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

CRIMINAL APPEAL NO.AAU 135 of 2014
[High Court Criminal Case No. HAC 84 of 2009)

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BETWEEN	:	**ILIKIMI NAITINI**
		01st Appellant
	:	**PAILATO CAVASIGA**
		02nd Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Gamalath, JA** **Prematilaka, JA** **Nawana, JA**
Counsel	:	**Mr. Waqanabete S for the 01st Appellant**
	:	**Mr. Fesaitu M for the 02nd Appellant**
	:	**Ms. Kiran S for the Respondent**
Date of Hearing	:	**10 February 2020**
Date of Judgment	:	**27 February 2020**

JUDGMENT

Gamalath, JA

[1] I have read the draft judgment and conclusions of Prematilaka,JA and agree with the Judgment.

Prematilaka, JA

[2] The two appeals arise from the conviction of the appellants on a single count of murder of Tevita Voivoi contrary to section 237 of the Crimes Decree, 2009 alleged to have been committed on 07 August 2012 at Nanuku Settlement, Vatuwaqa in the Central Division.

[3] After trial, the three assessors had returned a unanimous opinion of guilty of murder against both appellants. The Learned Trial Judge on 10 November 2014 delivered the judgment and convicted the appellants of murder and on the same day sentenced them to life imprisonment with minimum serving periods of 18 years and 16 years respectively on the 01st and 02nd appellants.

[4] The appellants appealed only against conviction. On 30 September 2015 the single Judge of the Court of Appeal granted leave to appeal on a single ground of appeal not raised by the 01st appellant and on all three grounds of appeal raised by the 02nd appellant. For the purpose of this appeal the order in which the appellants' names appear in the caption were adjusted to be in line with their standing in the High Court with the concurrence of all counsel.

[5] The ground of appeal in respect of which leave to appeal was granted for the 01st appellant by the single judge is as follows.

> *'[10]……. The only issue that appears to be arguable but not raised by Naitini is the Trial Judge's failure to put the defence of provocation to the assessors. On this issue, I grant him leave.'*

[6] The 02nd appellant's three grounds of appeal where leave to appeal was granted by the single judge are as follows.

> *'Ground 1: The Learned Trial Judge erred in law and in fact when he found that the Appellant was an active participant in the joint enterprise that led to the death of the deceased.*

Ground 2: The Learned Trial Judge erred in law and in fact when he did not give directions to the assessors in the Summing Up on the defence of self defence and provocation and also to consider the same given the evidence led in the trial from the eye witnesses.

Ground 3: The Learned Trial Judge erred in law and in fact when he made this comment in paragraph 48 of the Summing Up in relation to the Appellant's witness evidence, "Well that was the witnesses evidence and you might find it to be a bit "pat", a little too" coached" to be credible, especially after Karailina had said that Atelina hadn't seen what had occurred but then it is all a matter for you Ladies and Gentlemen". By doing so, the Learned Trial Judge had usurped the function of the assessors thus resulted in a gross miscarriage of justice.'

[7] The counsel for the 01st appellant informed this court at the hearing that he would urge only the sole ground of appeal articulated by the single judge and filed written submissions thereon. The counsel for the 02nd appellant urged all three grounds of appeal but said that he would rely on the written submissions filed at the leave stage. The State had filed written submissions responding to all grounds of appeal allowed at the leave hearing.

Facts in brief

[8] The deceased, Tevita Voivoi and his wife, Karalaini had visited relatives living in Nanuku settlement, Vatuwaqa over the weekend on 05 August 2012. Close to midnight, the deceased had been out and his pregnant wife and her sister, Theresa were having grog inside the house. They were both still up in Theresa's kitchen when the deceased came to the house drunk and held on to a window demanding that the door be opened and he be allowed to come inside. Karalaini told him to go away and sleep it off. Then the first appellant was seen pulling him away from the window. A fist fight ensued between the first appellant and the deceased and both fell on the ground. The second appellant came and joined the two. He had also punched the deceased. The first appellant then took a pine post and hit the deceased on the head with it. He fell to the ground and was seen bleeding from the ear. The pathologist had seen a hair line fracture on the deceased's skull and subdural haemorrhage and cerebral haemorrhage in the brain had been the causes of death.

01st Appellant's appeal

[9] I shall now deal with the ground of appeal raised on behalf of the 01st appellant namely the failure of the learned trial judge to address the assessors on the defense of provocation.

[10] In **Regina v. Duffy** [1949] 1 All E.R. 932 the gist of the defence of provocation was encapsulated by Devlin J. in a single sentence in his summing-up, which was afterwards treated as a classic direction to the jury:

> *"Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind."*

[11] The counsel for the appellant heavily relies on the decision in **Tapoge v State** [2017] FJCA 140; AAU121.2013 (30 November 2017) in support of the sole ground of appeal. In **Codrokadroka v State** [2008] FJCA 122; AAU0034.2006 (25 March 2008) the Court of Appeal in relation to section sections 203 and 204 of the Penal Code dealing with provocation has engaged in an exhaustive analysis and come out with the approach that should be taken 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 provocative 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 a "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 fact of each case. However cumulative provocation is in principle relevant and admissible.*
>
> *6. There must be an evidential link between the provocation offered and the assault inflicted.'*

[12] The Supreme Court in **Codrokadroka v State** [2013] FJSC 15; CAV07.2013 (20 November 2013) adopted the above propositions as accurately reflecting the approach that should be taken by a trial judge to the issue of provocation.

[13] In ***Tapoge*** the Court of Appeal had applied both the CA and the SC decisions in ***Codrokadroka*** to section 242 of the Crimes Decree and further observed as follows

> *'[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*
>
> ***'**[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.'*

[14] In **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012) the Supreme Court dealing with the issue of whether or not directions on possible alternative verdicts should be included in the summing-up, held that

> *'34…… Given that ours is an adversarial system where the parties and their counsel take the fullest responsibility for the conduct and presentation of their cases, the trial judge cannot be faulted, in a case of exceptional difficulty, if he consults counsel, and gives his careful consideration to their views. However, the fact that a defending counsel did not raise any alternate defence, or as in the instant case, oppose any direction being made on such an alternative verdict, does not relieve the judge from the duty of directing the jury or the assessors to consider the alternative, if there is sufficient evidence placed before the jury or assessors which would justify a direction that they should consider it. As Lord Bingham observed in Coutts [2006] 1 WLR 2154 [HL] at paragraph 23, the public interest in the administration of justice demands that where there is sufficient evidence to suggest any obvious alternate verdict, the trial judge should consider it his paramount duty to include the same in his summing-up, subject to any appropriate caution or warning, irrespective of the wishes of trial counsel.*

35. Deciding whether or not directions on possible alternative verdicts should be included in the summing-up may often prove to be a difficult question for a trial judge, given the complexities of the factual circumstances in which such questions might arise in a particular case. In Mancini (1942) AC 1 at page 12, Viscount Simon L.C set out the following pertinent guidelines which can be of value to any trial judge in a common law jurisdiction such as Fiji:-

"If the evidence before the jury at the end of the case does not contain material on which a reasonable man could find a verdict of manslaughter instead of murder, it is not a defect in the summing-up that manslaughter is not dealt with. Taking, for example, a case in which no evidence has been given which would raise the issue of provocation, it is not the duty of the judge to invite the jury to speculate as to provocative incidents, of which there has been no evidence and which cannot be reasonably inferred from the evidence. The duty of the judge to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them, for it is on the evidence, and the evidence alone, that the prisoner is being tried, and it would only lead to confusion and possible injustice if either judge or jury went outside it." (Emphasis added)

36. A trial judge who has to grapple with the question as to whether in a given case, a direction on one or more alternative defences should be included, may find solace in the following observation of Lord Steyn in Regina v Acott [1997] UKHL 5; [1997] 1 All ER 706 [1997] 1 WLR 306 [HL] at page 313-

"What is sufficient evidence in this particular context is not a question of law. Where the line is to be drawn depends on a judgment involving logic and common sense, the assessment of matters of degree and an intense focus on the circumstances of a particular case. It is unwise to generalise on such matters: it is a subject best left to the good sense of trial judges. For the same reason it is not useful to compare the facts of decided cases on provocation with one another." (Emphasis added)

[15] The counsel for the 01st appellant has admitted in the written submission that his client had not run his case on the basis of provocation but on self-defense. Nor is there any complaint based on self-defense in appeal. The appellant's trial counsel too had specifically indicated during the trial that there was no provocation. However, the counsel for the 01st appellant in appeal sought to substantiate the only ground of appeal by referring to his client's caution interview which was led in evidence without any challenge. He argues that according to the 01st appellant's caution interview he had assaulted the deceased due to an attack on the 02nd appellant's brother by a group of people including the deceased some time ago and that could be construed as provocation.

[16] According to the caution statement of the 01st appellant he had gone to Nanuku settlement at the request of one woman called Atelina to have tea and when he reached there he had found Atelina, the 02nd appellant and two other women who are all related to him. Later, the others had started having dinner and the 01st appellant had eaten biscuits and was having tea. Then he wanted to go to the toilet and Atelina had led him there and on the way he had seen a man lying inside a shed whom Atelina had identified as the deceased when inquired by the 01st appellant. When he was inside the toilet, the 01st appellant had heard the deceased calling his wife and the wife chasing him away. Shortly thereafter the 01st appellant had encountered the deceased who was drunk outside the house. The following questions and answers in his caution interview reveal what happened thereafter.

Q29: How did you come to know Tevita Voivoi?

A: I came to know him during an incident where he assaulted the elder brother of Pailato named Naiteqe.

Q31: Can you tell me what happened next?

A: I went out to go back to Pailato and then when I met Tevita standing in the shed right at the window.

Q34: What did Tevita do?

A: As I pulled him from infront of the window, he punched me.

Q36: Then what happened?

A: As I assaulted Tevita, Pailato came to stop the fight.

Q39: A you pulled Tevita outside and assaulted him didn't you hear his wife calling out for you to stop what you were doing?

A: Yes. I heard her but I was really pissed off for what he had done to Pailato's elder brother, Naiteqe as they had injured him and ended up in hospital and admitted.

Q40: That means that you have been waiting for Tevita before this day?

A: Yes. It was not only Tevita, but the rest of his friends that assaulted Naiteqe.

Q44: At what time and place did Pailato joined in?

A: As we wrestled at the back of the shed.

Q45: Then what did Pailato do?

A: Pailato had pulled Tevita backwards and Tevita punched me. Here Pailato started to punch Tevita.

Q46: What did you do?

A: I was still angry and as I was free from Tevita, I pivked a post and hit his head.

Q47: Where did you pick the post from?

A: It lay on that small ground.

Q50: How many times did you hit him?

A: Only once.

Q51: Where was Pailato when you hit Tevita with the pine post?

A: I told Pailato to move away and struck it on Tevita.

Q52: What was Tevita doing when you hit him on his head?

A: I can't recall. All I know is that I took the post and him with.

Q58: Can you explain what made you wild?

A: Becouse Tevita and his friends had assaulted Naiteqe where he ended up at Suva hospital.

Q59: Do you know that the post you used is big and heavy and can cause serious injuries if someone is hit with it? [Post shown to Illikini]

A: I had done that when I was angry and didn't expect that it would kill him?

Q63: What did you do when you saw him lying facing down motionless?

A: As I stood there a man came in civilian clothes saying he was a police officer and questioned me why did I hit Tevita with the post.

Q64: What did you tell this guy?

A: I told him that he has reaped the fruits of his actions.

Q73: Why didn't you assist Tevita as he lay on the ground after you had hit him?

A: That was what Tevita and his friends had done to Naiteqe when that assaulted him.

Q74: ……. What can you say? [Medical report and cause of death shown]

A: When I hit him, I didn't expect that he would die.

Q75: Then why did you use a pine post to hit him with?

A: Because Tevita and his friends had also used a timber to assault Naiteqe. I also used it but did not mean to cause his death.

[17] It is clear from the evidence of the wife of the deceased and her sister that the 01st appellant had come and pulled the deceased by his T-shirt from behind when he was holding onto the window and both of them had fallen on the ground. Though the deceased had wanted to fight back he had been handicapped due to his state of drunkenness. The 01st appellant had punched the deceased and some blows had exchanged between the two. Thereafter, at some point of time the 01st appellant had hit the deceased once on his head with a pine post.

[18] The 01st appellant under oath had taken up the position that he had warned the deceased not to shout as the neighbors were sleeping and he thought that if he did not take the deceased away he would break the window and harm the ladies inside the house. However, the deceased had not listened and punched him and a fist fight had resulted. Fearing that the deceased would injure him and the 02nd appellant, the 01st appellant acting in self-defense had dealt a blow on the deceased's head with a pine post but had entertained no intention to cause his death.

[19] The 01st appellant's account in evidence as to what happened is contradictory to his narration in his caution interview where he had not said that he was acting in fear of the well-being of the wife and sister of the deceased or his attack on the deceased was necessitated by his desire to save himself and the 02nd appellant. There are new positions taken up only at the trial to buttress his defense of self-defense.

[20] What is clear is that in any event, the 01st appellant's version of events either in his caution interview or in evidence at the trial does not even remotely give rise to a possibility of his having acted under provocation. There was no evidence of the deceased having provoked the 01st appellant. The deceased had nothing to do with the 01st appellant or the 02nd appellant until the 01st appellant decided to pull him away. Even if the deceased had delivered a blow or a couple blows on the 01st appellant when the latter was pulling the deceased away from behind, that cannot amount to provocation as it was the result of the 01st appellant's own actions and the deceased was merely reacting in his state of drunkenness. Provocation cannot be sought after or self-made. The 01st appellant had no business to go where he went and confronted the deceased.

[21] Therefore, there was no 'credible narrative' on the evidence of provocative words or deeds of the deceased directed at the 01st appellant or to someone with whom he had a fraternal (or customary) relationship. No was there a 'credible narrative' of a resulting loss of self-control by the 01st appellant. In the circumstances the requirement of 'credible narrative' of an attack on the deceased by the accused which is proportionate to the provocative words or deeds, does not even come into the equation. In my view the judge had no basis to ask himself whether provocation should be left to the assessors even on the most favourable view of the defense case.

[22] Therefore, I hold that there is no merit in the ground of appeal urged on behalf of the 01st appellant.

[23] However, as the counsel for the appellant in his written submissions had urged that a verdict of manslaughter be considered, I shall proceed to deal with it.

[24] It is true that there is no evidence that the 01st and 02nd appellants had pre-planned to attack the deceased on this occasion. However, it is equally clear that the 01st appellant was waiting for an opportunity to retaliate against the deceased for the earlier assault on the 02nd appellant's brother by a group of people including the deceased. Thus, when Atelina told the 01st appellant that the man lying in the hut was the deceased he appears to have decided to make use of the opportunity to take revenge on him. The 01st appellant had got involved in the incident without any

request from the wife and the sister of the deceased when he had all the opportunities to simply walk away from the scene. In any event, there was no threat to the wife and her sister from the deceased though there was some exchange of words, justifying the 01st appellant's voluntary intervention. The 01st appellant had clearly used the occasion unexpectedly presented to get even with the deceased. His assault on the deceased has the hallmark of a revenge attack.

[25] Though the 01st appellant had dealt only one blow, the weapon used is a wooden post of 02 meters long and 10.14 kilograms in weight. According to the caution interview he had deliberately hit the deceased's head after carefully asking the 02nd appellant to move away. A man is presumed to intend the natural and probable consequences of his act. He had claimed that he did not intend to cause the death of the deceased. However, section 237 (c) states *inter alia* that a person commits an indictable offence (of murder) if the first-mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct. Recklessness is defined in section 21 of the Crimes Decree, 2009. It is as follows

> *'21. — (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.'*

[26] The learned High Court Judge had addressed the assessors on the issue of murder and manslaughter as follows.

'11. By looking at the first accused alone, he has admitted that he hit Tevita with the pine post in the course of the fight. The Doctor has said that Tevita died from injuries caused to the brain from the impact of a blunt object. Therefore you might have no difficulty in finding that Ilikimi engaged in conduct that caused Tevita's death and Counsel for Ilikimi herself admits that on behalf of her client. You must then decide if he intended to kill him or alternatively if he was reckless in using such a heavy post to hit him. A person is reckless if he is aware that there would be a substantial risk of death resulting from the use of such a heavy post, and that he was not justified in taking such a risk. So that is the first step you should take and it relates to the first accused only. If you think he intended to kill Tevita or was reckless in taking the risk that death might occur then you will find him guilty and put his case to one side before considering the case against the second accused in the manner in which I am going to direct you.

'19. That is all I wish to say at this stage about the first accused. In summary then you will find him guilty of murder if you are sure that by hitting him over the head with the heavy post and that by doing that he caused his death he intended to kill him or was reckless as to the substantial risk of death. If however you find that he was acting in lawful self defence then you will find him not guilty. If you think he had no intention to kill nor was he reckless as to the risk of death by his actions but he was only intending to cause very serious harm to Ilikimi or was reckless as to the serious harm he might cause by his actions then you will find him not guilty of murder but guilty of the alternative offence of manslaughter.'

'51. I remind you that your possible opinions are:

***For the first accused**: Guilty of murder.*
Not guilty of murder but guilty of manslaughter.
Not guilty of anything (if you find self defence)'.

[27] Being given an option of bringing an opinion of murder or manslaughter in respect of the 01st appellant, the assessors had unanimously opinioned that the 01st appellant was guilty of murder. The learned High Court Judge directed himself as to why he agreed with the assessors on their opinions of guilty against the 01st appellant in his judgment dated 10 November 2014.

'4. The first accused had admitted striking the deceased with a heavy wooden post, which the Pathologist says would have caused the cracked skull and haemorrhage of the brain that led to his death. At trial he ran the defence of self defence which the assessors obviously rejected. To use such extensive force against a very drunken man was entirely unnecessary to defend himself. The weight and size of the post, which had been produced in evidence, is such that one strike with it on the head would certainly presume an intention to kill or at least presume a significant risk of death to amount to recklessness. I find

that the first accused certainly had the requisite intention to convict him for murder.'

[28] I am guided by the pronouncements in **Sahib v State** AAU0018u of 87s: 27 November 1992 [1992] FJCA 24 as to whether this court should interfere with the opinion of the assessor and the judgment of the learned High Court Judge in reducing the verdict of murder to that of manslaughter. The Court of Appeal in ***Sahib*** stated with regard to the approach the appellate court should adopt in an appeal in the light of section 23 of the Court of Appeal Act in the following words

> *'Authorities in England since the passing of the 1966 Act are based on the requirement that the Court shall consider whether the verdict is unsafe or unsatisfactory. That test has given a number of appeal decisions based on a wide ranging consideration of the evidence before the lower Court and the views of the appellate Court on it. We were urged to make it the basis of our consideration of the present case but section 23 does not allow us that liberty and the powers of this Court are limited by the statute that created it. The difference of approach between the two tests was concisely stated by Widgery LJ in the final passages of his judgment in R v Cooper (1968) 53 Cr. App. R 82.*
>
> *Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.*
>
> *It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.*
>
> *We are not able to usurp the functions of the lower Court and substitute our own opinion.'*

[29] Having considered the evidence against the 01st appellant as a whole, I cannot say that the verdict was unreasonable or cannot be supported having regard to the evidence. Nor could I say that there has been a miscarriage of justice. Therefore, I see no reason why the verdict of guilty for murder against the 01st appellant should be disturbed and substituted with a verdict of manslaughter.

02nd appellant

[30] I shall now consider the grounds of appeal urged and allowed by the single judge in respect of the 02nd appellant

> *'Ground 1: The Learned Trial Judge erred in law and in fact when he found that the Appellant was an active participant in the joint enterprise that led to the death of the deceased.*

[31] The single judge while granting leave to appeal remarked as follows.

> *'[6] The assessors expressed unanimous opinion that Cavasiga was guilty of murder. The Trial Judge agreed. The issue is whether the evidence led by the prosecution proved beyond reasonable doubt that Cavasiga was part of an agreement to assault the deceased and that he participated in the venture with the foreseeability of death or serious harm (**Chan Wing–Jiu v The Queen** [1985] AC 165, 175). In my judgment, this is an arguable issue.'*

[32] The second appellant's criminal liability was based on whether or not he was a joint offender in prosecution of a common purpose as defined in section 46 of the Crimes Decree, 2009. Section 46 reads as follows.

> *'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.*

[33] In **Vasuitoga v State** [2013] FJCA 8; AAU0036 of 2007 (8 February 2013) the Court of Appeal dealt with joint enterprise liability of secondary parties.

> *'[38] Section 22 of the Penal Code, Chapter 17 reads:*
>
> *"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 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"*
>
> *This section is the codification of a long line of cases that establish the joint enterprise liability of secondary parties in an unlawful enterprise.*
>
> *[39] In **Chan Wing-Siu** [1985] AC 168, Sir Robin Cooke (as he then was) giving the opinion of the Board said this:*

"It is what the individual accused in fact contemplated that matters. As in other cases where the state of the person's mind has to be ascertained, this may be inferred from his conduct and any other evidence throwing light on what he foresaw at the material time, including of course any explanation that he gives in evidence or in a statement put in evidence by the prosecution. It is no less elementary that all questions of weight are for the jury. The prosecution must prove the necessary contemplation beyond reasonable doubt, although that may be done by inference as just mentioned. If, at the end of the day and whether as a result of hearing evidence from the accused or for some other reason, the jury conclude that there is a reasonable possibility that the accused did not even contemplate the risk, he is in this type of case not guilty of murder or wounding with intent to cause serious bodily harm. In some cases in this field it is enough to direct the jury by adapting to the circumstances the simple formula common in a number of jurisdictions. For instance, ***did the particular accused contemplate that in carrying out an unlawful purpose one of his partners in the enterprise might use a knife or a loaded gun with the intention of causing really serious bodily harm****?" (Emphasis added)*

[40] This proposition was later adopted by the House of Lords in ***Powell*** *and* ***English*** *[1991] 1 AC 1 and* ***Rahman*** *[2008] UKHL 45.*

[41] It must first be established by the prosecution, through direct evidence or circumstantial evidence that the accused whose case is being dealt with acted in concert with another who used a weapon to inflict serious bodily harm and the use of that weapon was with the contemplation or foreseeability of the secondary party.

[34] In order to consider this ground of appeal, it is helpful to summarize the salient pieces of evidence led as part of the prosecution case against the 02nd appellant. Theresa has said that after the 01st appellant had attacked the deceased and left the scene, the 02nd appellant came there and threw a few punches on the deceased who was already on the ground. She was emphatic that when the 02nd appellant came to the scene of the crime when the deceased had already been hit by the 01st appellant and went back to his relative's house. On the other hand, Karalaini, the wife of the deceased has testified that while her husband and the 01st appellant were exchanging blows, the 02nd appellant came and held the deceased's hands behind his back and punched him from behind. Then the 01st appellant had got the pine post and dealt a blow on the deceased's head. Yet, in cross-examination the witness has said that the 02nd appellant had come and pulled the deceased away from fight.

[35] The 02nd appellant in his caution interview has admitted that he punched the deceased twice on the chest because the deceased had hit him when he tried to stop the fight and get hold of him. He had gone to the scene because his cousins Atelina and Akanisi had asked him to go and stop the fight between the 01st appellant and the deceased. Then, he had heard some sound and seen the deceased on the ground but not seen the person who had hit him with the pine post. He had specifically denied having held the deceased's hands behind his back. He had also said that the fact that the deceased had allegedly assaulted his elder brother some months back is not the reason why he punched him but he did so because the deceased had first hit him. He has maintained that he went to the scene of the offence to stop the scuffle between the deceased and the 01st appellant and landed two punches on the deceased due to the latter having first hit him.

[36] The 02nd appellant's evidence at the trial is consistent with his version of events given at the caution interview. Defense witness Atelina's evidence also lends support to the 02nd appellant's testimony. Post Mortem Report and the medical evidence of Dr. Goundar confirms that the single blow to the deceased head would have been caused by a severe and weighty blunt object causing subdural and cerebral hemorrhage. He had not recorded any other external injuries. In other words there had not been any traces of physical blows exchanged between the deceased and the appellants.

[37] At the end of the trial and in the absence of the assessors the trial judge had advised the counsel for the 02nd appellant that he should have established before the assessors that his client was not part of a joint plan to attack the deceased and he did not foresee that the 01st appellant would use a heavy wooden post to hit Tavita on the head. This sheds some light on the thinking of the trial judge regarding the 02nd appellant's criminal liability.

[38] The trial judge's summing up to the assessors on the joint liability is as follows

> *'22. The Prosecution's case is that both Ilikimi and Pailato committed this offence together. Where a criminal offence is committed by two 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. Agreement or plan does not need to be a formal pre-decided pact. It can arise on the spur of the moment and nothing need to be said at all. An agreement can be inferred from the behavior of the parties. You may wish to take into account the two records of interview that are before you. Both accused have referred to the deceased's part he played in a group attack on the 2nd accused's brother Naiteqe and the grudge that they held against Tevita for that. So you might ask yourselves did they "have it in" for Tevita? Were they waiting for an opportunity to get back at him? Was the fight that night their opportunity for revenge?

23. 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.

24. Your approach to the case of Pailato should therefore be as follows: if you are sure that with the intention I have mentioned he took some part in committing the murder or manslaughter with Ilikimi, then he is guilty. Every person who willingly joins in a plan to commit an illegal act is responsible for whatever happens as a result of that act.

25. Mere presence at the scene of a crime is not enough to prove guilt but if you find that Pailato was on the scene and was there intending to assist the first accused and did encourage and assist the first accused in the offence then he is equally guilty.

26. Pailato says in his interview and in his evidence that he knew nothing about the attack on Tevita by the pine post. However if you find that Pailato was a willing party in the assault on Tevita then that doesn't matter because the law says that when two or more persons join together for an illegal purpose and in the course of that illegal purpose an offence is committed which is a probable consequence of that purpose then each is deemed to have committed the offence.

27. Now, I appreciate that that sounds terribly legalistic so let me try to explain it for you in simpler terms.

28. If you find that both Ilikimi and Pailato were in agreement to beat up Tevita, for whatever reason, and in the course of that hiding it was foreseeable that one of them could do something that would result in Tevita's death, then they are both liable for that death by a finding of either murder or manslaughter.

29. Your approach to the second accused should be therefore:

- *If you think he was there just to stop the fight and for no other purpose, then you will find him not guilty.*
- *If you think he was assisting the first accused in beating up Tevita then he is jointly liable.*

- *If you find that it was foreseeable that the beating up would lead to the death of Tevita then Pailato is guilty of whatever you find Ilikimi guilty of; that is murder or manslaughter.*
- *If you find that the death was not foreseeable then you will find him not guilty.'*

[39] The 02nd appellant has no complaint on the above directions. However, the counsel for the 02nd appellant submits that the learned trial judge has not referred to one material question and answer given by the deceased's wife under cross-examination which shows that the 02nd appellant was not an active participant in the joint enterprise that led to the death of the deceased. It is as follows.

> *'Q: It is true that when the fight was in progress between the deceased and Iilikini, the second man came and pulled the deceased away from the fight using his waist*
>
> *A: Yes.'*

[40] There is no question and answer in this exact form recorded in the transcript but the first question and answer recorded under cross-examination by the 02nd appellant's counsel is similar in its substance.

[41] The learned trial judge concluded in his judgment as quoted below on the liability of the 02nd appellant.

> *'5. The case against the second accused was one of an accessory in the joint enterprise. He said in evidence and in his cautioned interview that he was merely trying to stop the fight but the two eye witnesses said that he had taken an active part in the fight against the deceased. The first accused said in evidence that the second accused was present when the fatal blow was struck. The 1st accused had told him to stand aside. I have no hesitation in finding beyond reasonable doubt that the second accused was an active participant in the joint enterprise and that a fierce attack on a drunken man could lead in all probability to his death.'*

[42] However, with due respect to the learned trial judge, I cannot bring myself to agree with his conclusion on the totality of the evidence available in the case. Even if the 01st appellant had asked the 02nd appellant to move away before striking the deceased that fact does not necessarily mean that the latter was an active participant in the joint enterprise. The 02nd appellant has not testified to such a fact in his evidence or in his caution interview. Nor have both eye witnesses said so. Similarly his presence alone

or the fact that he himself had dealt two blows on the deceased is not sufficient to treat him as a party to such a joint enterprise to attract criminal liability for murder.

[43] Nothing in the evidence suggests that the 02nd appellant was part of a joint plan to attack the deceased and that he could foresee that the 01st appellant would use a heavy wooden post to hit Tavita on the head. I have arrived at this conclusion having considered all the evidence available against the 02nd appellant. The totality of evidence does not lead to the inescapable or irresistible conclusion that the 02nd appellant was a joint offender in prosecution of a common purpose with the 01st appellant. There is clearly a reasonable doubt on that score.

[44] On the other hand, if one were to accept the eye witness account of Theresa, the 02nd appellant had come to the scene after the 01st appellant had hit the deceased with the pine post. This cuts across the other eye witness evidence of Karalaini. No explanation had been given by the prosecution for this material contradiction. Nor has the State treated Theresa as an adverse witness. Then the prosecution is left with only the caution interview of the 02nd appellant which does not support a conviction for murder. The learned trial judge had not highlighted sufficiently this aspect to the assessors. Nor has he directed himself of it either.

[45] Therefore, I am of the view that the conviction of murder against the 02nd appellant cannot be supported having regard to the evidence and the verdict is unreasonable. I hold that the 02nd appellant's appeal should be allowed on this ground of appeal.

[46] Although, technically a charge of common assault under section 274(1) of the Crimes Decree can be levelled against the 02nd appellant, considering the period of imprisonment he has served I do not thank that such a course of action is fair and reasonable at this stage.

[47] I shall now deal with the other two grounds of appeal.

> *'Ground 2: The Learned Trial Judge erred in law and in fact when he did not give directions to the assessors in the Summing Up on the defence of self defence and provocation and also to consider the same given the evidence led in the trial from the eye witnesses.*

[48] This ground of appeal is very similar to the sole ground of appeal urged on behalf of the 01st appellant on provocation. For the same reasons that I have given for rejecting the 01st appellant's ground of appeal, I hold that the 02nd ground of appeal in so far as it relates to provocation has no merit and should be rejected.

[49] Though the second part of this ground of appeal relates to self-defense, it was not the 02nd appellant's defense at the trial. **Vasuitoga v State** [2013] FJSC 1; CAV001 of 2013 (29 January 2016) has dealt with the duty of the trial judge when defense of self-defense is relied upon by an accused.

> *'[28] It is settled that when an accused relies on self-defence, the trial judge should direct the assessors to consider whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds. As the Privy Council said in **Palmer v The Queen** [1971] AC 814, 831-832:*
>
> *"The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable ground that it was necessary in self defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal."*
>
> *[29] In **State v Li Jun** unreported CAV0017/2007S; 13 October 2008 Sackville JA referred to the English and Australian authorities on self-defence and said at [46]:*
>
> *"It is important to appreciate that the test stated in Zecevic is not wholly objective. It is the belief of the accused, based on the circumstances as he or she perceives them to be, which has to be reasonable."*
>
> *[30] We also refer to what Lord Lowry CJ said in **R v Browne** [1973] NI 96 which is cited in the unreported decision of the English Court of Appeal of **Balogun** [1999] EWCA Crim. 2120. Lord Lowry said at p 106:*
>
> *"To justify killing or inflicting serious injury in self-defence the accused must honestly believe on reasonable grounds that he is in immediate danger of death or serious injury and that to kill or inflict serious injury provides the only reasonable means of protection."*

[50] More recently the Supreme Court in **Naicker v State** [2018] FJSC 24; AAV0019.2018 (1 November 2018) commented on the defense of self-defense in similar terms to that of provocation as follows.

> *'It needs to be noted that the defence did not ask the judge to leave the issue of self-defence. That was not necessarily negligence on the part of trial counsel. Such a defence was completely inconsistent, of course, with Naicker's defence at trial, which was that the death of Naicker had had nothing to do with him, and trial counsel may well have thought that tactically it would be better if the alternative of self-defence was not considered. But the mere fact that the defence in a particular case does not want an alternative defence to be raised does not mean that it should not be: see Marsoof JA's compelling judgment in Praveen Ram v The State [2012] FJSC 12 in which the relevant authorities on the topic were reviewed.* ***It all depends on whether such a defence arises on the evidence – or to be more precise, whether there is "a credible narrative of events suggesting the presence of" such a defence: see the decision of the Privy Council in Lee Chun Chuen v R [1963] AC 220****.'*

[51] I have already reviewed all material evidence available against the 02nd appellant and I am convinced that there is no credible narrative of events suggesting the presence of a defence of self-defense in the case as far as the 02nd appellant is concerned. His defence was that he came to stop the fight between the deceased and the 01st appellant. According to his evidence, he had delivered two punches on the deceased due to pain that he felt from the deceased's elbow landing on his chest.

[52] Therefore, in my view the learned trial judge was not required to address the assessors on the issue of self-defense as far as the 02nd appellant was concerned. Nor was the trial judge required to direct himself on such a proposition. Accordingly, the 02nd ground of appeal is rejected in respect of the complaint on self-defense.

[53] The third ground is based on some comments made by the learned trial judge in the summing up.

> *'Ground 3: The Learned Trial Judge erred in law and in fact when he made this comment in paragraph 48 of the Summing Up in relation to the Appellant's witness evidence, "Well that was the witnesses evidence and you might find it to be a bit "pat", a little too" coached" to be credible, especially after Karailina had said that Atelina hadn't seen what had occurred but then it is all a matter for you Ladies and Gentlemen". By doing so, the Learned Trial Judge had usurped the function of the assessors thus resulted in a gross miscarriage of justice.'*

[54] The impugned comments have been made regarding the defense witness Atelina Tinai. The prosecution had not even suggested to her that she had been coached to give evidence in favour of the appellants. Nor has the prosecution contradicted her

evidence *vis-à-vis* her previous police statement. That shows that her evidence may well have been consistent with what she had told the police. Therefore, it is unreasonable for the trial judge to have suggested in the summing up that her evidence was not natural or realistic and she may have been coached so as to render her evidence not credible. Further, I cannot find support from Karalaini's evidence to say that she had stated that Atelina had not seen what had occurred, as stated by the trial judge in the impugned paragraph.

[55] In **Rokete v State** [2019] FJCA 49; AAU0009.2014 (7 March 2019) the Court of Appeal regarding a criticism of the trial judge's comments on a witness noted as follows.

> **'**[125] In **Tamaibeka v State** Criminal Appeal No.AAU0015 of 1997S: 08 January 1999 [1999] FJCA 1 the Court of Appeal held
>
> *'A Judge is entitled to comment robustly on either the case for the prosecution or the case for the defence in the course of a summing up. It is appropriate that he puts to the assessors clearly any defects he sees in either case. But that must be done in a way that is fair, objective and balanced. If it is not, the independent judgment of the assessors may be prejudiced.'*

[56] I am not convinced that the learned trial judge has been fair to the 02nd appellant when he commented on the credibility of defense witness Atelina in the manner he did in the impugned paragraph.

[57] Though I agree with the 02nd appellant's complaint under the 03rd ground of appeal, in the light of the totality of evidence, in my view the unwarranted comments from the learned trial judge may not have tilted the assessors' opinion against him. Had the assessors not believed the 02nd appellant's evidence they would not have anyway acted upon Atelina's evidence to come to a different finding. In other words the assessors' finding of guilty against the 02nd appellant cannot be said to be founded on rejecting Atelina's testimony as being not creditworthy on account of what the trial had said in paragraph 48 of the summing up.

[58] In **Bese v State** [2015] FJCA 21; AAU0067 of 011 (27 February 2015) the Court of Appeal said:

> *'[24] The determination of the truth of the record if it is held to be admissible is a determination within the ambit of the fact finding tribunal, be it a panel of assessors, or a judicial officer sitting alone. That being so, it is highly prejudicial to the fact finding function if a judge should make comments that could be seen to usurp that function.*

[59] However, before parting with the appeal I would like to advert to a matter that this court and the Supreme Court have been alive to for a considerable time *i.e.* the silence on the part of the counsel in not seeking re-directions in this type of scenarios (see for example **Tuwai v State** [2016] FJSC 35; CAV0013.2015 (26 August 2016) and ***Rokete).*** I think that the counsel should not hesitate to point out to the trial judges where they think that the judges have gone wrong with their directions so that those complaints do not become appeal grounds. This is a duty cast on all counsel and not a favour extended to a trial judge.

Nawana, JA

[60] I agree with the reasons, conclusions and orders proposed by Prematilaka, JA.

The Orders of the Court are:

1. *01st Appellant's appeals is dismissed.*
2. *Conviction against 01st appellant is affirmed.*
3. *02nd Appellant's appeals is allowed.*
4. *Conviction against 02nd appellant is quashed.*
5. *02nd Appellant is acquitted.*

Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

Hon. Mr. Justice P. Nawana
JUSTICE OF APPEAL