

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

CRIMINAL APPEAL NO.AAU 0073 of 2017
[In the High Court at Suva Case No. HAC 261 of 2015]

BETWEEN : **KELEPI SAMUTA QAQA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Ms. S. Ratu for the Appellant**
: **Mr. Y. Prasad for the Respondent**

Date of Hearing : **02 July 2021**

Date of Ruling : **07 July 2021**

RULING

- [1] The appellant (02nd accused in the High Court) had been indicted with two others (appellants in AAU 0070/2017 and AAU 0012 /2018) in the High Court of Suva with one count of murder (of the deceased) contrary to section 237 of the Crimes Act, 2009 and with one count of an ‘act intended to cause grievous harm’ (of the deceased’s brother) contrary to section 255(a) of the Crimes Act, 2009 committed on 18 July 2015 at Nausori in the Central Division.

- [2] The information read as follows:

FIRST COUNT

Statement of Offence

MURDER: *Contrary to section 237 of the Crimes Act No. 44 of 2009.*

Particulars of Offence

JOSAIA VUSUYA ,KELEPI SAMUTA QAQA and TEVITA DAKUITURAGA on the 18th day of July 2015 at Nausori, in the Central Division, murdered EPINERI WAQAWAI.

SECOND COUNT

Statement of Offence

ACT INTENDED TO CAUSE GRIEVOUS HARM: *Contrary to section 255(a) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

KELEPI SAMUTA QAQA on the 18th day of July, 2015 at Nausori in the Central Division, with intent to cause grievous harm to SAVENACA NAITABA unlawfully wounded the said SAVENACA NAITABA by hitting his head with a beer glass.

- [3] After full trial, the assessors had expressed a divided opinion in that the majority opinion had been that the appellant was guilty of count 01 but the minority opinion had been that he was guilty of only manslaughter. However, the assessors had been unanimous that the appellant had been guilty of count 02. The learned High Court judge had agreed with the majority opinion on count 01 and the unanimous opinion on count 02 and convicted the appellant as charged. The appellant had been sentenced on 19 April 2017 to life imprisonment with a minimum serving period of 15 years on count 01 and 05 years of imprisonment on count 02 which was to run concurrently to the life imprisonment.
- [4] The appellant's appeal in person against conviction and sentence had been timely. Subsequently, the Legal Aid Commission had filed amended grounds of appeal and

written submissions on behalf of the appellant. The state had too filed written submission.

- [5] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The test for leave to appeal against conviction and sentence is ‘reasonable prospect of success’ [see **Caucu v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Wagasaga v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].
- [6] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011) and they are whether the sentencing judge had:
- (i) *Acted upon a wrong principle;*
 - (ii) *Allowed extraneous or irrelevant matters to guide or affect him;*
 - (iii) *Mistook the facts;*
 - (iv) *Failed to take into account some relevant consideration.*
- [7] The evidence of PW1 who was the deceased’s brother is summarised by the learned trial judge in the sentencing order as follows:

2. *The facts of the case were as follows. On 18 July 2015 at about 9pm, the deceased and his younger brother, Savenaca (PW1) were at the Bridge Nightclub, Nausori. They were consuming liquor and having a good time. Kelepi (Accused No. 2) and two friends joined Savenaca and the deceased. They started to consume liquor together. After a while Savenaca and the*

deceased decided to leave the nightclub and visit the Whishling Duck nightclub. When they went outside the Bridge Nightclub, Kelepi confronted the two over his alleged money. The brothers denied taking his money and the three parted ways.

3. While walking near RB Patel Supermarket, Kelepi suddenly re-appeared and punched Savenaca twice. While doing so, he injured Savenaca's head with a broken beer glass. Kelepi and Tevita (Accused No. 3) then attacked the deceased by repeatedly punching him. They fought a moving battle from Brown Lane to Ross Street Nausori to the back of Westpac Bank. Josaia later joined the two by felling the deceased with a straight left hand punch to his jaw. The deceased fell on the concrete ground. Josaia, Kelepi and Tevita then repeatedly stomped the deceased on the face, chest and body. Two days later the deceased died of massive brain injuries as a result of the above assaults. The accused were later charged for the deceased's murder. Kelepi was also charged with wounding Savenaca with a broken beer glass when he punched Savenaca's head, while holding the same.
5. *In this case, the violence used by the accused against the deceased and his brother, Savenaca, were totally unnecessary and uncalled for. The brothers visited the Bridge Nightclub to enjoy themselves. They were drinking liquor with others. Kelepi and his friends joined them. They consumed liquor together. Instead of making the evening an enjoyable one, Kelepi began to pick a fight with Savenaca and his brother, the deceased. Kelepi accused the brothers of taking his money.*
6. *An argument erupted. Kelepi punched Savenaca twice, and injured his head with a broken beer glass. Kelepi and Tevita then ganged up on Epineri and repeatedly assaulted him with several punches. Later Josaia joined the two and fell the deceased with a hard left punch. The deceased fell on the ground unconscious. Josaia, Kelepi and Tevita then repeatedly stomped him. The deceased died 2 days later as a result of the above assaults. This was a senseless killing that had caused Epineri's family heartache and sadness. They had lost a loved one. The accused must not complain when they lose their liberty to atone for their misdeed.*

- [8] Pita Rabaka (PW2) had seen the appellant in AAU 0012/2018 (03rd accused) being the aggressor fighting the deceased who was defending and the two exchanging punches at each other. At one point the appellant had joined the fight and thrown left and right hand punches at the deceased. The deceased was retreating and trying to save his life. All were drunk. PW2 had seen the deceased falling onto the ground but he had not seen as to whose punch had felled the deceased. However, he had seen the appellant and the 03rd accused and another stomping the deceased repeatedly on the chest and the front of the face while the latter lay unconscious on the ground.

- [9] Alesi Ranadi (PW3) who was selling BBQ food nearby with her husband (PW4) had seen 04 boys fighting, punching and slapping each other. She had identified the appellant and the 03rd accused among them. She had also seen the 01st accused coming in and joining the fight and throwing a straight left hand punch at the deceased's right jaw. As a result of the blow, the latter had fallen on to the concrete ground while hitting his head on the iron post. Thereafter, PW3 had seen all three accused repeatedly stomping and punching the deceased's face and chest while swearing at him. According to PW3 the 03rd accused had hurt his knee as a result of his stomping the deceased and had to crawl away from the crime scene.
- [10] Moape Batigai (PW4), the husband of PW3 had more or less confirmed his wife's evidence.
- [11] Doctor James Kalougivaki had testified that the cause of death had been severe traumatic brain injuries and bleeding within the skull cavity as a result of blunt force trauma caused by a rounded solid object including a fist, feet and baseball bat. The brain injuries had been necessarily fatal in the sense that the deceased had little chance of survival even with surgical intervention.
- [12] The appellant had given evidence and relied on the two witnesses called on behalf of the 01st accused. He had admitted pinching the deceased's brother while holding a beer glass and felt blood in his hand. He had denied attacking the deceased at all but stated that he was only interested in recovering his \$15 from the deceased and his brother.
- [13] The appellant's amended grounds are as follows:

Conviction

Ground 1

The Learned Trial Judge erred in law and in fact in his inadequate direction on joint enterprise to the assessors and himself on how the appellant formed a common intention with his co-defendants to assault the deceased.

Ground 2

The verdict is not supported by the totality of the evidence in terms of the joint enterprise.

Ground 3

The Learned Trial Judge erred in law and in fact with his inadequate direction on the reckless element of murder.

Sentence

Ground 1

The minimum term imposed on the appellant is harsh and excessive in the circumstances of the offending.

01st ground of appeal

- [14] The gist of the appellant's complaint is that the trial judge had not succinctly laid out at paragraph 15 of the summing-up how the appellant and his co-accused had formed a common intention to prosecute the unlawful purpose which led to the death of the deceased. The argument is more or less similar to the 01st ground of appeal urged on behalf of the 01st accused.
- [15] In the circumstances, the first question is whether the appellant had formed a common intention with other appellants to prosecute an unlawful purpose (see **Vasuitoga v State** [2016] FJSC1; CAV001 of 2013 (29 January 2016)). However, common intention could be proved by inference from conduct alone without words but that inference should be sufficiently strong to satisfy the high degree of certainty which criminal law requires (vide **Henrich v State** [2019] FJCA 41; AAU0029 of 2017 (07 March 2019)). The assessors and the trial judge appear to have concluded that the appellant's continued assault on the deceased even after he knocked him down to the ground along with the other two accused was sufficient to prove that he was acting in furtherance of a common intention with the other two. The appellant's counsel submits that he was not sharing a common intention with the other two accused when he attacked the deceased.

- [16] The trial judge had asked the assessors to decide the issue of common intention from the conduct of the appellants (*i.e.* all three accused) at paragraph 16 of the summing-up but not referred to the conduct of each of the appellants separately in relation to common intention. In other words the trial judge had particularly not brought to their attention the conduct of the appellant in that context. To that extent there is substance in the counsel's argument.
- [17] The State relies on **Rokete v State** [2019] FJCA 49; AAU0009 of 2014 (07 March 2019) and **Sean Patrick McAuliffe v The Queen** [1995] HCA 37; 183 CLR 108; 69 ALJR 621; 130 ALR 26 to justify the convictions on all three accused for murder including the appellant on the legal basis of the doctrine of common purpose where the High Court of Australia said:

'Per curiam. The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design. The liability which attaches to the traditional classifications of accessory before the fact and principal in the second degree may be enough to establish the guilt of a secondary party: in the case of an accessory before the fact where that party counsels or procures the commission of the crime and in the case of a principal in the second degree where that party, being present at the scene, aids or abets its commission. But the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others. Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The undertaking or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission. Further, each party is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose, the scope of that purpose being determined by what was contemplated by the parties sharing that common purpose.'

'A party is also guilty of a crime which falls outside the scope of the common purpose if that party contemplated as a possibility the commission of that offence by one of the other parties in the carrying out of the joint criminal enterprise and continued to participate in that enterprise with that knowledge.'

- [18] Is ‘*an understanding or arrangement amounting to an agreement*’ to commit a crime the same as ‘forming a common intention’ to prosecute an unlawful purpose in section 46? It appears that the scope in section 46 of the Crimes Act, 2009 may be wider in some respects and narrower in some other respects than what is contemplated in **Sean Patrick McAuliffe v The Queen** (supra). It is a matter for the full court to consider.
- [19] However, the most important question is whether it was open to the assessors and the trial judge to infer a common intention on the part of the appellant which he had formed with the other two accused to prosecute an unlawful purpose such as inflicting grievous physical injuries on the deceased [vide **Henrich v State** (supra)]. This could be ascertained by the full court only upon examination of the appeal record which is not available at this stage.
- [20] In the circumstances, I am inclined to grant leave to appeal on the first ground of appeal to enable the full court to examine the appellant’s grievance more fully although I cannot determine at this stage whether this ground of appeal has a reasonable prospect of success.

02nd ground of appeal

- [21] The counsel for the appellant submits that the verdict is not supported by the totality of evidence. This is similar to the 02nd ground of appeal raised on behalf of the 01st accused.
- [22] The second limb of ‘joint enterprise’ is that there should be proof that in the prosecution of the unlawful purpose an offence has been committed which is of such a nature that its commission is a probable consequence of the prosecution of such purpose and in case of murder the prosecution is required to prove the subjective element *i.e.* that the secondary party contemplated and foresaw the probability of death or infliction of serious harm on the deceased in the execution of the planned unlawful purpose [see also **Vasuitoga v State** (supra)].

- [23] To impute secondary liability for murder under the doctrine of joint enterprise, the fault element that the prosecution was required to prove was that the accused contemplated or foresaw death when they carried out their common intention to assault the deceased. To be guilty of manslaughter under the doctrine of joint enterprise, the fault element that the prosecution was required to prove was that the accused contemplated or foresaw serious harm when they carried out their common intention to assault the deceased (vide Tapoge v State [2017] FJCA 140; AAU121.2013 (30 November 2017).
- [24] The counsel for the appellant submits there was no evidence of a ‘joint enterprise’.
- [25] If the first limb in section 46 of the Crimes Act, 2009 is not satisfied, then the proof of second limb would obviously fail. The counsel for the appellant submits that there is insufficient evidence to infer shared common intention on the part of the appellant to assault the deceased and also that the appellant foresaw probability of death in the execution of that common intention.
- [26] The State cites Gillard v The Queen 2003] HCA 64; 219 CLR 1; 78 ALJR 64; 202 ALR 202; 139 A Crim R 100 (2003) 219 in support of its defence of the conviction for murder:

‘110. In its simplest application, the doctrine of joint criminal enterprise means that, if a person reaches an understanding or arrangement amounting to an agreement with another or others that they will commit a crime, and one or other of the parties to the arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, all are equally guilty of the crime regardless of the part played by each in its commission^[98].’

111. The doctrine has further application. It is not confined in its operation to the specific crime which the parties to the agreement intended should be committed. "[E]ach of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose"^[99]. The scope of the common purpose is to be determined subjectively: by what was contemplated by the parties sharing that purpose^[100]. And "[w]hatever is comprehended by the understanding or arrangement,

expressly or tacitly, is necessarily within the contemplation of the parties to the understanding or arrangement”^[101].

- [27] I think this aspect of the appeal also deserves to be examined by the full court with the help of trial proceedings and therefore leave to appeal on the second ground is granted. Once again, I make no determination as to whether the second ground of appeal has a reasonable prospect of success due to want of all the material at this stage.

03rd ground of appeal

- [28] The counsel for the appellant submits that the trial judge’s directions on recklessness at paragraph 42 of the summing-up were inadequate in that he had treated all three accused as principle offenders. The trial judge seems to have ruled out intention and decided that what was applicable was recklessness for the murder count on the facts of the case.
- [29] If recklessness was the fault element relied upon by the prosecution, then the learned trial judge was required to give clear direction that in the case of the principal offender (the accused who used the deadly force), the prosecution was required to prove that the accused was aware of a substantial risk that death would occur by conduct and having regard to the circumstances known to him it was unjustifiable to take the risk (*i.e.* recklessness). But to impute secondary liability for murder under the doctrine of joint enterprise, the fault element that the prosecution was required to prove was that the accused contemplated or foresaw death when they carried out their common intention to assault the deceased (**Vasuitoga v State** [2016] FJSC1; CAV001 of 2013 (29 January 2016) and **Tapoge v State** [2017] FJCA 140; AAU121.2013 (30 November 2017)).
- [30] It appears that the above decisions have made a distinction between the fault element required in the case of the principal offender and secondary offenders sought to be made liable under ‘joint enterprise’.

- [31] To impute secondary liability for murder under the doctrine of joint enterprise, the fault element that the prosecution was required to prove was that the accused contemplated or foresaw death when they carried out their common intention to assault the deceased. To be guilty of manslaughter under the doctrine of joint enterprise, the fault element that the prosecution was required to prove was that the accused contemplated or foresaw serious harm when they carried out their common intention to assault the deceased [vide **Tapoge v State** [2017] FJCA 140; AAU121.2013 (30 November 2017)].
- [32] The complaint of the appellant appears to be that the trial judge had not pointed out who the principal offender was and who rendered the fatal blow *vis-à-vis* his fault element and the secondary offenders *vis-à-vis* their fault element. This argument presupposes that in the case of ‘joint enterprise’ there must always be a principal offender and secondary offenders. Whether this is in fact the case could be discussed by the full court under the 01st and 02nd grounds of appeal.
- [33] But, it does not appear that the prosecution had relied on recklessness as the fault element but it had based its case on the doctrine of joint enterprise where the fault element is either contemplation or foreseeing death (for murder) or serious harm (manslaughter) when the accused carried out their common intention to assault the deceased.
- [34] Therefore, I think that this ground of appeal is misconceived and has no reasonable prospect of success. Accordingly, leave to appeal is refused.

01st ground of appeal (sentence)

- [35] The appellant complains that the minimum serving period of 15 years is disproportionately high considering his role in the offending.
- [36] In **Balekivuya v State** [2016] FJCA 16; AAU0081 of 2011 (26 February 2016) the court reduced the minimum serving period from 19 years to 15 years for an appellant who was 19 years at the time of committing the offence though the minimum period

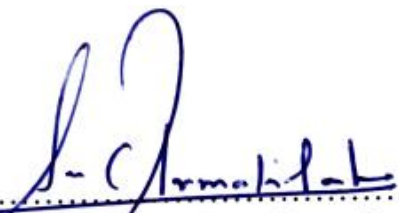
of serving the sentence was still a matter of discretion on the part of the trial judge in terms of section 237 of the Criminal Procedure Act, 2009. In the instant case, the evidence reveals that it is the appellant who seems to have waylaid the deceased and his brother and had started the brawl and even after the deceased fell on the ground and remained motionless the appellant had been seen to be attacking continuously the deceased.

[37] There is no sentencing error or a reasonable prospect of success in the appeal ground against the minimum serving period of 15 years. Leave to appeal against sentence is refused.

Orders

1. Leave to appeal against conviction is allowed.
2. Leave to appeal against sentence is refused.




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Hon. Mr. Justice Chandana Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL