

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

**CRIMINAL APPEAL NO.AAU 57 of 2021**  
**[In the High Court at Lautoka Case No. HAC 192 of 2015]**

**BETWEEN** : **GEETA DEVI**

***Appellant***

**AND** : **THE STATE**

***Respondent***

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

**Counsel** : **Mr. M. Fesaitu for the Appellant**  
: **Mr. S. Babitu for the Respondent**

**Date of Hearing** : **24 October 2022**

**Date of Ruling** : **28 October 2022**

**RULING**

[1] The appellant with Sundar Kaur, her mother in law had been indicted in the High Court at Lautoka for murder of Sanjini Lata, one of the daughters of Sundar Kaur contrary to section 237 of the Crimes Act, 2009 committed on 01 November 2015 at Sigatoka in the Western Division. The second count was accessory after the fact of murder contrary to section 238 of the Crimes Act, 2009 as an alternative count against the appellant. The third count against the appellant was giving false information to a public servant contrary to section 201 of the Crimes Act, 2009.

[2] Sundar Kaur had pleaded guilty for murder and sentenced to life imprisonment with a minimum serving period of 14 years. The appellants had pleaded guilty only to the charge of giving false information to a public servant and received a sentence of 10 month's imprisonment.

- [3] After full trial, the assessors had unanimously expressed an opinion of guilty against the appellant for murder. The learned High Court judge had agreed with the assessors and convicted the appellant of murder. She was sentenced on 25 September 2019 to life imprisonment without a minimum serving period.
- [4] The appellant's appeal against conviction is untimely being 01 year and 09 months out of time.
- [5] 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? (vide **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] These factors are not to be considered and evaluated in a mechanistic way as if they are on par with each other and carry equal importance relative to one another in every case. 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. No party in breach of the relevant procedural rules and timelines has an entailment to an extension of time and it is only in deserving cases where it is necessary to enable substantial justice to be done that breach will be excused [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100]. In practice an unrepresented appellant would usually deserve more leniency in terms of the length of delay and the reasons for the delay compared to an appellant assisted by a legal practitioner.
- [7] The delay of this appeal is substantial. The appellant's explanation is that she waited for the counsel for Legal Aid Commission to inform her as to who would be handling her appeal and in the meantime she was diagnosed with Hodgkin lymphoma cancer

and had to undergo treatments. As result she was not able to follow up her appeal. Thus, the reasons for the inordinate delay seem acceptable. In any event, I would have to see whether there is a **real prospect of success** for the belated grounds of appeal against sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]. The respondent has not averred any prejudice that would be caused by an enlargement of time.

[8] The grounds of appeal urged on behalf of the appellant at the leave hearing are as follows:

‘Conviction:

Ground 1

*THAT the Learned Trial Judge erred in law and facts when directing the assessors on joint enterprise given that;*

- (i) The direction is not adequately tailored to the facts of the case to assist the assessors in their evaluation of the evidence; and*
- (ii) Further to the direction on joint enterprise the Learned Trial Judge had not directed himself nor the assessors on the secondary liability imputed on the joint enterprise when evaluating the evidence thereby causing a substantial miscarriage of justice to appellant.*

Ground 2

*THAT the Learned Trial Judge had erred in law and facts when directing the assessors on the charge of murder given that;*

- (i) The direction as to the elements of murder are not adequately tailored to the facts of the case to assist the assessors in their evaluation of whether the appellant is guilty or not; and*
- (ii) The Learned Trial Judge had not directed himself nor the assessors to consider the lesser charge of manslaughter whether the appellant is guilty or not, if the assessors were to opined that the appellant is not guilty of murder.*

Ground 3

*THAT the learned trial Judge had erred in law and in fact by not adequately directing the assessors and himself on circumstantial evidence.*

Ground 4

*THAT the Learned Trial Judge had erred in law and in facts having not fairly and objectively summed up the appellant's case.*

Ground 5

*THAT the conviction for murder is unreasonable and not supported by the totality of the evidences in light of the joint enterprise.*

Ground 6

*THAT the Learned Trial Judge had erred in law by granting leave to prosecution to admit into evidence the two statements of Koyal Radika [PW1] when section 134 (2) of the Criminal Procedure Act has not been fully met and that his Lordship had not considered the appellant's right to a fair trial in light of the prior statements made out of court.'*

[9] The appellant's counsel informed court at the hearing that he would abandon 03<sup>rd</sup> and 06<sup>th</sup> grounds of appeal.

[10] The trial judge in his judgment had summarized the case as follows:

6. *The prosecution relied on the principle of joint enterprise to prove the charge against the Accused. The assessors were given directions on joint enterprise, alternative charges, circumstantial evidence and other general considerations. Further the assessors were directed on the elements of murder as well as the elements of the alternative count of accessory after the fact to murder. I am satisfied that the assessors have followed those directions in considering the evidence adduced in this case.*

7. *The main witness for the prosecution was Koyal Radhika. According to her evidence her mother, Sundar Kaur had been assaulting the deceased in a room. The Accused had been inside the room in two occasions when the assault was taking place. Later the Accused had dragged the deceased out of the room. Koyal Radhika said that the deceased was still moving and was breathing heavily when she was dragged outside by the Accused. The prosecution evidence reveals that the Accused later burnt the deceased. Although Koyal Radhika was cross examined at length by the defence, her credibility could not be shaken. Her evidence was consistent, and I do not have any reason to disbelieve her. I am satisfied that Koyal Radhika's evidence is credible and reliable.*

8. *The prosecution further relied on the caution interview statement of the Accused. The Accused has admitted in the caution interview that she burnt the*

*body of the deceased and later the remains were disposed in a septic tank. The assessors were given directions on how to consider the caution interview and what weight should be attached to a mixed statement.*

9. *According to the evidence given by the pathologist the cause of death is not ascertained. Therefore, it was not established what caused the death or at what point of time the deceased, Sanjini Lata died. However, the prosecution presented solid evidence that when the deceased was dragged out of the house by the Accused, she was still alive and later she was burnt by the Accused. Further the prosecution adduced evidence that the remains which were found in the septic tank were of the deceased according to DNA analysis.*

10. *The position of the defence was that the Accused did not take part in the assault and she only intervened to revive the deceased. However, the defence did not deny that the Accused took part in burning the body of the deceased. I am not inclined to believe that the Accused made attempts to revive the deceased as Koyal Radhika's evidence suggests that the deceased was just left in the bathroom by the Accused.*

[11] The prosecution had called 06 witnesses and the appellant had remained silent and had not called any witnesses.

[12] The main witness, Koyal Radhika (the sister of the deceased and the daughter of Sundar Kaur) on 01 November 2015 at about 6.00 am had seen her mother Sundar Kaur sitting on the bed and the deceased, Sanjini Lata standing inside her mother's room. Koyal had seen the deceased's hands tied up with a blue cloth and tears were coming out from her eyes. She had heard the deceased saying to her mother Sundar Kaur '*please don't do anything*'. At that time the appellant, Geeta Devi had been making roti in the kitchen.

[13] When Koyal was having breakfast, she had seen the appellant (referred to as bhabhi) entering her mother's room and closing the door. Koyal had not seen what was happening inside. At one point, her niece asked for roti and the appellant had opened the door from inside and given roti to the niece. The witness from the kitchen through the opened door had seen Sundar Kaur beating the deceased Sanjini with a pipe (rod). Sundar Kaur was on the bed and beat the deceased by using the iron rod on Sanjini's bum. Sanjini was crying slowly. Sanjini was wearing a stripe top and her skirt was not on but only her panty was on. After the witness had finished breakfast, Sundar Kaur had called her inside the room and the appellant had come out. She had seen both legs

of Sanjini tied with a rope and a rope was tied to the edge of the bed where the iron rod was. Sundar Kaur had told her to press the iron rod but she had refused and gone out of the bedroom. When she left the bedroom only Sundar Kaur and Sanjini were in the room and when she was in the sitting room, she had heard Sanjini crying out loudly and she did not know where the appellant was.

[14] Koyal Radhika had then seen the appellant coming again when she was in the sitting room. The appellant had cut the blue cloth with a kitchen knife and had dragged the deceased to the bathroom. Sundar Kaur on wheelchair also had gone with the appellant. The appellant had taken Sanjini inside the bathroom while Sundar Kaur was standing at the door of the kitchen. After that the appellant had dragged Sanjini outside on the cement where Sundar Kaur was. The witness had seen Sanjini sleeping on the cement outside. After that the appellant had again taken Sanjini in the bathroom, left her there. Sundar Kaur was in the kitchen and the appellant had gone to her room.

[15] Koyal Radhika had further stated that one old lady referred to as Dadi also came with the appellant when her mother Sundar Kaur was inside the room with the deceased. Koyal had seen that the deceased bleeding from her backside and she had also seen blood on the iron rod. She had been later sent to buy cassava with her niece. She had seen rubbish burning in her compound when she returned.

**01<sup>st</sup> and 05<sup>th</sup> ground of appeal - Joint enterprise**

[16] The appellant argues firstly that the directions at paragraphs 19-21 on 'joint enterprise' is inadequate in that it is not tailor-made to the facts of the case (with possible illustrations) to assist the assessors to determine whether the appellant had acted in a joint enterprise with Sundar Kaur to be liable for murder. Secondly, it is argued that the trial judge had not addressed the assessors on a secondary liability. Particular reference is made to the absence of a direction whether the appellant had contemplated or foreseen that death or serious harm would be a probable consequence of executing the common purpose.

- [17] Under the 05<sup>th</sup> ground of appeal which is the substantial complaint, the appellant argues that the verdict for murder is unreasonable or cannot be supported having regard to the evidence on the basis of ‘joint enterprise’. The gist of the appellant’s argument appears to be that she did not act in furtherance of a common intention with Sundar Kaur to assault (unlawful purpose) the deceased. Secondly, she seems to argue that even if she did form a common intention with Sundar Kaur in assaulting the deceased, she did not contemplate or foresee the death of the deceased as a probable consequence when they carried out their common purpose to assault the deceased.
- [18] 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 (vide section 46 of the Crimes Act, 2009).
- [19] It was held in **Heinrich v State** [2019] FJCA 41; AAU0029 of 2017 (07 March 2019) that the formation of a common intention to prosecute in conjunction an unlawful purpose and the prosecution in fact of that purpose and the commission of an offence which was a probable consequence of the prosecution of the purpose can, like all facts, be proved by inference, provided always that the inference is sufficiently strong to satisfy the high degree of certainty which the criminal law requires.
- [20] **Tapoge v State** [2017] FJCA 140; AAU121 of 2013 (30 November 2017) has dealt with the required fault element for murder and manslaughter in the ‘principle offender’ and other accused. It was held that if recklessness is the fault element relied upon by the prosecution, then the trial judge is required to give clear direction that in the case of the principal offender, 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. 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. Similarly, for manslaughter, the prosecution is 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 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 is required to prove is that the accused contemplated or foresaw serious harm when they carried out their common intention to assault the deceased.

[21] In this case, Sundar Kaur appears to be the principle offender. It is difficult to consider the appellant's arguments under both grounds of appeal without the full record, for whether there was a common intention to prosecute an unlawful purpose, the prosecution of that purpose and the commission of the offence of murder which was a probable consequence of the prosecution of the purpose are all matters to be determined on the totality of facts of the case including the appellant's cautioned statement. Similarly, to determine whether the fault element in the 'principle offender' and other accused for murder was present or whether what was established was only the fault element for manslaughter, one needs to scrutinise the trial transcripts.

[22] I cannot determine the degree of success (or failure) of these grounds of appeal at this stage, However, I am inclined to grant extension of time on this aspect of 'joint enterprise' so that the full court may determine it in due course with the assistance of complete record.

**02<sup>nd</sup> ground of appeal**

[23] Under this ground of appeal, the appellant firstly argues that the directions on elements of murder at paragraphs 22 -31 is inadequate. Secondly, it is submitted that the trial judge had failed to address the assessors on manslaughter.

[24] I am not convinced of the merits of the first argument but the second complaint appears to deserve further consideration.



#### **04<sup>th</sup> ground of appeal**

- [25] The appellant criticizes the summing-up as not being objective and fair apparently on the same grounds argued earlier. Thus, this ground of appeal is intractably interwoven with earlier grounds of appeal.
- [26] However, the trial counsel had not raised any re-directions with the trial judge with regard to any of the alleged inadequacies or omissions in the summing-up. Thus, the appellant cannot raise them at this stage with much conviction without cogent reasons (see **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018).
- [27] However, the 05<sup>th</sup> ground of appeal goes to the merits of the appeal which the full court would be equipped to examine closely.

#### **Bail pending appeal**

- [28] The legal position is that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellant has to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The**


State AAU 41 of 2004 (23 August 2004), Ranigal v State [2019] FJCA 81; AAU0093.2018 (31 May 2019), Kumar v State [2013] FJCA 59; AAU16.2013 (17 June 2013), Qurai v State [2012] FJCA 61; AAU36.2007 (1 October 2012), Simon John Macartney v. The State Cr. App. No. AAU0103 of 2008, Talala v State [2017] FJCA 88; ABU155.2016 (4 July 2017), Seniloli and Others v The State AAU 41 of 2004 (23 August 2004)].

- [29] Out of the three factors listed under section 17(3) of the Bail Act ‘likelihood of success’ would be considered first and if the appeal has a ‘very high likelihood of success’, then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.
- [30] If an appellant cannot reach the higher standard of ‘very high likelihood of success’ for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of ‘very high likelihood of success’.
- [31] I have allowed enlargement of time leave to appeal against conviction but not determined that there is a real prospect of success in the appeal. I do not at this see a ‘very high likelihood of success’ in the appeal. Concerning her medical condition, the appellant has been treated while she was an inmate inside the Correction Centers for a considerable time and there is nothing to indicate that such treatments cannot continue in the same way or that she needs to be treated outside the precincts of the Correction Center for lack of required medical care inside. Thus, in that context, I would not consider her medical condition as an exceptional circumstance.
- [32] Therefore, I am not inclined to allow the appellant’s application for bail pending appeal and release her on bail at this stage.

**Orders of the Court:**

1. Enlargement of time to appeal against conviction is allowed.
2. Bail pending appeal application is dismissed.



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