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

CRIMINAL APPEAL NO. AAU121 of 2013
[High Court Case No. HAC48 of 2011]

BETWEEN	:	**PURATAKE TAPOGE** **KITIONE VESIKULA** **FILOMENA ULUIVITI** ***Appellants***
AND	:	**THE STATE** ***Respondent***
Coram	:	**Calanchini P** **Lecamwasam JA** **Goundar JA**
Counsel	:	**Mr M Fesaitu for the Appellants** **Mr L Fotofili for the Respondent**
Date of Hearing	:	**14 November 2017**
Date of Judgment	:	**30 November 2017**

JUDGMENT

Calanchini P:

[1] I have read the draft judgment of Goundar JA and agree with his reasoning and his conclusions.

Lecamwasam JA:

[2] I agree with the reasoning and conclusions of Goundar JA.

Goundar JA:

[3] Following a trial in the High Court at Labasa, the appellants were convicted of murder contrary to section 237 of the Crimes Act 2009 and sentenced to life imprisonment with minimum terms to be served before pardon may be considered as follows:

Puratake Tapoge	-	18 years
Kitione Vesikula	-	19 years
Filomena Uluiviti	-	15 years

[4] The appeal is against both conviction and sentence. The grounds of appeal are:

(i) The learned Trial Judge erred in law and in fact when he did not give any directions on provocation and intoxication although there was evidence which required such a direction to be given to the assessors.

(ii) The learned Trial Judge erred in law and in fact when he did not properly guide and direct the assessors on how to approach the evidence contained in the statement given by the second Appellant to the Police.

(iii) The learned Trial Judge erred in law and in fact when he did not properly direct the assessors in respect of the reckless elements of manslaughter.

(iv) The learned Trial Judge erred in law and in fact when he did not properly direct the assessors in respect of the reckless elements of murder.

(v) The Appellants were prejudiced due to lack of legal representation.

(vi) The Learned Trial Judge erred in law and in fact when he misdirected the assessors in respect of the standard of proof by using the phrase "fanciful doubt" resulting in substantial miscarriage of justice.

(vii) The Learned Trial Judge erred in law in imposing a minimum term to be served which is in conflict with the penalty provision of Section 237 of the Crimes Decree.

(viii) The learned Trial Judge erred in principle in imposing non parole period which was excessive and also erred in failing to take into account the

following relevant considerations when arriving at the minimum term for all the Appellants:

i) The period spent in remand by all the Appellants;
ii) It was not a premeditated or calculated murder;
iii) The victim was equally to be blamed;
iv) The first and second Appellants were intoxicated and not the initial aggressors;
v) The personal circumstances of all the Appellants such as their family ties, young age, etc.

Facts

[5] The incident leading to the killing arose in Taveuni on 28 July 2011. The victim was Iowane Petuna, a male aged 32. The three appellants are related. Tapoge and Uluiviti are married. Vesikula and Uluiviti are siblings. All three lived together in the same house at Lesuma, Taveuni. The deceased was from Tavuki, Taveuni.

[6] Evidence was led that on 28 July 2011, Tapoge and Vesikula had consumed a significant amount of alcohol during the day and before the alleged incident at about 5 pm in the afternoon. The deceased was also drunk and was seen near the appellants' home in the company of two other men.

[7] The first witness who gave evidence for the prosecution saw the alleged incident but he did not identify the appellants. A staff nurse who was on her way to a shop witnessed the incident from about 50 meters. She said she saw the assault on the deceased by the appellants, but her view was partially obstructed by a big tree between her and the alleged incident.

[8] Iliavu Suka was the main witness implicating all three appellants to the alleged incident. Suka was the appellants' neighbour. He witnessed the alleged incident from a distance of 10 meters and his view was not obstructed. His evidence was that when the brawl started, two other men who were in the company of the deceased fled the scene, leaving the deceased behind. He saw Vesikula, Uluiviti and Tima confronting the deceased. Tima was holding a stone. Vesikula punched the deceased in the face, causing him to fall to the

ground. While the deceased was still on the ground, Vesikula grabbed a stick (4 × 2 inches in size) and struck him twice in the shoulder. By this time, Tapoge arrived at the scene and was standing beside Vesikula. While the deceased remained on the ground, Uluiviti rushed inside her house and returned with a cane knife and handed it to Tapoge. Tapoge struck the deceased in the head twice with the cane knife. Vesikuka stood beside Tapoge when the deceased was struck with the cane knife.

[9] The victim died within minutes upon arriving at the hospital. Post mortem examination revealed an 11 cm deep cut over the head on the top right, a cut so deep that it was exposing the bone. A fracture of the temporal bone and parietal bone was found on the left side of the upper head. Also, there was extensive brain hemorrhaging on the left side. Death was due to the head injuries.

[10] Only Vesikula's caution interview was led in evidence after a voir dire. In his interview, Vesikula said he punched and used a timber twice to hit the deceased, but he couldn't remember which part of the body he hit. While the deceased was on the ground, Vesikula challenged the other men who were in the deceased's company for a fight, but they fled the scene leaving the deceased behind. Vesikula said when he returned to the deceased, he saw the deceased was wounded and bleeding from the head.

[11] Vesikula in his evidence gave a slightly different version of his involvement. He said that in the afternoon of 28 July 2011, he was home after consuming a significant amount of alcohol during the day. He heard a commotion and when he came out of his house, he saw the deceased throw a punch at Tima and then he threw a punch at Vesikula. They punched each other until the deceased fell down. Vesikula then went after the other boys but came back and saw the deceased still lying on the roadside. He said he told the police that he had used the timber, just to get them off his back because they were pestering him.

[12] Tapoge's evidence was that in the afternoon of 28 July 2011, he was at home after having drunk alcohol during the day. He came to know about Tavuki boys swearing and relieving themselves in public outside his home by someone. He did not leave the house and later in the evening he came to know that the deceased was injured by someone. He denied striking the deceased with a cane knife.

[13] Uluiviti's evidence was that she did not even know that the Tavuki boys were outside her home on 28 July 2011. Later she got to know that one of them was injured. She denied taking the cane knife from her home and handing it to Tapoge.

[14] Tima gave evidence for the defence. Her evidence was that she heard the deceased swearing and then unzipped his pants and relieved himself in front of her. When she confronted the deceased, he grabbed her by the collar and punched her chest. She said that Vesikula came and got into a fight with the deceased. When the deceased fell to the ground, Vesikula ran off after the other boys. Tima never saw Vesikula with the timber. She never saw Uluiviti come out of the house and Tapoge was not there.

Provocation

[15] Provocation is not a complete defence to an unlawful killing. It is a partial defence. Killing with provocation reduces culpability from murder to manslaughter. This lesser culpability is the effect of section 242 of the Crimes Act 2009, which states:

> (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as defined in sub-section (2), and before there is time for the passion to cool, he or she is guilty of manslaughter only.
>
> (2) The term "provocation" means (except as stated in this definition to the contrary) any wrongful act or insult of such a nature as to be likely when –
>
> a) done to an ordinary person; or
>
> b) done in the presence of an ordinary person to another person –
>
> (i) who is under his or her immediate care; or

(ii) who is the husband, wife, parent, brother or sister, or child of the ordinary person-

to deprive him or her of the power of self-control and to induce him or her to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

(3) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as state in sub-section (2), the former is said to give to the latter provocation for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him or her to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who believes and has reasonable grounds for believing the arrest to be unlawful.

[16] There is a general duty on the courts to consider a defence, even if it was not expressly relied upon by the accused at trial. The scope of that duty in relation to provocation was explained by Lord Devlin in *Lee Chun Chuen v R* (1963) AC 220 as follows:

> Provocation in law consists mainly of three elements – the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements.

[17] In *Praneel Kumar v Reginam* Cr. App. No 25 of 1972, this Court said:

> ...it is well established law that a trial Judge is under no obligation to leave the issue of provocation to the Jury – in this case Assessors – where there is no evidence of facts upon which a finding of provocation could properly be based.

[18] Similarly in *Maha Narayan v Regina* Criminal Appeal No. 1 of 1972, this Court said that the issue of provocation should be left to the assessors only if there is a credible narrative

of events suggesting the presence of the three elements referred to in *Lee Chun Chuen v R* (1963) AC 220 namely, the act of provocation, the loss of self control, both actual and reasonable, and the retaliation proportionate to the provocation.

[19] More recently, in *Isoa Codrokadroka v The State* unreported Cr App No. CAV of 2013; 20 November 2013, the Supreme Court endorsed the judicial approach to provocation that was formulated by this Court at [16]:

> The Court of Appeal summarised at paragraph 38 the judicial approach that should be taken in relation to provocation as follows:
>
> *"1 The judge should ask himself/herself whether provocation should be left to the assessors on the most favourable view of the defence case.*
>
> *2 There should be a credible narrative on the evidence of provocation words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship.*
>
> *3 There should be credible narrative of a resulting loss of self control by the accused.*
>
> *4 There should be a credible narrative of an attack on the deceased by the accused which is proportionate to the provocative words or deeds.*
>
> *5 The source of the provocation can be one incident or several. To what extent a past history of abuse and provocation is relevant to explain a sudden loss of self-control depends on the facts of each case. However accumulative provocation is in principle relevant and admissible.*
>
> *6 There must be an evidential link between the provocation offered and the assault inflicted."*

[20] The wrongful act or insult relied upon by counsel for the appellants are the assault on Tima by the deceased. There is no credible narrative of evidence that Tima was assaulted in the presence of Tapoge and Uluiviti. Tima was the elder sister of Vesikula and Uluiviti. Tima's evidence suggests that Vesikula may have witnessed the assault for him to get into a fight with the deceased, but her evidence did not suggest that Vesikula lost

his self-control as a result of the assault on Tima and used deadly force in that fight. The independent witnesses gave an account of the violence inflicted on the deceased by Vesikula, but they did not know the reason for the use of violence. Vesikula in his caution interview and in his evidence did not claim to have lost his self control and reacted in the heat of passion to inflict the deadly injury on the deceased. There was no evidential link between the assault on Tima and the infliction of the deadly injury. As the Supreme Court in *Praveen Ram v The State* unreported Cr App CAV001 of 2011; 9 May 2012, said at [45]:

> In the absence of some evidence of the attendant circumstances that led to the argument and the provocative incident, in particular, the nature of the provocation, its intensity and duration, one cannot assume that the act of provocation or insult resulted in the loss of self control by the Petitioner and that his reaction to it was proportionate.

[21] There is no error shown in the trial judge's decision in not directing the assessors or himself on the defence of provocation.

Intoxication

[22] Like provocation, voluntary intoxication is not an excuse for an unlawful killing. But voluntary intoxication is relevant in determining whether the accused had the pre-requisite fault element to be guilty of murder. Section 31 (1) of the Crimes Act 2009 states that if any part of a defence is based on actual knowledge or belief, evidence of intoxication may be considered in determining whether that knowledge or belief existed. (underlining mine)

[23] The person directly responsible for using the deadly force was Tapoge. His evidence was that while he had consumed substantial alcohol throughout the day, he remained inside his house and did not participate in any assault on the deceased. Similarly, Vesikula denied any involvement in the infliction of the deadly injury on the deceased although he had consumed a significant amount of alcohol earlier on during the day. Uluiviti said she was sober and was not involved in the alleged assault of the deceased. There was no

evidence to suggest that Tapoge and Vesikula due to their state of intoxication was not aware of a substantial risk that striking the deceased on the head with a cane knife would cause death.

[24] There is no error shown in the learned trial judge's decision in not directing the assessors or himself on intoxication.

Direction on the caution statements

[25] Vesikula made incriminating admissions in his caution statements. At paragraph [23] of the summing up, the learned trial judge told the assessors '[i]f you think that the answers that Kitione gave in that interview are true, then they become evidence for you to accept or reject in the normal way'. At paragraph [24], the assessors were told that the caution statements were evidence against the maker only and not against his co-accused.

[26] Vesikula's first complaint is that the learned trial judge did not direct the assessors to consider whether the accused had made the alleged confession and whether the confession was true, citing *Burns v The Queen* [1975] 132 CLR 258 as authority. Vesikula's second complaint is that the learned trial judge should have also left the issue of voluntariness of the confession to the assessors.

[27] Vesikula's evidence was that he told the police he had used the timber, just to get them off his back because they were pestering him. He admitted making the admission but claimed the admission was not true. Clearly, voluntariness of the admission was never an issue at the trial. The truth of the admission was. The learned trial judge correctly left the truth of the admission for the assessors to decide. There is no error shown in that regard.

Direction on recklessness

[28] Section 237 of the Crimes Act 2009 defines murder as follows:

A person commits an indictable offence if —

(a) the person engages in conduct; and

(b) the conduct causes the death of another person; and

(c) the first-mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct.

[29] Section 239 defines manslaughter as follows:

A person commits an indictable offence if—

(a) the person engages in conduct; and

(b) the conduct causes the death of another person; and

(c) the first-mentioned person—

(i) intends that the conduct will cause serious harm; or

(ii) is reckless as to a risk that the conduct will cause serious harm to the other person

[30] There are two common fault elements for murder and manslaughter. They are intention or recklessness. The key difference in the murder recklessness and manslaughter recklessness is the result. For an accused to be guilty of murder, the fault element is an intention to cause death or recklessness as to causing death by the alleged conduct. For an accused to be guilty of manslaughter, the fault element is an intention to cause serious harm or recklessness as to causing serious harm. The learned trial judge told the assessors that the prosecution was relying upon recklessness as the fault element for murder or manslaughter. The direction was tailored to comply with the statutory definition of recklessness.

[31] Section 21 of the Crimes Act 2009 defines recklessness as:

(1) A person is reckless with respect to a circumstance if —

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if —

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

[32] The prosecution further imputed secondary liability for murder under the doctrine of joint enterprise provided by section 46 of the Crimes Act 2009:

> 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.

[33] The learned trial judge tailored his direction on the fault element for murder and manslaughter to reflect the secondary liability for those offences as well. The direction was:

> [9] So conduct can be anything such as stabbing, strangling, poisoning, punching chopping etc., and if that conduct causes the other person to die, then the third element comes into play. The State in this case are saying that Take the first accused engaged in the conduct of chopping Iowane and that it caused his death. I do not think that you will have any trouble with the first two elements of murder. There is ample evidence that both Take and Kitione engaged in conduct (slashing with a knife and hitting with a piece of wood) that resulted in Iowane's death. The State is saying that they were not necessarily intending to kill him but they say in the alternative, that they were each nevertheless reckless in causing his death. Now a person is reckless with respect to causing death if he is aware of a substantial risk that death will occur by his actions and having regard to the circumstances known to him, it is unjustifiable to take that risk. So in our case you must find proved that Take, the first accused engaged in conduct that caused

the death and that he knew that there was a risk that what he was doing might kill him and also that he was not justified in taking that risk.

[10] An alternative verdict to murder which is available for you to find, is guilty of the lesser offence of manslaughter. Manslaughter has the same first two ingredients of murder; that is to say that the accused engages in conduct which caused the death of another, but instead of the recklessness as to causing the death by his conduct, he just has to be reckless as to whether his conduct will cause serious harm to the victim.

[11] So, what does this mean for us in this case? If you find that the conduct of either Take, the first accused or of Kitione, the second accused caused the death of Iowane, looking at their cases separately, you must consider their respective intentions. If you think that either Take or Kitione intended to kill that person then he is guilty of murder. However if you think he didn't intend to kill, you must consider his recklessness in what he did. If you think that he was so reckless that there was every chance of death occurring by his actions, then he is guilty of murder; however if you think his recklessness extended only to the causing of serious harm to Iowane, then he is not guilty of murder but guilty of the lesser offence of manslaughter. It is all about the degree of the violence, and I think that the post-mortem evidence will help you here.

[12] There are three accused in this case charged with murder. In order to make them jointly liable for the alleged murder of Iowane, the prosecution is relying on and running its case on the concept of "joint enterprise." "Joint enterprise" is "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." In considering each accused, you will have to ask yourselves the following questions: Did each of them form a common intention with the others to attack the deceased? If so, when the deceased was allegedly murdered as a result of the violent attacks, was this a probable consequence of the common intention? If your answer to the above questions for a particular accused was yes, and you are satisfied beyond reasonable doubt that the elements to murder are satisfied, he's guilty of murder.

[13] When a criminal offence is committed by 2 or more persons, each of them may play a different part, but if they are in it together as part of a joint plan or agreement to commit it, they are each guilty. The words "plan" or "agreement" do not mean there has to be any formality about it. An agreement to commit an offence may arise on the spur of the moment. Nothing need be said at all. It can be made with a nod or a wink or a knowing look. An agreement can be inferred from the behaviour of the parties. So if they all set off to attack, carrying weapons, you might find that that is evidence of a plan to commit an offence. The

essence of joint responsibility for a criminal offence is that each accused shared the intention to commit the offence and took some part in it (however great or small) so as to achieve that aim.

[14] The law goes further than that. The law says that if one of the participants in the joint enterprise carries out an act that was not originally planned, and if that act was a probable consequence of the enterprise, then they are all liable and responsible for that act.

[15] There is evidence that Kitione, the second accused, used the piece of wood to bash Iowane on the head and there is evidence from Kitione himself that he punched Iowane so hard that he fell to the ground. There is also evidence that Take, the first accused, used the cane knife to slash him on the head (although Take denies this) and we know that Iowane died of head wounds – then it is up to you whether you think the actions of Kitione or Take caused Iowane's death. If you think it did you must then decide whether in the joint enterprise, each of the accused (looking at them separately and in turn) would expect such recklessness to result in a death. If yes then each is guilty of murder but if not then the unlawful act and that act causing death, you may think that each is then guilty of manslaughter.

[16] Now all of this sounds terribly complicated and difficult but I am now going to sum up the evidence in the trial and when I have done that I will come back to the legal principles and try to put them in context for you.

[34] Later, the learned trial judge told the assessors:

[38] Your first step will be to decide whether this is a joint enterprise between all three to assault Iowane. You will probably have no difficulty in deciding that Take and Kiti were acting together but it is for you to decide if Filo was "in on it." If you believe the evidence from Paulini and Iliavu that she had brought out the knife and had given it to Take, then you may well think that she was playing a part in the attack. Remember you can be a part of a joint enterprise no matter what part you play, large or small. She doesn't have to have had struck any blows or thrown any punches. If you think that she was not part of the attack then you will find her not guilty of anything.

[39] If you find that there was a joint enterprise between the three, then you will decide if Iowane's death was caused by any one of the accused and if so then all three are guilty of either murder or manslaughter. It doesn't really matter who

landed the killing blow and whether it was by knife or wood. If it is one of them who was responsible then they all are.

[40] Having decided that point, you will then go on to decide whether they are guilty of murder or guilty of manslaughter. If you think that the fatal blow was inflicted by the person who made it recklessly with no regard to whether death might ensue by it then it is murder; however if you think that the person who inflicted the fatal blow was only being reckless in doing very serious injury to Iowane then you will find each of them guilty of manslaughter.

[35] The above direction is not an ideal direction. Certain aspects of the direction are confusing. The learned trial judge after telling the assessors that the prosecution was not necessarily alleging an intention to kill in paragraph [9] later directs the assessors in paragraph [11] to consider whether "Take or Kitione intended to kill". It is not clear why Uluiviti's intention was not included in that direction. After all, it was Uluiviti who supplied the deadly weapon to her husband (Tapoge) after the deceased was knocked down to the ground by her brother (Vesikula).

[36] The learned trial judge in his direction also gave an impression that Vesikula was principally responsible for the fatal head injury together with Tapoge. There was unequivocal medical evidence that the fatal injury was the head wound. The evidence was that Tapoge inflicted the fatal head wound with a knife. There was no evidence that Vesikula struck the deceased in the head with the timber. In his caution interview, he admitted using the timber twice to strike the deceased but he could not recall which part of the deceased's body he hit. In his evidence, he denied using the timber at all. The neighbour's evidence was that Vesikula struck the deceased's in the shoulders twice with the timber.

[37] 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 (wounding the head with a cane knife) and having regard to the circumstances known to him (the victim

being drunk and knocked down to the ground by an earlier assault) it was unjustifiable to take the risk. 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 and Qurai v The State* unreported Cr App No CAV001 of 2013; 29 January 2016).

[38] Similarly, for manslaughter, the prosecution was required to prove that the principal offender was reckless in the sense that he was aware of a substantial risk that serious harm would occur by striking the head of a drunken victim knocked down to the ground by an earlier assault and having regard to the circumstances known to him, it was unjustifiable to take the risk. 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.

[39] Although some of the aspects of the learned trial judge's direction are confusing, when the direction is read as a whole, I am not convinced that there has been a miscarriage of justice, in the sense that the appellants had been denied a reasonable prospect of an acquittal or a verdict for a lesser offence. The assessors were told to consider the case of each accused separately and to decide the level of their recklessness as to the result of their conduct. If they were reckless as to death, that is, aware of a substantial risk that death would occur and having the circumstances known to them, it was unjustifiable to take the risk, they would be guilty of murder. If they were reckless as to serious harm, that is, aware of a substantial risk that serious harm would occur and having the circumstances known to them, it was unjustifiable to take the risk, they would be guilty of manslaughter. Grounds three and four are not made out.

Lack of legal counsel

[40] The right to counsel is a constitutional right of an accused. Section 14 (2) (d) of the Constitution provides for that right. But, that right is not absolute *(Eliki Mototabua v The State* unreported Cr App No CAV004 of 2005S; 29 February 2008, [37]).

[41] When the appellants first appeared in the Magistrates' Court on 2 August 2011 after being charged with murder, they informed the learned Magistrate that they chose to be represented by private counsel. Thereafter, the case was transferred to the High Court.

[42] On 25 August 2011, the appellants appeared in the High Court for first call with their counsel of choice, Mr Marawai and applied for bail. Subsequently, the appellants were released on bail pending trial. Mr Marawai remained counsel on the record until 29 November 2012 when Mr Marawai was suspended from practice. The new counsel was Mr Maisamoa. Mr Maisamoa remained counsel on the record until 15 April 2013 when he stopped appearing in court. On 15 April 2013, the case was fixed for trial to commence on 31 July 2013. The case was then called on numerous occasions for mention to check if the appellants had engaged counsel for trial. They remained on bail to make that arrangement. On 31 July 2013, the appellants appeared for trial without legal counsel. The trial commenced on the same day with the appellants defending themselves after pleading not guilty to the charge.

[43] There is no question that the appellants were ignorant of their right to counsel. They declined to engage counsel who was available to represent them for the trial despite being warned about the seriousness of the charge and need to engage counsel when the trial date was fixed. The fact that the appellants had to conduct their case without counsel was their own making. They have no basis for complaint that their right to counsel was infringed.

[44] Counsel for the appellants submits that the appellants were prejudiced by lack of legal representation in that they were not able to carry out an effective cross examination of the

prosecution witnesses and raise their defence properly. Any accused facing a serious charge like murder will no doubt suffer some prejudice due to lack of counsel. The question is whether the trial miscarried as a result of the accused being unrepresented. Procedural guarantees were accorded to the appellants. The strength of the evidence that was led at the trial against the appellants is also an important factor in making an assessment whether the trial miscarried due to the appellants being unrepresented. In that regard, the prosecution witness, Suka gave credible and reliable evidence implicating all three appellants to a common intention to assault the deceased to death. The trial did not miscarry due to the appellants being unrepresented.

Fanciful doubt

[45] The final ground of appeal against conviction relates to the trial judge's use of the phrase 'fanciful doubt' in directing on the standard of proof. The impugned direction is at paragraph [7]:

> It is most important to remind you of what I said to you when you were being sworn in. The burden of proving the case against this accused is on the Prosecution and how do they do that? By making you sure of it. Nothing less will do. This is what is sometimes called proof beyond reasonable doubt. If you have any doubt then that must be given to the accused whose case you are considering and you will find him or her not guilty - that doubt must be a reasonable one however, not just some fanciful doubt. None of these accused have to prove anything to you. If however you are sure that each of these accused whose case you are considering, engaged in conduct which led to the death of the deceased, then you will find him or her guilty of murder or manslaughter.

[46] In *Laojindamanee v State* unreported Cr App No AAU0044 of 2013; 30 September 2016, a similar objection was raised against a direction that referred to a reasonable doubt as a doubt that was not just some fanciful doubt. The Court looked at the direction as a whole and concluded that the phrase 'a fanciful doubt' did not have the effect of vitiating the direction on the standard of proof. Similarly, Lord Goddard CJ in *R v Hepworth* [1955] 2 QB 600, 603 said that a reference to a reasonable doubt, by contrast with a fanciful doubt, was in itself unhelpful because these expressions did not explain themselves. In the present case, the direction adequately conveyed the appropriate standard of proof.

[47] For these reasons, I would affirm the appellants' convictions and dismiss their appeals against conviction.

Sentence appeal

[48] The punishment for murder is fixed by law. The penalty is life imprisonment, with a judicial discretion to set a minimum term to be served before pardon may be considered. The appeal is against the minimum terms imposed on the appellants. The complaints are that the trial judge should not have imposed the minimum terms and that the minimum terms are excessive due to the failure of the trial judge to take into account relevant factors.

[49] There is no merit in the complaints of the appellants against their minimum terms. The minimum term is not an additional sentence. The sentence is life imprisonment. The minimum term is fixed to make the offender remain in prison before any possibility for a pardon can be considered by the President on the recommendation of the Mercy Commission under section 119 of the Constitution. In other words, the offender must serve the minimum term and cannot be pardoned or released before the expiration of the minimum term. The minimum term affects the eligibility timeframe for the possibility of a pardon or release. The minimum term by no means guarantees a pardon or a release. An offender may not be pardoned or released and may spend life in prison even after the completion of the minimum term.

[50] In the present case, the learned trial judge justified the minimum terms he imposed on the appellants by giving reasons. The learned trial judge said that there was very little evidence of provocation apart from swearing and suggestion of a fight the week before in a bar, a fight in which the deceased was not even present. The learned trial judge said that the fact that the two appellants were drunk was not an excuse to savagely beat someone.

[51] The victim who was unarmed and drunk could hardly defend himself from the ferocious attack by the appellants. The minimum terms that the learned trial judge imposed are within the acceptable range for killing using violence. There is no error shown in the learned trial judge's exercise of discretion to fix minimum terms.

[52] For the reasons given, I would dismiss the appeals against sentence.

Order of the Court:

Appeals dismissed.

.....

Hon. Mr Justice W Calanchini
PRESIDENT, COURT OF APPEAL

.....

Hon. Mr Justice S Lecamwasam
JUSTICE OF APPEAL

.....

Hon. Mr Justice D Goundar
JUSTICE OF APPEAL

Solicitors:
Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the Respondent