

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

**CRIMINAL APPEAL NO.AAU 0059 of 2019**  
**[In the High Court at Suva Case No. HAC 013 of 2017]**

**BETWEEN** : **NIKO BALEIWAIRIKI**  
**ERONI RAIVANI**

**AND** : **THE STATE** *Appellants*  
*Respondent*

**Coram** : **Prematilaka, RJA**

**Counsel** : **Ms. S. Prakash for the Appellants**  
: **Mr. R. Kumar for the Respondent**

**Date of Hearing** : **09 December 2022**

**Date of Ruling** : **19 December 2022**

**RULING**

[1] The appellants had been indicted with another in the High Court at Suva on one count of murder contrary to section 237 read with section 46 of the Crimes Act, 2009 and one count of aggravated robbery contrary to Section 311 (1) (a) of the Crimes Act 2009 committed on 01 January 2017 at Lokia, Rewa in the Central Division.

[2] After the summing-up, the three assessors in unanimity had opined that both appellants were guilty of murder and aggregated robbery. The learned High Court judge had agreed with the assessors and convicted and sentenced them on 15 April 2019 to mandatory life imprisonment for murder with a minimum serving period of 22 years and 12 years imprisonment for aggravated robbery; both sentences to run concurrently.

- [3] This court allowed leave to appeal only on the question whether the trial judge should have directed the assessors on the lesser offence of manslaughter. However, the trial judge had himself considered this aspect at paragraphs 22 and 23 of the judgment and concluded that the appellants contemplated or foresaw the death of the deceased. Thus, by necessarily implication the judge seems to have ruled out contemplation or foreseeing serious harm by the appellants as a probable consequence of carrying out the aggravated robbery.
- [4] Under the principle of joint enterprise in terms of section 46 of the Crimes Act, 2009 (earlier section 22 of the Penal Code), the first limb to be proved is whether the appellants had formed a common intention to prosecute an unlawful purpose [see also **Vasuitoga v State** [2016] FJSC1; CAV001 of 2013 (29 January 2016)] 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)]. I held in the LA Ruling that there is no doubt at all about the fact that all three offenders formed a common intention to rob the deceased's outboard engine (unlawful purpose).
- [5] 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. Thus, to impute secondary liability for murder under the doctrine of joint enterprise, the fault element that the prosecution is required to prove is that the accused contemplated or foresaw death as a probable consequence when they carried out their common intention to rob the deceased. To be guilty of manslaughter under the doctrine of joint enterprise, the fault element that the prosecution is required to prove is that the accused contemplated or foresaw serious harm as a probable consequence when they carried out their common intention to rob the deceased (vide **Tapoge v State** [2017] FJCA 140; AAU121.2013 (30 November 2017 and see also **Vasuitoga v State** (supra)].

- [6] In **Clayton v The Queen** [2006] HCA 58; (2006) 81 ALJR 439 at 443 the High Court declined to reopen its earlier decisions in **McAuliffe v R** [1995] HCA 37; (1995) 183 CLR 108, 115 and **Gillard v The Queen** [2003] HCA 64; (2003) 219 CLR 1, 38 on the law relating to extended common purpose. Six members of the High Court restated the principle of foresight of the possibility of a murderous assault as follows:

*'If a party to a joint criminal enterprise [interchangeably referred to as 'acting in concert'] foresees the possibility that another might be assaulted with intention to kill or cause really serious injury to that person, and, despite that foresight, continues to participate in the venture, the criminal culpability lies in the continued participation in the joint enterprise with the necessary foresight.'*

- [7] Therefore, contemplation or foreseeability of the probable consequence appears to be the fault element under section 46 of the Crimes Act, 2009 **Rokete v State** [2019] FJCA 49; AAU0009 of 2014 (07 March 2019) and **Talala v State** [2019] FJCA 50; AAU 155 of 2015 (07 March 2019)]. If death was in contemplation or foreseeable the offenders would be liable for murder; If serious harm was in contemplation or foreseeable the offenders would be liable for manslaughter [see **Tapoge v State** [2017] FJCA 140; AAU1212 of 2013 (30 November 2013)].

- [8] On the basis of the appellants' confessions, the evidence of Ulaiasi Tuikoro and the deceased's post-mortem report and in the absence of full transcript of trial proceedings, it cannot be unequivocally determined that the appellants contemplated or foresaw only serious harm to the deceased as a probable consequence of carrying out the robbery and did not contemplate or foresee death as a probable consequence of the robbery. The State has submitted that the appellants were not wearing masks and did not try to sneak into the house while the deceased was asleep. They knew that the deceased was awake and knocked on the door. Thus, the State argues that the only way they could prevent them from being identified by the deceased was to silence the deceased forever and therefore, they should be taken to have contemplated or foreseen death of the deceased as a probable consequence of carrying out the robbery. Thus, it is argued the appellants' criminal liability for murder could be imputed on the basis of joint enterprise under section 46 of the Crimes Act, 2009.

- [9] Whether the trial judge should have left the issue whether it was the death or the serious harm that was in contemplation or foreseeability of the appellants; *i.e.* whether the appellants could contemplate or foresee death of the deceased as a probable consequence to be liable for murder as opposed to contemplating or foreseeing serious harm as a probable consequence to be liable for manslaughter, alone is not sufficient for me to conclude that the appellants have a very high likelihood of success in appeal.

**Law on bail pending appeal**

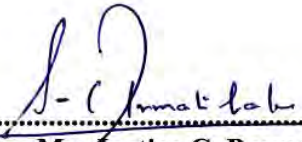
- [10] The legal position is that the appellants have the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellants when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellants have to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, appellants can even rely only on ‘exceptional circumstances’ including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004), **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

- [11] Out of the three factors listed under section 17(3) of the Bail Act ‘likelihood of success’ would be considered first and if the appeal has a ‘very high likelihood of success’, then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.
- [12] If an appellant cannot reach the higher standard of ‘very high likelihood of success’ for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of ‘very high likelihood of success’.
- [13] As stated earlier the appellants cannot be said to be having a ‘very high likelihood of success’ in his appeal at this stage. No other exceptional circumstances have been demonstrated.
- [14] I shall in any event consider the second and third limbs of section 17(3) of the Bail Act namely ‘*(b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellants when the appeal is heard*’ together.
- [15] The appellants are serving a life imprisonment and it will not make much of a difference to their balance sentence to be served as to when their appeal is going to be taken up before the full court for hearing in due course. LAC is in the process of preparing the appeal records but awaiting judge’s notes and transcripts. Therefore, it appears that section 17(3) (b) and (c) need not be considered in favour of the appellant at this stage.

**Order of the Court:**

1. Bail pending appeal is refused.



  
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**Hon. Mr. Justice C. Prematilaka**  
**RESIDENT JUSTICE OF APPEAL**