 239 of the Crimes Act.

[90] In paragraph 23 the directions are intended to direct the assessors to the difference between murder and manslaughter in the context of the common purpose rule. The distinction between contemplating the probability of death and contemplating the probability of inflicting serious harm is stated, but the effect of the distinction is ambiguously expressed in that contemplation of the probability of inflicting serious harm is not expressly linked to the alternative offence of manslaughter.

[91] Although these shortcomings would constitute misdirections in a trial by a Judge sitting with a jury, in Fiji the role of the assessors was to consider the evidence and to provide individual opinions as to the guilt or otherwise of each of the offenders. The final decision on both facts and law rested with the trial Judge. The Judge was under no obligation to agree with those opinions although in the case of any disagreement with the assessors' opinions, he was required to provide a written judgment setting out with cogent reasons his findings and conclusions. Consequently it was always open to the Judge to either qualify or correct any misdirection or non-direction that may have appeared in the summing up.

[92] In his judgment at paragraph 9 the trial Judge indicated that Rafaele could only be made liable for the murder of Mr Dass on the principle of joint enterprise. The three assessors had unanimously returned opinion that Rafaele was guilty of murdering Mr Dass presumably on the principle of joint enterprise. The Judge concluded: *"I agree with the unanimous opinion that (Rafaele) is guilty of count No.1 and count No.2 in the information."* There is no further analysis of the evidence upon which he could be said to have rectified the misdirection in the summing up. Furthermore, in paragraph 6 of the judgment, the trial Judge has stated that he had reviewed the evidence and directed himself in accordance with his summing up. Under section 237 of the Criminal Procedure Act 2009 (section 237 has since been repealed) the summing up and the decision of the Court (and/or) the reasons, if given, are collectively deemed to be the judgment of the Court. Consequently, the reference to *"aiding and abetting*" in the summing up, the direction in paragraph 22 of the summing up, which was meant to be a direction on culpability for murder under section 46 of the Crimes Act, but which was the appropriate direction for manslaughter and the confusing directions on the difference between culpability under section 46 in respect of murder and manslaughter in paragraph 23 of the summing up may well have resulted in the unanimous opinions and the subsequent verdict of guilty of murder under section 46. This in turn may have caused a grave miscarriage of justice.

[93] As the trial Judge noted in his judgment Rafaele had denied that he was involved in the murder of Mr Dass in his out of court statements and in his evidence at the trial. However in his evidence he clearly admitted to entering the house and taking money. He did not see Mr Dass and had urged Ilivasi Navunicagi not to do *"anything to the old man."* On the basis of his evidence at the trial, which was the only evidence before the Court, the prosecution failed to establish beyond reasonable that Rafaele contemplated and foresaw the probability of death in the execution of the planned unlawful purpose. However, I am satisfied that the evidence established beyond reasonable doubt that Rafaele contemplated and foresaw the probability of serious harm being inflicted. Pursuant to section 239 of the Crimes Act, Rafaele is guilty of manslaughter under section 46 of the Crimes Act.

Sireli Lilo's Petition

[94] Sireli Lilo filed a timely petition for leave to appeal the final judgment of the Court of Appeal affirming his convictions for manslaughter and aggravated robbery. Sireli, along with the four other Petitioners had been convicted on the count of aggravated robbery. He was sentenced to 14 years imprisonment with a non-parole term of 13 years on count 2. On count 1 he was convicted for the offence of manslaughter and acquitted on the charge of murder. He was sentenced to 4 years 4 months imprisonment on count 1 for manslaughter. The sentences were ordered to be served concurrently.

[95] Although Sireli's timely application for leave to appeal to the Court of Appeal included both conviction and sentence, he had subsequently filed an application to abandon his sentence appeal on 8 August 2019. On 30 August 2019 the single Judge of the Court directed that the application to abandon the sentence appeal be listed for hearing before the Court of Appeal at the same time as the hearing of the appeal against conviction. Unfortunately for reasons that are not readily ascertainable that did not happen. As a result the sentence appeal remains pending in the Court of Appeal.

[96] In his Petition filed on 24 June 2022 Sireli raised 6 grounds of appeal against conviction. In an amended Petition filed on 29 March 2023 Sireli filed three grounds of appeal against

sentence. This document is to be forwarded to the Court of Appeal to be considered when that Court finally considers each of the Petitioners appeals against sentence. Presently this Court has no jurisdiction to consider his sentence appeal since there is no final Judgment of the Court of Appeal on the sentence appeals. In written submissions filed in March 2024 Sireli addresses six grounds of appeal against conviction and seeks to raise the issue of inconsistent verdicts for which leave to appeal to the Court of Appeal had been granted. Sireli also seeks to raise the issue of his application to lead fresh evidence that had been dismissed by the Court of Appeal.

[97] When the Petition came on for hearing, Sireli indicated that he was abandoning grounds 2, 3, and 4 set out in his Petition. He intended to pursue grounds 1 and 6 that raised issues already considered by the Court of Appeal. He informed the Court that ground 5 was a new ground. Therefore the three grounds upon which Sirelo relies in his application for leave to appeal against conviction are:

(a) The learned High Court Judge erred in law and in fact when he failed to direct the assessors that the truthfulness and voluntariness of the confession was a matter for them to decide in the light of all the evidence in the matter. (Ground 1 in the Petition).

(b) The learned High Court Judge failed to put to the assessors the Petitioner's case in a fair, balanced and objective manner. (Ground 6 in the Petition).

(c) The learned High Court Judge erred in law and in fact when he failed to give a proper, precise or sufficient direction to the assessors in his summing up on the principle of joint enterprise causing substantial miscarriage of justice. (Ground 5 in the Petition).

[98] The first ground relates to the issue of the approach that the trial Judge adopted in his summing up and the directions given to the assessors on the out of court admissions made by the Petitioner to the Police. It must be noted that this ground does not seek to challenge

the *voir dire* finding, as a matter of law that Sireli's admissions had been made voluntarily and as such were admissible as evidence against him at the trial. This ground is concerned with the directions that the trial Judge should give to the assessors when the issue of voluntariness is in issue at the trial.

[99] The directions given to the assessors are contained in paragraph 45 as follows:

> *"When considering the above confessions, I must direct you as follows, as a matter of law. A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on the five accuseds' above confessions, you will have to answer two questions, in each accused's situation. First, whether or not the accused did in fact make the statements contained in his police caution interview and charge statements? If your answer is no, then you will have to disregard those caution interview and charge statements. If your answer is yes, then you have to answer the second question, for each accused: Are the confessions true? In answering the above questions, the prosecution must make sure that the confessions were made, and they were true. You will have to examine the circumstances surrounding the taking of the accused's statements from the time of his arrest, his time while in police custody, the caution interview, the formal charging and when he was first taken before the courts. If you find that the police did not assault, threaten or made promises to them while in their custody, and that they gave their statements voluntarily and out of their own free will, you may give more weight and value to the statements and use the same in your deliberation. If it's otherwise, you may give it less weight and value, and may disregard the same in your deliberation. It is a matter entirely for you."*

[100] The trial took place in December 2015. The summing up was delivered on 30 November 2015. The approach that a trial Judge should adopt in crafting directions to the assessors was considered briefly in **Kean –v- The State** [2011] FJSC 11; CAV 15 of 2010 (12 August 2011) at paragraph 25 where the Court briefly noted:

> *"In his summing up the learned trial Judge quite correctly left the truth of the confession to the assessors after determining admissibility. The truth and weight of the confession was a matter for the assessors to consider after taking into account all the evidence."*

[101] In **Khan –v- The State** [2014] FJSC 6; CAV 9 of 2013 (17 April 2014) this Court considered the directions given to the assessors at the trial that were similar to the directions given in the present Petition. The Court concluded that:

> *"_ _ _ _if (the assessors) accepted the interview admission as having been given voluntarily, not elicited by pressure or assaults, and that the account of events given by the only witness to the murder were to be relied upon, the prosecution case was complete."*

[102] The trial Judge directed the assessors that (a) they must consider whether the accused made the statements; (b) if the answer is no then the admissions are to be disregarded; (c) if the answer is yes then the assessors must consider whether the admissions are true; (d) the prosecution must satisfy assessors beyond reasonable doubt that the admissions were made and that they were true; (e) if the assessors are satisfied that the police did not assault, threaten or make promises to the Petitioners while in their custody and that the statements were given voluntarily and from their own free will then you may give them more weight and value and (f) if its otherwise you may give the admission less weight and value and may disregard the same _ _ _ _. It is a matter for you. In my judgment those directions were consistent with the requirements that then existed for directions concerning issues relating to voluntariness and weight of out of court statements. The Supreme Court has consistently stated that there was no formula for crafting directions to assessors on the issue of weight to be given to out of court admissions. Finally, I am satisfied that there was no reason on the evidence at the trial for the learned trial Judge to change his mind in his judgment.

[103] Following the decision of this Court in **Maya –v- The State** [2015] FJSC 30; CAV 9 of 2015 (23 October 2015) which was delivered about one month earlier than the date of the summing up in the present petition, the guidance offered by Keith J at paragraphs 19 – 23 of the judgement may be relevant in certain circumstances. However, as Keith J noted at paragraph 22:

> *"The problem does not arise in this case. Although the Judge did not give reasons why he agreed with the opinions of the assessors, he would unquestionably have said something if he had changed his mind about the*

voluntariness of the confession in the course of the trial. So the correctness or otherwise of his directions to the assessors in paragraph 16 of his summing up would have had no impact on the eventual outcome of the case. Since it is unnecessary to decide in this particular case which of the two schools of thought should be adopted in Fiji, I would prefer not to do so, leaving it to be decided in a case in what it needs to be addressed, i.e. in a case on which the Judge changes his mind about the voluntariness of the confession in the course of the trial."

[104] Whether there was any shortcoming in the directions set out in paragraph 46 of the summing up is of no consequence if the learned trial Judge has agreed with the opinions of the assessors. This is on the basis that if he had, for any reason, changed his mind on the issue of voluntariness he would have indicated that in his judgment as a reason for disagreeing with the majority opinions of the assessors.

[105] The second ground raised by Sireli is the manner in which the trial Judge put (or explained) the Petitioner's case to the assessors. The case against Sireli was summarised in paragraph 28 of the summing up in these terms:

"*Accused No.2, when he entered the house, went into Mr Dass's room. Mr Dass was asleep, and Accused No.2 went and held him, while two others were punching him in the chest. He assisted in the tying of Mr Dass and (taking him) to the girl's bedroom."*

[106] The case for Sireli was briefly stated in paragraph 31 as follows:

"as for accused No.2, on oath, he denied the 2 allegations against him."

The trial Judge informed the assessor that Sireli admitted to being arrested on 23 August 2010 and caution interviewed the following day. He alleged Police assaults and claimed that the admissions had not been made voluntarily.

[107] In paragraph 41 the trial Judge indicated to the assessor that in his caution interview at questions and answers 74, 75, 82, 86 to 110 and 112. Sireli had admitted aggravated robbery. The caution interview confirms that Sireli had entered Mr Dass's house and removed items belonging to the occupants. In the caution interview Sireli admitted assaulting Mr Dass but maintained that the last time he saw Mr Dass he was still alive

and talking to one or other of the other Petitioners. There are specific admissions that Sireli had assisted in lifting the deceased from his room to the girls room, admitted holding the old man to stop him struggling and shouting in his room, assisting tying up the old man's hands and legs and later untying him. Sireli had denied the count of murder on his charge statement.

[108] At paragraph 24 the trial Judge had directed the assessors (and himself) that the admissions in the caution interview and charge statement of each Petitioner could only be relied on as evidence against the maker of the statement. Each statement and interview could not be relied upon in relation to any other Petitioner. In his evidence at the trial Sireli denied both count 1 and 2. The trial Judge was correct to refer to the admissions made in the caution interview since the admissions had been ruled admissible on the basis that they had been made voluntarily. The assessors had concluded that the admissions had been made voluntarily and a majority of the assessors returned opinions that Sireli was not guilty of murder but guilty of manslaughter. It was on the basis of the admissions that the trial Judge agreed with the majority opinion as stated in paragraph 10 of his judgment. On the evidence that was before the Court at the trial the Judge had fairly and accurately outlined the evidence against the Petitioner. The only case mounted by the Petitioner in his defence was a denial that he had murdered Mr Dass. His culpability arose under the common purpose Rule. The verdict of guilty of manslaughter under that rule could only have been established on the basis that both the assessors and the Judge were satisfied beyond reasonable doubt that Sireli had contemplated and foresaw the infliction serious harm as a probable consequence of the unlawful purpose.

[109] The directions given to the assessors on the issue of common purpose (referred to as *"joint enterprise"* in the judgment) have been discussed at some length earlier in his judgment. It is sufficient to note that as Sireli had been convicted for the lesser offence of manslaughter, any misdirection that may otherwise have resulted in a conviction of murder, is not relevant in this case. On any view of the directions to the assessors, it was open to the assessors on the basis of his admissions for the assessor and the trial Judge to

be satisfied beyond reasonable doubt that Sireli was guilty of manslaughter under the common purse rule.

Aggravated Robbery Convictions

[110] Throughout the appellate hearings it was apparent that the Petitioners' appeals against conviction were exclusively concerned with their convictions arising from the death of Mr Dass. In any event to the extent that the convictions for aggravated robbery were challenged by the Petitioners, it is only necessary to state that they had each been convicted as principal offenders. Their culpability under section 311(1)(a) of the Crimes Act was that of principal offenders. They were all involved in the plain and in the execution of the robber. Any difference in their various roles may be reflected in their sentences for their involvement. The various admissions in the testimony given by Rafaele Noa and Iliesa Vakabua together with any admissions made by Rafaele, Sireli and Iliesa in their out of court statements amounted to evidence sufficient to establish guilt beyond reasonable doubt.

CONCLUSION

[111] I would grant leave to appeal to each of the Petitioners on the basis that the application and the scope of culpability under section 46 of the Crimes Act involves a question of general legal importance. I would further grant leave to Ilivasi Navunicagi and Eparama Tamanivakabauta on the basis that the failure of the Court of Appeal to consider and or analyse their respective application to lead fresh evidence may have resulted in a grave and substantial miscarriage may have occurred if the Supreme Court had not addressed the issues. I would treat the hearing of the application for leave to appeal as the hearing of the appeal. In respect of each Petitioner I would make the following orders:

(i) Rafaele Noa

a) Leave to appeal against conviction is granted.

b) Appeal against conviction of murder is allowed.

c) Rafaele Noa is convicted on the lesser offence of manslaughter.
d) Conviction of aggravated robbery is affirmed.
e) On the conviction for manslaughter the Petitioner is sentenced to 4 years 4 months with a non-parole term of 3 years.
f) His application for leave to appeal against sentence remains pending in the Court of Appeal.

(ii) Sireli Lilo

a) Leave to appeal against conviction is granted.
b) Appeal is dismissed.
c) Convictions of manslaughter and aggravated robbery affirmed.
d) His application for leave to appeal against sentence remains pending in the Court of Appeal.

(iii) Ilivasi Navunicagi

a) Leave to appeal against conviction is granted.
b) Appeal is dismissed.
c) Convictions of murder and aggravated robbery affirmed.
d) His application for leave to appeal against sentence remains pending in the Court of Appeal.

(iv) Eparama Tamanivakabauta

a) Leave to appeal against conviction is granted.
b) Appeal against the conviction of murder is allowed.
c) Eparama is convicted on the lesser offence of manslaughter.
d) Appeal against conviction of aggravated robbery is affirmed.
e) On the conviction for manslaughter, the Petitioner is sentenced to 4 years 4 months with a non-parole term of 3 years.
f) His application for leave to appeal against sentence remains pending in the Court of Appeal.

Arnold, J

[112] I have had the opportunity to read Calanchini's judgment in draft. I agree with it and with the orders proposed.

Goddard, J

[113] I agree and endorse the reasoning and conclusions of the learned Judge.

Orders of the Court:

(i) Rafaele Noa

a) Leave to appeal against conviction is granted.

b) Appeal against conviction of murder is allowed.

c) Rafaele Noa is convicted on the lesser offence of manslaughter.

d) Conviction of aggravated robbery is affirmed.

e) On the conviction for manslaughter the Petitioner is sentenced to 4 years 4 months with a non-parole term of 3 years.

f) His application for leave to appeal against sentence remains pending in the Court of Appeal.

(ii) Sireli Lilo

a) Leave to appeal against conviction is granted.

b) Appeal is dismissed.

c) Convictions of manslaughter and aggravated robbery affirmed.

d) His application for leave to appeal against sentence remains pending in the Court of Appeal.

(iii) Ilivasi Navunicagi

a) Leave to appeal against conviction is granted.

b) Appeal is dismissed.

c) Convictions of murder and aggravated robbery affirmed.

d) His application for leave to appeal against sentence remains pending in the Court of Appeal.

(iv) <u>Eparama Tamanivakabauta</u>

a) *Leave to appeal against conviction is granted.*

b) *Appeal against the conviction of murder is allowed.*

c) *Eparama is convicted on the lesser offence of manslaughter.*

d) *Appeal against conviction of aggravated robbery is affirmed.*

e) *On the conviction for manslaughter, the Petitioner is sentenced to 4 years 4 months with a non-parole term of 3 years.*

f) *His application for leave to appeal against sentence remains pending in the Court of Appeal.*

The Hon Justice William Calanchini
JUDGE OF THE SUPREME COURT

SUPREME COURT FIJI

The Hon Justice Terence Arnold
JUDGE OF THE SUPREME COURT

The Hon Justice Lowell Goddard
JUDGE OF THE SUPREME COURT