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

CRIMINAL APPEAL NO.AAU 0012 of 2018
[In the High Court at Suva Case No. HAC 261 of 2015]

BETWEEN : **TEVITA DAKUITURAGA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, ARJA**

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

Date of Hearing : **02 July 2021**

Date of Ruling : **07 July 2021**

RULING

[1] The appellant (03rd accused in the High Court) had been indicted with two others (appellants in AAU 0070/2017 and AAU 0073 /2017) in the High Court of Suva only on one count of murder (of the deceased) contrary to section 237 of the Crimes Act, 2009. In addition to the charge of murder, his co-accused, the appellant in AAU 73/2017 had been charged with one count of an 'act intended to cause grievous harm' (of the deceased's brother) contrary to section 255(a) of the Crimes Act, 2009 committed on 18 July 2015 at Nausori in the Central Division.

[2] The information read as follows:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

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

SECOND COUNT

Statement of Offence

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

Particulars of Offence

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

[3] After full trial, the assessors had expressed a divided opinion in that the majority opinion had been that the appellant was guilty of count 01 but the minority opinion had been that he was guilty of only manslaughter. The learned High Court judge had agreed with the majority opinion on count 01 and convicted the appellant for murder. The appellant had been sentenced on 19 April 2017 to life imprisonment with a minimum serving period of 15 years.

[4] The appellant's appeal in person against conviction and sentence had been received on 16 February 2019 and therefore untimely. The delay is about 09 months. Subsequently, the Legal Aid Commission had filed a notice of motion seeking enlargement of time, the appellant's affidavit, amended grounds of appeal and written submissions. The state had too filed written submission.

[5] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17.

[6] The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced?

[7] Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained (vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100).

[8] It is clear that the delay is substantial and appellant's explanation for the delay that he 'believed' that notice of appeal was lodged at the 'Prison Registry' within time is not substantiated and not plausible. No other reasonable explanation has been submitted for the delay. The DPP had, however, not averred any prejudice that would be caused by an enlargement of time. If there is a **real prospect of success** in the belated grounds of appeal in terms of merits this court would be inclined to grant extension of time (vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019**).**

[9] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011) and they are whether the sentencing judge had:

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii)Mistook the facts;
(iv) Failed to take into account some relevant consideration.

[10] The evidence of PW1 who was the deceased's brother is summarised by the learned trial judge in the sentencing order as follows:

> 2. *The facts of the case were as follows. On 18 July 2015 at about 9pm, the deceased and his younger brother, Savenaca (PW1) were at the Bridge Nightclub, Nausori. They were consuming liquor and having a good time. Kelepi (Accused No. 2) and two friends joined Savenaca and the deceased. They started to consume liquor together. After a while Savenaca and the deceased decided to leave the nightclub and visit the Whishling Duck nightclub. When they went outside the Bridge Nightclub, Kelepi confronted the two over his alleged money. The brothers denied taking his money and the three parted ways.*
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> 3. *While walking near RB Patel Supermarket, Kelepi suddenly re-appeared and punched Savenaca twice. While doing so, he injured Savenaca's head with a broken beer glass. Kelepi and Tevita (Accused No. 3) then attacked the deceased by repeatedly punching him. They fought a moving battle from Brown Lane to Ross Street Nausori to the back of Westpac Bank. Josaia later joined the two by felling the deceased with a straight left hand punch to his jaw. The deceased fell on the concrete ground. Josaia, Kelepi and Tevita then repeatedly stomped the deceased on the face, chest and body. Two days later the deceased died of massive brain injuries as a result of the above assaults. The accused were later charged for the deceased's murder. Kelepi was also charged with wounding Savenaca with a broken beer glass when he punched Save's head, while holding the same.*
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> 5. *In this case, the violence used by the accuseds against the deceased and his brother, Savenaca, were totally unnecessary and uncalled for. The brothers visited the Bridge Nightclub to enjoy themselves. They were drinking liquor with others. Kelepi and his friends joined them. They consumed liquor together. Instead of making the evening an enjoyable one, Kelepi began to pick a fight with Savenaca and his brother, the deceased. Kelepi accused the brothers of taking his money.*
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> 6. *An argument erupted. Kelepi punched Savenaca twice, and injured his head with a broken beer glass. Kelepi and Tevita then ganged up on Epineri and repeatedly assaulted him with several punches. Later Josaia joined the two and fell the deceased with a hard left punch. The deceased fell on the ground unconscious. Josaia, Kelepi and Tevita then repeatedly stomped him. The deceased died 2 days later as a result of the above assaults. This was a senseless killing that had caused Epineri's family heartache and*

sadness. They had lost a loved one. The accused must not complain when they lose their liberty to atone for their misdeed.

[11] Pita Rabaka (PW2) had seen the appellant being the aggressor fighting the deceased who was defending and the two exchanging punches at each other. At one point they had run out of steam and rested for a while. Then, the appellant in AAU 0073/2017 (02nd accused) had joined the two and he too was seen throwing punches at the deceased who was retreating in order to save himself. PW2 had seen the deceased falling onto the ground but he had not seen as to whose punch had felled the deceased. However, he had seen the appellant, the 02nd accused and another stomping the deceased repeatedly on the chest and the front of the face while the latter lay unconscious on the ground.

[12] Alesi Ranadi (PW3) who was selling BBQ food nearby with her husband (PW4) had seen 04 boys fighting, punching and slapping each other. She had identified the 02nd accused and the appellant among them. She had also seen the 01st accused coming in and joining the fight and throwing a straight left hand punch at the deceased's right jaw. As a result of the blow, the latter had fallen on to the concreate ground while hitting his head on the iron post. Thereafter, PW3 had seen all three accused repeatedly stomping and punching the deceased's face and chest while swearing at him. According to PW3, the appellant had hurt his knee as a result of his stomping the deceased and had to crawl away from the crime scene.

[13] Moape Batigai (PW4), the husband of PW3 had more or less confirmed his wife's evidence.

[14] Doctor James Kalougivaki had testified that the cause of death had been severe traumatic brain injuries and bleeding within the skull cavity as a result of blunt force trauma caused by a rounded solid object including a fist, feet and baseball bat. The brain injuries had been necessarily fatal in the sense that the deceased had little chance of survival even with surgical intervention.

[15] The appellant has given evidence and admitted being at the crime scene at the material time. According to him, when he went towards Brown Lane from Dunstan Street, he heard people arguing about money. At one point of time, suddenly, two persons attacked him by repeatedly punching his back and the back of his head. They had challenged him to a fight and while punching him they kept moving towards the ANZ bank. Then someone kicked his right leg injuring his knee and he had difficulty in standing. A little while later he called a vehicle and went home. He had denied stomping, kicking or punching the deceased after the latter was felled by the 01st accused's punch.

[16] The appellant's amended grounds are as follows:

Conviction

Ground 1

That the Learned Trial Judge may have fallen into an error in fact and law by directing the assessors as that "failing to provide a fair; balance and objective Summing Up when directing the assessors on the appellant's right to the defence of 'self-defence'.

Ground 2

That the Learned Trial Judge may have fallen into an error in fact and law by failing to provide a fair; balance and objective Summing Up on whether the appellant had formed a common intention with his co-defendants to assault the deceased and whether appellant had a criminal responsibility in the death of deceased.

Ground 3

That the Learned Trial Judge may have caused a substantial miscarriage of justice in convicting the appellant affording the appellant right to the defence of 'self-defence' as stipulated by law.

Ground 4

That the Learned Trial Judge may have caused a substantial miscarriage of justice in convicting the appellant on 'joint enterprise; when there was no evidence adduced that the accused had formed a common intention to assault the deceased and that appellant had a criminal responsibility in the death of deceased.

Ground 5

That the Learned Trial Judge may have caused a substantial miscarriage of justice in convicting the appellant without any regard to the fact that State was not relieved from the burden to prove the element of 'intention to cause the death of deceased or reckless as to cause the death of deceased', beyond a reasonable doubt.

Sentence

Ground 1

That the Learned Sentencing Judge may have erred in law by imposing a minimum term that is harsh and excessive.

01st and 03rd grounds of appeal

[17] The counsel for the appellant argues that the trial judge's summing-up was not balanced and objective on the appellant's defence of self-defence denying him a fair trial.

[18] 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 (vide **Naitini v State** [2020] FJCA 20 AAU135 of 2014, AAU 145 of 2014). However, the burden of proof of self-defence does not rest with the appellant but once the evidence discloses the possibility that the fatal act was done in self-defences, a burden falls on the prosecution to disprove that fact by proving beyond reasonable doubt that the fatal act was not done in self-defence [vide **Zecevic v DPP** (1987) 162 CLR 645].

[19] The test 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. The test is not what a reasonable person in the accused's position would have believed. It follows that where self-defence is an issue, account must be taken of the personal characteristics of the accused which might affect his appreciation of the gravity of the

threat which he faced and as to the reasonableness of his or her response to the threat (vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015).

[20] **Narayan v State** [2020] FJCA 189; AAU0610.2017 (6 October 2020), I had the occasion to remark:

> *'[14] In my view, in the case of a defense of self-defense the primary question similar to that of provocation is 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 *and Fiji Supreme Court decision in **Naicker v State*** [2018] FJSC 24*; AAV0019.2018 (1 November 2018)]. If and when the factual matrix giving rise to ' self-defense ' is believed, the assessors have to then consider whether it could be said that the accused believed upon reasonable grounds that it was necessary in **self-defense** to do what he did. If the accused 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.* ***However, the test is not wholly objective and it is the subjective belief of the accused based on the circumstances, as perceived by him, that counts but that belief should be objectively reasonable in those circumstances that he was in immediate danger of death or serious injury and that to kill or inflict serious injury provided the only reasonable means of protection.*** *The fact that an appellant has taken up ' **self-defense** ' in his evidence does not necessarily make it a credible story and the assessors should always act upon it.*

[21] The trial judge had summarised the appellant's evidence at paragraph 30 of the summing-up. There is no reference whatsoever to the appellant having stated that he acted in self-defence. In fact according to his evidence he had attacked nobody and only some other two persons had attacked him. Even then, he had not alleged that the deceased attacked him.

[22] More importantly, the evidence of prosecution witnesses particularly PW2-PW4 who were independent of either party to the conflict had not seen the appellant trying to defend himself against anybody particularly against the deceased. It is the deceased who had been under attack and he was trying to save his life by retreating until he was rendered unconscious by the fall due to the 01st accused's left hand punch. All three

accused had continued to attack the deceased. The appellant had injured his knee as a result of stomping the deceased.

[23] The assessors including the one in the minority and the trial judge had rightly thought that there was no credible narrative of self-defence before them.

[24] In the circumstances, I do not think that there is a real prospect of success in the 01st and 03rd grounds of appeal. Accordingly, enlargement of time to appeal is refused.

02nd ground of appeal

[25] The trial judge had addressed the assessors on the concept of joint enterprise in terms of section 46 of the Crimes Act, 2009 upon which the prosecution sought to make all appellants liable for murder at paragraph 14, 15 and 16 of the summing-up. The appellant's complaint is that the trial judge had not adequately put his involvement in the offending in the light of 'joint enterprise' in that whether he had formed a common intention with the other two appellants to prosecute an unlawful purpose.

[26] The first question is whether the appellant had formed a common intention with other appellants to prosecute an unlawful purpose (see **Vasuitoga v State** [2016] FJSC1; CAV001 of 2013 (29 January 2016). However, common intention could be proved by inference from conduct alone without words but that inference should be sufficiently strong to satisfy the high degree of certainty which criminal law requires (vide **Henrich v State** [2019] FJCA 41; AAU0029 of 2017 (07 March 2019). The assessors and the trial judge appear to have concluded that the appellant's continued assault on the deceased even after he was knocked down to the ground by the 01st accused along with the other two accused was sufficient to prove that he was acting in furtherance of a common intention with the other two. The appellant's counsel seems to submit that he was not sharing a common intention with the other two accused when he attacked the deceased.

[27] The trial judge had asked the assessors to decide the issue of common intention from the conduct of the appellants (*i.e.* all three accused) at paragraph 16 of the summing-

up but not referred to the conduct of each of the appellants separately in relation to common intention. In other words the trial judge had particularly not brought to their attention the conduct of the appellant in that context. To that extent there is substance in the counsel's argument.

[28] The State relies on **Rokete v State** [2019] FJCA 49; AAU0009 of 2014 (07 March 2019) and **Sean Patrick McAuliffe v The Queen** [1995] HCA 37; 183 CLR 108; 69 ALJR 621; 130 ALR 26 to justify the convictions on all three accused for murder including the appellant on the legal basis of the doctrine of common purpose where the High Court of Australia said:

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

[29] Is *'an understanding or arrangement amounting to an agreement'* to commit a crime the same as 'forming a common intention' to prosecute an unlawful purpose in

section 46? It appears that the scope in section 46 of the Crimes Act, 2009 may be wider in some respects and narrower in some other respects than what is contemplated in **Sean Patrick McAuliffe v The Queen** (supra). It is a matter for the full court to decide.

[30] However, the most important question is whether it was open to the assessors and the trial judge to infer a common intention on the part of the appellant which he had formed with the other two accused to prosecute an unlawful purpose such as inflicting grievous physical injuries on the deceased [vide **Henrich v State** (supra)]. This could be ascertained by the full court only upon examination of the appeal record which is not available at this stage.

[31] In the circumstances, I am inclined to grant enlargement of time to appeal on the 02nd ground of appeal to enable the full court to examine the appellant's grievance more fully although I cannot determine at this stage whether this ground of appeal has a real prospect of success.

04th ground of appeal

[32] The fourth ground of appeal flows from or an extension of the second ground of appeal. The counsel for the appellant submits that the prosecution had not proved that the appellant was criminally liable for murder on the basis of 'joint enterprise'.

[33] The second limb of 'joint enterprise' is that there should be proof that in the prosecution of the unlawful purpose an offence has been committed which is of such a nature that its commission is a probable consequence of the prosecution of such purpose and in case of murder the prosecution is required to prove the subjective element *i.e.* that the secondary party contemplated and foresaw the probability of death or infliction of serious harm on the deceased in the execution of the planned unlawful purpose [see also **Vasuitoga v State** (supra)].

[34] To impute secondary liability for murder under the doctrine of joint enterprise, the fault element that the prosecution was required to prove was that the accused

contemplated or foresaw death when they carried out their common intention to assault the deceased. To be guilty of manslaughter under the doctrine of joint enterprise, the fault element that the prosecution was required to prove was that the accused contemplated or foresaw serious harm when they carried out their common intention to assault the deceased [vide **Tapoge v State** [2017] FJCA 140; AAU121.2013 (30 November 2017)].

[35] The counsel for the appellant submits that each of the accused has been treated as principal offenders and there was no evidence of a 'joint enterprise'.

[36] If the first limb in section 46 of the Crimes Act, 2009 is not satisfied, then the proof of second limb would obviously fail. The counsel for the appellant submits that there is insufficient evidence to infer shared common intention on the part of the appellant to assault the deceased and also that the appellant foresaw probability of death in the execution of that common intention.

[37] The State cites **Gillard v The Queen** 2003] HCA 64; 219 CLR 1; 78 ALJR 64; 202 ALR 202; 139 A Crim R 100 (2003) 219 in support of its defence of the conviction for murder:

> *'110. In its simplest application, the doctrine of joint criminal enterprise means that, if a person reaches an understanding or arrangement amounting to an agreement with another or others that they will commit a crime, and one or other of the parties to the arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, all are equally guilty of the crime regardless of the part played by each in its commission[98].'*
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> *111. The doctrine has further application. It is not confined in its operation to the specific crime which the parties to the agreement intended should be committed. "[E]ach of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose"[99]. The scope of the common purpose is to be determined subjectively: by what was contemplated by the parties sharing that purpose[100]. And "[w]hatever is comprehended by the understanding or arrangement, expressly or tacitly, is necessarily within the contemplation of the parties to the understanding or arrangement"[101].'*

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

05th ground of appeal

[39] The counsel for the appellant argues that the prosecution had not proved either intention or recklessness as the fault element on the part of the appellant and relies on **Vosa v State** [2019] FJCA 89;AAU0084 of 2015. This ground of appeal seems to forget that criminal liability under section 46 of the Crimes Act, 2009 *i.e.* 'joint enterprise' is determined on a different basis.

[40] The trial judge seems to have he had treated all three accused as principle offenders ruled out intention and decided that what was applicable was recklessness for the murder count on the facts of the case. The trial judge had given directions on recklessness at paragraph 42 of the summing-up.

[41] If recklessness was the fault element relied upon by the prosecution, then the learned trial judge was required to give clear direction that in the case of the principal offender (the accused who used the deadly force), the prosecution was required to prove that the accused was aware of a substantial risk that death would occur by conduct and having regard to the circumstances known to him it was unjustifiable to take the risk (*i.e.* recklessness). But to impute secondary liability for murder under the doctrine of joint enterprise, the fault element that the prosecution was required to prove was that the accused contemplated or foresaw death when they carried out their common intention to assault the deceased (**Vasuitoga v State** [2016] FJSC1; CAV001 of 2013 (29 January 2016) and **Tapoge v State** [2017] FJCA 140; AAU121.2013 (30 November 2017).

[42] It appears that the above decisions have made a distinction between the fault element required in the case of the principal offender and secondary offenders sought to be made liable under 'joint enterprise'.

[43] To impute secondary liability for murder under the doctrine of joint enterprise, the fault element that the prosecution was required to prove was that the accused contemplated or foresaw death when they carried out their common intention to assault the deceased. To be guilty of manslaughter under the doctrine of joint enterprise, the fault element that the prosecution was required to prove was that the accused contemplated or foresaw serious harm when they carried out their common intention to assault the deceased [vide **Tapoge v State** [2017] FJCA 140; AAU121.2013 (30 November 2017)].

[44] It is not clear who the principal offender was and who rendered the fatal blow and his fault element and similarly the secondary offenders and their fault elements. There is argument whether in the case of 'joint enterprise' there must always be a principal offender and secondary offenders. If this is in fact the case or not, could be discussed by the full court under the 02nd and 04th grounds of appeal.

[45] But, it does not appear that the prosecution had relied on intention or recklessness as the fault element but it had based its case on the doctrine of joint enterprise where the fault element is either contemplation or foreseeing death (for murder) or serious harm (manslaughter) when the accused carried out their common intention to assault the deceased.

[46] Therefore, I think that this ground of appeal has no real prospect of success. Accordingly, enlargement of time to appeal is refused.

01st ground of appeal (sentence)

[47] The appellant complains that the minimum serving period of 15 years is disproportionately high considering his role in the offending.

[48] In **Balekivuya v State** [2016] FJCA 16; AAU0081 of 2011 (26 February 2016) the court reduced the minimum serving period from 19 years to 15 years for an appellant who was 19 years at the time of committing the offence though the minimum period of serving the sentence was still a matter of discretion on the part of the trial judge in

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

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

Orders

1. Enlargement of time to appeal against conviction is allowed.
2. Enlargement of time to appeal against sentence is refused.

COURT OF APPEAL FIJI

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