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

CRIMINAL APPEAL NO. AAU 166 of 2015
AAU 006 of 2016
AAU 007 of 2016
AAU 048 of 2016
AAU 097 of 2016
[In the High Court at Lautoka Case No. HAC 89 of 2010]

BETWEEN	**:**	**[1] RAFAELE NOA**
	:	**[2] SIRELI LILO**
	:	**[3] ILIESA VAKABUA**
	:	**[4] EPARAMA TAMANIVAKABAUTA**
	:	**[5] ILIVASI NAVUNICAGI**

Appellants

AND	**:**	**STATE**

Respondent

Coram	**:**	**Gamalath, JA**
	:	**Prematilaka, JA**
	:	**Bandara, JA**
Counsel	**:**	**Mr. M. Fesaitu and Ms V. Diroiroi for 1st, 2nd and 3rd Appellants**
		Ms. S. Ratu for 4th Appellant
		5th Appellant appeared in person
		Mr. S. Babitu for the Respondent
Date of Hearing	**:**	**02 February 2022**
Date of Judgment	**:**	**27 May 2022**

JUDGMENT

Gamalath, JA

[1] I agree with the conclusions of Bandara, JA.

Prematilaka, JA

[2] I have read in draft the judgment of Bandara, JA and agree with the proposed outcome that the appeals be dismissed.

Bandara, JA

[3] The Appellant's were charged with 1 count of Murder contrary to section 237 of the Crimes Act 2009 and Aggravated Robbery contrary to section 311 (1) (a) of the Crimes Act 2009.

[4] The information read as follows:

'***COUNT ONE***
Statement of Offence

MURDER: Contrary to Section 237 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

RAFAELE NOA, SIRELI LILO, ILIESA VAKABUA, ILIVASI NAVUNICAGI and EPARAMA TAMANIVAKABAUTA between the 21st and the 22nd day of August 2010 at Lautoka, in the Western Division, murdered **JOHN LEONARD DASS s/o BENJAMIN BALRAM**.

COUNT TWO
Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

RAFAELE NOA, SIRELI LILO, ILIESA VAKABUA, ILIVASI NAVUNICAGI and EPARAMA TAMANIVAKABAUTA between the 21st and the 22nd day of August 2010 at Lautoka, in the Western Division, in the company of each other robbed **JOHN LEONARD DASS s/o BENJAMIN BALRAM** of Assorted Jewelries worth $2,000.00, 5 gross BH 10 Cigarette valued at $250.00, Nike Canvas valued at $200.00, New Balance Ladies canvas valued at $100.00, 2 Motorola Mobile Phones valued at $40.00, 2 Timex Wrist Watches valued at $200.00, 1 Maglite torch valued at $15.00, 100ml Pleasure Perfume valued at $80.00, Nivea, Avon, Pure Fiji Lotion valued at $20.00, 1 Black Bag containing new clothes valued at $300.00, 1 knapsack trolley bag valued at $50.00, 1 shoulder bag valued at $20.00, 1 gold ring valued at $300.00, 2 Jack Daniels valued at $155.00, 3 Quick Sliver flip flops valued at $60.00 all to the total value of $3,790.00 the property of **JACK LEONARD DASS s/o BENJAMIN BALRAM.**'

[5] The five appellants have been convicted as follows:

'*(i) Accused No. 1: Found guilty of count no. 1 and 2.*

(ii) Accused No. 2: Found not guilty of murder, but guilty of manslaughter, and guilty of count no. 2.

(iii) Accused No. 3: Found not guilty of murder and not guilty of manslaughter, but guilty of count no. 2.

(iv) Accused No. 4: Found guilty of count no. 1 and 2.

(v) Accused No. 5: Found guilty of count no. 1 and 2.

The Appellants were sentenced as follows:

(i) Accused No. 1: Mandatory life imprisonment, with 20 years minimum term to be served, before pardon may be considered by his Excellency the President of the Republic of Fiji.

(ii) Accused No.2: 14 years imprisonment, with a non-parole period of 13 years imprisonment, effective forthwith, and this is to be concurrent to any prison term presently served.

(iii) Accused No. 3: 13 years imprisonment, with a non-parole of 12 years imprisonment effective forthwith.

(iv) Accused No. 4: Mandatory life imprisonment, with 20 years minimum term to be served, before pardon may be considered by His Excellency the President of the Republic of Fiji.

(v) Accused No. 5: Mandatory life imprisonment, with 20 years minimum term to be served, before pardon may be considered by His Excellency the President of the Republic of Fiji.'

The version of the prosecution

[6] At about midnight on 21st August 2010 the five Appellants assembled near the deceased Mr. Dass's (hereinafter referred to as the deceased) residence. Having climbed the fence they entered his compound.

[7] The Appellants made a forcible entry into the house having broken wooden shutters of windows, cutting the burglar mesh wire and removing two louvre blades of a window. Thereafter the 5th Appellant entered the property through the window, and opened the main door letting the others enter into the house.

[8] The 3rd Appellant was assigned the task of keeping watch at the house gate, and warn the rest of the group if anyone approached the scene. The other four Appellants entered the deceased's house, ransacked it and stole the items set out in count No. 2 of the information.

[9] According to the version of the prosecution, the 1st Appellant entered the empty bedroom, kitchen and the deceased's room. The 2nd Appellant went into the deceased's room, the girls' room, the kitchen and the sitting room. The 4th Appellant went into the deceased's room, the girls' room, the vacant room, the sitting room and the kitchen. The 5th Appellant had gone into the girls' bedroom, the vacant room, and the other parts of the house.

[10] The deceased had been asleep at the time the Appellants entered his house. The 2nd Appellant had gone to the deceased's room and held him whilst two others punched him on the chest. The 2nd Appellant assisted in the tying of the deceased, and took him to the girls' room. The 2nd, 4th and 5th Appellants had subdued the deceased in his daughter's room.

[11] Thereafter, having ransacked and robbed the properties of the household all five Appellants had fled the scene.

The version of the defence

[12] At their arraignment on the 20th November 2018 each of the five Appellants entered a plea of not guilty of the charges against them in the information. Upon the State making out a *prima facie* case, a defence was called from each Appellant by the Trial Judge whereupon the first, second, third and the fifth Appellants chose to give evidence and not to call other evidence in their defence.

[13] The 4th Appellant decided to exercise his right to remain silent by not choosing to give evidence or call any evidence on his behalf. He did not have to. It is up to the State to prove and establish the guilt of the Appellants beyond reasonable doubt.

[14] The 1st Appellant chose to give evidence and admitted on oath that he with others, broke into the deceased's house at the time in question. He admitted having stolen $70 cash from the bedroom but denied causing the death of the deceased or assisting therein. The 2nd Appellant admitted on oath that he was arrested by the police on the 23rd August 2010, and caution interviewed on the 24th August 2010. He said he was subjected to torture by being repeatedly assaulted by the police, and chilli being rubbed on his arms and private parts. He alleged his caution interview statements were not voluntary.

[15] The 3rd Appellant on oath admitted having been a member of the group that broke into the deceased's house and stealing the items mentioned in count No. 2. He further stated that he was only acting as a "*look-out*" for the others. His role had been to warn the others upon anyone entering the scene of the crime whilst they were offending. He said he expected that the others would use force if the deceased resisted.

[16] The 3rd Appellant further admitted having been caution interviewed by the police on the 23rd August 2010, but alleged that the same was made after being subjected to torture. In his summing up the Trial Judge states that, "*He appeared to say that he did not strangle Mr. Dass to death*."

[17] As regards the 4th Appellant the Learned High Court Judge in his summing up states that:

> *"As for Accused No. 4, because of his non-attendance, he was deemed to have chosen to remain silent. He was caution interviewed by police on 2 September 2010, and was formally charged on 6th September 2010. In his charge statement, he admitted the two charges against him."*

[18] The 5th Appellant testifying under oath denied having participated in the robbery. He admitted having been caution interviewed by the police on the 2nd September 2010 and formally charged on the 4th September 2010. In the charge statements he admitted the two charges levelled against him. However, he had stated that the statements were not made by him and hence should be disregarded. He further claimed that he was repeatedly assaulted while being in the police custody.

[19] Following items were also included in the evidence presented by the State:

(1) Booklet of the photographs.
(2) Passport of the deceased.
(3) Interview and charge statements of the five appellants.

[20] The 1st Appellant both in his charge statements and the caution interview statements, had admitted having committed "*aggravated robbery and denied the murder*."

[21] The 2nd Appellant both in his caution interview statements and the charge statements had admitted having committed aggravated robbery, but had denied involvement in the murder. However, he had admitted having assisted in carrying the deceased from his room to the girls' room, and hiding the deceased in order to prevent him from struggling and shouting, while two others repeatedly punched the deceased on the ribs. He had also admitted assisting in tying up the deceased's hands and legs and later untying him, and placing him between two beds.

[22] The 3rd Appellant in his caution interview statements and charge statements had admitted committing aggravated robbery but denied murder.

[23] The 4th Appellant in his caution interview statements had admitted having committed aggravated robbery but denied murder. However, in his charge statement the latter had admitted both aggravated robbery and murder.

[24] The 5th Appellant in his caution interview statements had admitted aggravated robbery and denied murder. However, in the charge statement he had admitted both aggravated robbery and murder.

[25] According to the deceased's post-mortem report the cause of death had been asphyxia due to manual strangulation. According to the medical expert's evidence if pressure was applied to the upper part of the neck, death could occur within 3 to 5 seconds. However, if pressure was applied at the bottom part of the neck death could occur within 15 minutes.

[26] At the conclusion of the trial the opinion returned by the assessors is set out in paragraph 2 of the Learned High Court Judge's Judgment, which reads:

> *"Yesterday, the three assessors returned with a unanimous guilty verdict on both counts against Accused No. 1, 4 and 5. On Accused No. 2, Assessor No. 1 found him guilty on both counts, while Assessor No. 2 and 3 found him not guilty of murder (count no. 1), but guilty of the alternative offence of manslaughter, and Assessor No. 2 also found him guilty of aggravated robbery (count no. 2). Assessor No. 3 found him not guilty of count no. 2. On Accused No. 3, Assessor No. 1 found him not guilty of murder (count no. 1), but guilty of the lesser offence of manslaughter, and also guilty of aggravated robbery (count no. 2). Assessor No. 2 and 3 found Accused No. 3 not guilty of murder or manslaughter, but guilty of aggravated robbery."*

[27] In paragraph 6 of the judgment the Learned High Court Judge indicates to which extent he concurred with the opinion of the assessors:

> *"I have reviewed the evidence called in the trial, and I have directed myself in accordance with the Summing Up I gave the assessors yesterday. The assessors' verdict was not perverse. It was open to them to reach such conclusion on the evidence. However, I am not bound by their opinion. On my analysis of the case based on the evidence, and on my assessment of the credibility of the witnesses, I agree with the unanimous guilty verdict of the three assessors on Accused No. 1,*

4 and 5 on both counts. On Accused No. 2, I accept the opinions of Assessor No. 2 and 3 that he is not guilty of murder, but guilty of manslaughter. I reject Assessor No. 1's opinion that he is guilty of murder. On count no. 2, I accept Assessor No. 1 and 2's opinion that Accused No. 2 is guilty, and I reject Assessor No. 3's opinion that he is not guilty. On Accused No. 3, I accept Assessor No. 2 and 3's opinion that he is not guilty of murder and manslaughter, and reject Assessor No. 1's opinion that he is not guilty of murder, but guilty of manslaughter. I accept the three assessors' unanimous opinion that he is guilty on count no. 2."

[28] Thereafter, the Trial Judge had proceeded to give reasons for his concurring and dissenting opinions with that of the assessors. Accordingly, the Learned High Court Judge concurred with the opinion of the assessors in finding Appellants 1, 4 and 5 guilty on both counts.

[29] In respect of the 2nd Appellant the Trial Judge had concurred with majority opinion of the assessors that he was not guilty of murder but manslaughter.

[30] The Trial Judge had rejected to concur with the assessor No. 1's opinion that the 2nd Appellant was guilty of murder.

[31] The Trial Judge had concurred with assessors' No. 1 and 2's opinion that the Appellant No. 2 was guilty of count 2 and had rejected assessor No. 3's opinion that he was not guilty. The Trial Judge concurred with the opinion of assessors No. 2 and 3's opinion that he was not guilty of murder or manslaughter and rejected assessors' No. 1's opinion that Appellant No. 3 is not guilty of murder, but guilty of manslaughter. The Trial Judge had further accepted the unanimous opinion that the 3rd Appellant is guilty on count No. 2.

[32] Accordingly the Trial Judge's guilty finding could be summarised as follows:

"(i) Accused No. 1 : found guilty of count no. 1 and 2.
(ii) Accused No. 2 : found not guilty of murder, but guilty of manslaughter, and guilty of count no. 2.
(iii) Accused No. 3 : found not guilty of murder and not guilty of manslaughter, but guilty of count no. 2
(iv) Accused No. 4 : found guilty of count no. 1 and 2.
(v) Accused No. 5 : found guilty of count no. 1 and 2."

[33] Accordingly, the Trial Judge had convicted the Appellants in the following manner:

> *"(i) Accused No. 1, 4 and 5 are formally convicted of the murder of Mr. John Leonard Dass between 20 and 21 August 2010, at Lautoka in the Western Division (count no. 1), and the aggravated robbery on him at the same time (count no. 2);*
>
> *(ii) Accused No. 2 is acquitted of the murder of Mr. John Leonard Dass between 20 and 21 August 2010, at Lautoka in the Western Division, but is convicted of his manslaughter, at the same time, and is convicted on the aggravated robbery (count no. 2) against him, at the same time.*
>
> *(iii) Accused No. 3 is acquitted of the murder and/or manslaughter of Mr. John Leonard Dass between 20 and 21 August 2010, at Lautoka in the Western Division, and is convicted of the aggravated robbery on him, at the same time (count no. 2)."*

[34] It is to be noted, that the Trial Judge had not found the assessors opinion to be perverse, but had not agreed with it in totality.

[35] Section 237 (1), (2), (4) and (5) of the Criminal Procedure Decree 2009, read as follows:

> *"237.-(1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.*
>
> *(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors. Cap 21 Criminal Procedure 2009 261*
>
> *(3) Notwithstanding the provisions of section 142(1) and subject to subsection (2), where the judge's summing up of the evidence under the provisions of subsection (1) is on record, it shall not be necessary for any judgment (other than the decision of the court which shall be written down)to be given, or for any such judgment (if given)–*
>
> *(a) to be written down; or*
> *(b) to follow any of the procedure laid down in section 141; or*
> *(c) to contain or include any of the matters prescribed by section 142.*
>
> *(4) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be–*

(a) written down; and
(b) pronounced in open court.

(5) In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for …all purposes."

[36] In ***Ram Dulare, Chandar Bhan and Permal Naidu v Reginam*** [1956 – 57], Fiji Law Report Volume 5, pages 1 to 6, page 3, the Fiji Court of Appeal held that:

"…In our opinion learned counsel for the appellants is confusing the functions of the assessors with those of a Jury in a trial. In the case of the King v. Joseph 1948, Appeal Cases 215 the Privy Council pointed out that the assessors have no power to try or to convict and their duty is to offer opinions which might help the trial Judge. ***The responsibility for arriving at a decision and of giving judgment in a trial by the Supreme Court sitting with assessors is that of the trial Judge and the trial Judge alone*** *and in the terms of the Criminal Procedure Code, section 308, he is not bound to follow the opinion of the assessors…"* (*emphasis added)*

[37] In ***Sakiusa Rokonabete v The State***, Criminal Appeal No. AAU 0048 of 2005, the Fiji Court of Appeal held that:

"…In Fiji, the assessors are not the sole judges of fact. The judge is the sole judge of fact in respect of guilt and the assessors are there only to offer their opinions based on their views of the facts..."

[38] The sentences imposed by the Trial Judge are as follows:

"(i) Accused No. 1: Count No. 1: Murder: Mandatory Life Imprisonment, with a minimum term of 20 years to be served, before a pardon may be considered by His Excellency the President of the Republic of Fiji.

Count No. 2: Aggravated Robbery: 13 years imprisonment.

(ii) Accused No. 2: Alternative to Count No. 1: Manslaughter: 4 years 4 months Imprisonment.

Count No. 2: Aggravated Robbery: 14 years imprisonment.

(iii) Accused No. 3: Count No. 2: Aggravated Robbery: 13 years imprisonment.

(iv) Accused No. 4: Count No. 1: Murder: Mandatory Life Imprisonment with a minimum term of 20 years to be served before a pardon may be considered by His Excellency the President of the Republic of Fiji.

Count No. 2: Aggravated Robbery: 13 years imprisonment.

(v) Accused No. 5: Count No. 1: Murder: Mandatory Life Imprisonment with a minimum term of 20 years to be served before a pardon may be considered by His Excellency the President of the Republic of Fiji.

Count No. 2: Aggravated Robbery: 14 years imprisonment."

[39] The Trial Judge following the principle of totality of sentencing made the sentences on count 1 and 2 to run concurrently.

[40] Accordingly, the final sentences for each Appellant would be as follows:

"(i) Accused No. 1: Mandatory life imprisonment, with 20 years minimum term to be served, before pardon may be considered by His Excellency the President of the Republic of Fiji.

(ii) Accused No. 2: 14 years imprisonment, with a non-parole period of 13 years imprisonment, effective forthwith, and this is to be concurrent to any prison term presently served.

(iii) Accused No. 3: 13 years imprisonment, with a non-parole period of 12 years imprisonment, effective forthwith.

(iv) Accused No. 4: Mandatory life imprisonment, with 20 years minimum term to be served, before pardon may be considered by His Excellency the President of the Republic of Fiji.

This sentence is to take effect from the time he is recaptured.

(v) Accused No. 5: Mandatory life imprisonment, with 20 years minimum term to be served, before pardon may be considered by His Excellency the President of the Republic of Fiji.

This sentence is concurrent to his present prison sentences."

[41] Now I turn to the grounds of appeal.

Grounds of Appeal in relation to the 1st Appellant

[42] The 1st Appellant advanced two grounds of appeal before the single judge of appeal. On the 30 August 2019, the single judge of appeal granted leave only on the first ground of appeal against the conviction which reads:

> *"THAT the guilty verdict for the charge of murder is not supported by the totality of the evidence."*

[43] The 1st Appellant did not contest his involvement in the incident, specifically regarding the charge of Aggravated Robbery. However, by preferring the present appeal he challenges his conviction against murder.

[44] The 1st Appellant had been found guilty of murder on the basis of the principle of joint enterprise where an individual can be jointly convicted of the crime of another.

[45] The common law doctrine of joint enterprise is statutory in Fiji in terms of section 46 of the Crimes Act 2009 which provides that:

> *"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."*

[46] Setting out the principle of joint enterprise in ***Powell and Another, RV.*** [1997] UKHL 45; [1999] AC 1; [1997] 4 All ER 545; [1997] 3 WLR 959; [1998] 1 Cr App Rep [261; [1998] Crim LR 48 (30th October, 1997) it has been held that:

> *"where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, that that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but (and this is the crux of the matter that, if one of the adventurers goes beyond what had been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act. Finally, he says it is for the jury in every case to decide whether what was done was part of the joint enterprise, or went beyond it and was in fact an act unauthorised by that joint enterprise."*

[47] In ***McAuliffe v R.*** (1995) 183 CLR 108; 130 ALR 26; ALJR 621 at CLR 113 it was held that:

> *"A join criminal enterprise "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."*

[48] In ***Vasuitoga v State*** [2016] FJSC 1; CAV001.2013 (29 January 2016), which was a case of robbery with violence and murder committed under similar circumstance of the present case, the Supreme Court held that:

> *"[39] The question is what the scope of section 22 is when the charge is murder. Section 22 has two limbs. The first limb requires proof that the accused formed a common intention with another to prosecute an unlawful purpose. The second limb requires proof that in the prosecution of the unlawful purpose an offence is committed of such a nature that its commission was a probable consequence of such purpose.*
>
> *[40] In case of murder, the subjective element that the prosecution is required to prove is 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. This principle was enunciated by the Privy Council in **Chan Wing-siu and others v The Queen** [1984] 3 ALL ER 877 and followed by the courts in Fiji in **Kumar and others v R** [1987] S.P.L.R. 131, 134, **Pauliasi Nacagilevu v The State** unreported Cr App No. AAU0058 of 2010; 14 August 2015 at [23] and **Eparama Niume and another v The State** unreported Cr App No. AAU0106 of 2011; 2 October 2015 at [23]."*

[49] In ***R v Gush*** [1980] 2 NZLR New Zealand Court of Appeal held that a person liable as a party *"…if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose. ……. Probable denoted an event that could well happen*".

[50] In ***R v Anderson and Morris*** [196] 2 QB Court of Criminal Appeal held that:

> "……. *where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, and that includes liability for unusual consequences if they arise for the execution of the agreed joint enterprise but (and this is the crux of the matter) …. if one of adventurers goes beyond what has been tacitly agreed as part of the common enterprise his co- adventurer is not liable for*

the consequences of that unauthorised act. Finally ….it is for the jury in every case to decide whether what was done was part of the joint enterprise, or went beyond it and was in fact an act unauthorised by that joint enterprise."

[51] In ***R v Chan Wing-siu*** [1985] 1 AC 168 Privy council held that:

> *"The test of mens rea here is subjective. It is what the individual accused in fact contemplated that matters. As in other cases where the state of a person's mind has to be ascertained, that 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 gives in evidence or in a statement put in evidence by the prosecution. ……the prosecution must prove the necessary contemplation beyond reasonable doubt, although that may be done by inference as just mentioned. ……. Where there is an evidential foundation for a remoteness issue, it may be necessary for the judge to give the jury more help. Although a risk of a killing or serious bodily harm has crossed the mind of a party to an unlawful enterprise, it is right to allow for a class of case in which the risk was so remote as not to make that party to an unlawful enterprise, it is right to allow for a class of case in which the risk was so remote as not to make that party guilty of a murder or intentional causing of grievous bodily harm committed by a co- adventurer in the circumstances that in the event confronted the latter. ……. In cases where an issue of remoteness does arise it is for the jury (or other tribunal of fact) to decide whether the risk as recognised by the accused was sufficient to make him a party to the crime committed by the principal".*

[52] The 1st Appellant admitted in his caution interview (which was not challenged), that he committed aggravated robbery against the deceased but denied the murder of the latter. The 1st Appellant can only be made liable of the murder of the deceased on the principle of joint enterprise.

[53] The vital question that arises here is, in the circumstances of the present case, whether the murder of the deceased was a probable consequence of the robbery, (or whether the 1st accused could foresee that any other accused would likely to commit the crime of murder).

[54] The Appellants having formed into a group entered the house of the deceased in the hope of robbing money to purchase more alcohol for them. It is highly probable, that the pursuance of such a joint enterprise could involve violence, putting the occupants into the risk of getting injured (whilst tying to resist etc.) and the potential injuries could lead to

serious consequences. Hence, in such situations the probability of the occurrence of an unlawful homicide is not an unforeseeable or remote issue.

[55] In his summing up the Trial Judge had analysed the culpability of the 1st Appellant in the following manner:

> 31. …"*As for Accused No. 1, he admitted on oath, that, he with others, broke into Mr. Dass's house, at the material time. He admitted, he stole $70 cash from the empty bedroom. He denied strangling Mr. Dass to death, and denied every assisting in the same."*

[56] On the same aspect the Trial Judge in his judgment states:

> *"On Accused No. 1, he admitted in his caution interview statements that he committed aggravated robbery against Mr. Dass. On this issue, I find he gave his statement voluntarily, and they were the truth. Accused No. 1 denied murdering Mr. Dass in his police caution interview and charge statements. He also repeated the above denials on oath. He can only be made liable for the murder of Mr. Dass, on the principle of joint enterprise, and/or aiding and abetting the commission of murder. The three assessors had unanimously found Accused No. 1 guilty of murdering Mr. Dass, presumably on the principle of joint enterprise and/or aiding and abetting murder. The three assessors had rejected his denials of murder. The assessors are there to assist the trial judge, and I agree with their unanimous opinion that Accused No. 1 is guilty of count no. 1 and 2 in the information."*

[57] As mentioned earlier the 1st Appellant had admitted in his caution interview statements, that he committed aggravated robbery against the deceased. Though he had denied murdering the deceased, (in his police caution interview, and charge statements, and also testifying under oath) culpability of murder could be imposed upon him on the principle of joint enterprise when the following factors are taken into consideration:

(1) The evidence places the 1st Appellant inside the house and that he was aware at the time that the occupants were also there.
(2) The evidence also shows that the 1st Appellant was inside the room of the deceased and he saw him alive while his group was looking for money.

(3) The 1st Appellant had knowledge that the deceased was being tied up by his associates.

(4) The 1st Appellant was present in the house right throughout the robbery without making an attempt to withdraw himself from it, when the deceased was still alive.

[58] It is clear that the tying of the deceased was done in order to incapacitate him from resisting. In such a process, the risk of sustaining serious or fatal injuries which could cause death, is a likelihood that could be anticipated. The 1st Appellant's participatory presence inside the room of the deceased, points towards the group's common intention to overpower the occupants of the house from raising the alarm or putting up a resistance.

[59] The 1st Appellant was in the group of intruders, who with similar intentions made a forcible entry into the house occupied by the deceased and his daughters.

[60] Having, regard to the foregoing facts and principles of law, I hold that the Trial Judge had not fallen into error by finding that the 1st Appellant was guilty of murder of the deceased, as per count 1 of the information.

[61] This ground of appeal lacks merit.

Appellate procedure in respect of the 2nd Appellant

[62] The 2nd Appellant preferred an appeal against his conviction to the Court of Appeal setting out six (6) grounds of Appeal, seeking leave to appeal.

[63] On the 8th of August 2019 the single judge of appeal refused, leave to appeal against conviction on all six grounds.

[64] A renewal notice of appeal was filed on behalf of the 2nd Appellant containing three grounds of appeal against conviction which are as follows:

"(i) The Learned Trial Judge failed to put to the assessors the Appellant's case in a fair, balanced and objective manner;
(ii) The Learned Trial Judge erred in law in not considering the locality to whch the offence was committed, contrary to section 35 (1) and 37 of the Criminal Procedure Act;
(iii) The Learned Trial Judge erred in law in admitting the confession contained in the caution and charge statement."

[65] The 2nd Appellant further filed documents pertaining to the examination of a witness, seeking leave to adduce new evidence, which application was supported by an affidavit by a witness, by the name of Rusila Baki.

[66] The evidence presented by the prosecution against the 2nd Appellant consisted of the admissions made in his record of interview and the recoveries made by the police at the house that he lived in.

[67] The items recovered from the possession of the 2nd Appellant are as follows:

"(i) Canvas – PEX 16;
(ii) Gold chain with 3 pendants – PEX 17;
(iii) Gold ring – PEX 18
(iv) Piece of cloth recovered from the Crime Scene – PEX 19

[68] At the trial the above items were identified by Marlene Nair as belonging to their household. The 2nd Appellant at the trial denied having involved in the impugned incident of robbery and the murder of the deceased.

[69] As mentioned earlier the Trial Judge concurring with the opinion of the assessors found the 2nd Appellant guilty of Manslaughter and Aggravated Robbery.

[70] The murder charge against the 2nd Appellant was maintained on the basis of the principles of joint enterprise. The legal position in relation to the same has been addressed elsewhere in this judgement (vide paras 45 to 51 above). The same principles are applicable in the

analysis of the evidence against the 2nd Appellant, in determining his liability either of murder or manslaughter.

Appeal ground one advanced by the 2nd Appellant

[71] In relation to ground one the grievance of the 2nd Appellant is that his case was not put fairly to the assessors. The 2nd Appellant was represented by a private counsel at the trial.

[72] The court record clearly indicates that at the conclusion of the summing up the Trial Judge had given both parties an opportunity to seek a redirection on any point. No such redirections had been sought on behalf of the 2nd Appellant. If the case was not fairly put to the assessors as alleged, the counsel for the 2nd Appellant could have sought a redirection on the matter.

[73] Moreover, paragraphs 27 and 28 of the summing up reflect, that the Trial Judge had adequately dealt with the evidence against the Appellants, including the participatory part played by the 2nd Appellant. The said two paragraphs appear elsewhere in this judgement (vide para 105 below).

[74] Under the heading "*The Accused's cases*" in paragraphs 30-34 the Trial Judge had adequately dealt with each Accused's case.

[75] The following remarks made by the Trial Judge in paragraphs 31 and 41 of the summing up in relation to the involvement of the 2nd Appellant are specifically worthy of note:

> *"31. As for Accused No. 2, on oath, he denied the two allegations against him. He admitted he was arrested by police on 23 August 2010. He admitted he was caution interviewed by police on 24 August 2010. He said, he was repeatedly assaulted by police. Chillies were rubbed on his anus and private parts. He said he gave his police caution interview statements involuntarily, and asks you to disregard the same."*

"41. Accused No. 2's police caution interview statements were tendered as Prosecution Exhibit No. 20(A) and 20(B), and his charge statements as Prosecution Exhibit NO. 21(A) and 21(B). In questions and answers 74, 75, 82, 86 to 110 and 112 of Prosecution Exhibit 20(B), Accused No. 2 admitted count no. 2 (aggravated robbery), but denied count no. 1 (murder). However, in questions and answers 94, 95, 96, 97, 99, 102, 108 and 110 of Prosecution Exhibit No. 20(B), Accused No. 2 admitted assisting in lifting the deceased from his room to the girl's room, admitted holding the old man to stop him struggling and shouting in his room, while two others repeatedly punched the old man in the ribs, admitted assisting in tying up the old man's hand and legs, and later untying him, admitted putting the old man between 2 beds in the girl's room. These admissions were important on the question of whether or not Accused No. 2 was guilty of murder or manslaughter on the principle of joint enterprise, or aiding and abetting the commission of a crime. In question and answer 18 of his charge statement, Accused No. 2 admitted aggravated robbery, but denied murder."

[76] Viewed from the foregoing I find no merit in appeal ground one.

Appeal ground two advanced by the 2nd Appellant

[77] In relation to the appeal ground two the grievance of the Appellant is, that the Trial Judge had erred in not considering the locality in which the offence was committed.

[78] Section 278 of the Criminal Procedure Act 2009 states that:

"Proceedings in wrong place

278. No finding sentence or order of any court hearing a criminal case shall be set aside merely on the ground that the trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong district or other local area, unless it appears that such error has in fact occasioned a failure of justice."

[79] In ***Koroi v State*** [2002] FJHC 152; HAA0055.2002S (23 August 2002), his Lordship Justice Singh stated that:

> "*The section is very clear. Unless the appellant can show that the failure to conduct proceedings in Nausori Court occasioned a failure of justice, he is not entitled to succeed. The onus is on him to show failure of justice. Rarely if ever an appellant who has pleaded guilty would succeed in showing a failure of justice. A failure of justice may occur where an accused with limited means is tried in an incorrect district and because of his limited means he is unable, due to expenses involved, to bring his witnesses to court and is unable to put forward his defence properly. The mere hearing of an action in a wrong court is by itself not a sufficient reason to set aside a conviction…"*

[80] It clearly appears that no objection had been taken at the trial proceedings, for holding the trial in a wrong locality. It should also be noted, that the trial proper commenced more than five years after the incident, giving the Appellant ample time to raise the impugned issue. Further in relation to the impugned issue no error appears to have occurred which caused prejudice to the accused, or occasioned a failure of justice.

[81] In relation to the application that has been made seeking leave to lead fresh evidence, the following common law rules must be taken into consideration:

> *"In **Fraser v State** [2021] FJCA 185; AAU 128.2014 (5 May 2021) the Court of Appeal had noted the following in relation to fresh evidence:*
>
> *[61] The fresh evidence the appellant seeks to adduce is that of his escorting officer SC 4187 Siriako Masala to the effect that the witness had seen Ronika Kiran and Imran Ali talking to each other during the trial.*
>
> *[62] Section 28 of the Court of Appeal Act, provides that the Court of Appeal may, if it thinks it necessary or expedient in the interest of justice receive fresh evidence by way of documents or witnesses (see Mudaliar v State Criminal Appeal No. CAV 0001 of 2007: 17 October 2008 [2008] FJSC 25 and Chand v State CAV0014 of 2010: 9 May 2012 [2012] FJSC 6).*
>
> *[63] In Tuilagi v State AAU0090 of 2013: 14 September 2017 [2017] FJCA 116 the Court of Appeal considered several past decisions and held that the main criteria for fresh evidence at the appeal stage is set out in Ladd v Marshall [1954] 3 All ER 745:*

*'[36] The Supreme Court in **Mudaliar** quoted with approval **Ladd v Marshall** [1954] 3 All ER 745 and stated there were three following preconditions to the reception of such evidence on appeal. The Supreme Court had referred to other decisions quoted in the following paragraphs as well:*

(i) the evidence could not have been obtained prior to the trial by reasonable diligence;
(ii) it must be such as could have had a substantial influence on the result; and
(iii) it must be apparently credible.'

*'[37] **Tuimereke v State** Criminal Appeal No. AAU 11 of 1998: 14 August 1998 [1998] FJCA 30 the Court of Appeal considered the principles governing the reception of fresh evidence in criminal matters. They referred to **Ratten v R** [1974] HCA 35; (1974) 131 CLR 510 and **Lawless v R** [1979] HCA 49; (1979) 142 CLR 659. In both **Ratten** and **Lawless** the High Court focussed upon the expression "miscarriage of justice" in the context of intermediate appellate courts dealing with criminal matters.'*

*'[41] In **Singh v The State** Criminal Appeal No.CAV0007U of 2005S: 19 October 2006 [2006] FJSC 15 the Supreme Court stated:*

"The well-established general rule is that fresh evidence will be admitted on appeal if that evidence is properly capable of acceptance, likely to be accepted by the trial court and is so cogent that, in a new trial, it is likely to produce a different verdict ..."

[66] Accordingly, the application to lead fresh evidence is refused.

[82] The following submission of the State on the point, set out under paragraph 21of its written submissions, is noteworthy:

"21. In relation to this ground, the appellant, Sireli Lilo has filed 2 Affidavits in relation to the issue of Rusila Baki, the witness for Sireli Lilo being available at the time to give evidence but due to Sireli Lilo's action, he had forgotten to inform the Officer in Charge of the Suva Correctional Centre to relay to his witness that the venue for the trial had change. It is unclear what the exact date was because the matter was first listed in the Suva High Court from the 25th of July 2014 and the Voir Dire had begun on the 17th of November 2015. The time was sufficient for the appellant to make the necessary arrangements, and further he had the services of counsel at the time to arrange for the said witness to come and give evidence at the Voir

Dire. Failure to do so was on the part of the appellant. It was his own decision not to call the said witness because if he wanted the witness to give evidence there were other methods to give evidence in terms of electronic mode etc."

[83] As mentioned earlier, the trial proper had commenced five years after the incident during which the time the Appellant had ample occasion to make arrangements find and call witnesses necessary to advance his defence, if he so wished.

[84] Ex facie the Appellants application to lead fresh evidence does not satisfy criteria set out in the judicial authorities set out above. In the circumstances the application to admit fresh evidence is refused.

[85] Having regard to the foregoing I hold that appeal ground two lacks merit.

Appeal ground three in respect of the 2nd Appellant

[86] The third ground of appeal pertains to the admission of the confession contained in the record of caution interview and charge statement.

[87] The Trial Judge had well considered the instant issue raised by the 2nd Appellant in paragraph 48 of the summing up which reads:

"48. The police caution interview officers, charging officers and witnessing officers said, they did not assault, threaten or made false promises to the five accuseds, while they were in their custody. They said, all the accuseds were given their right to counsel, right to talk to their relatives, formally cautions and given the standard rest and meal breaks, when they were caution interviewed and formally charged. The police officers said all the accuseds gave their statements voluntarily and out of their own free will. The police said, none of the accuseds complained to the Magistrate Court or the High Court of any police misbehaviour. No medical report was produced in court to verify injuries suffered as a result of alleged police assaults. Because of the above, the prosecution ask you to take into account the accuseds' interview and charge statements in your deliberation. Which version of events to accept and/or reject is entirely a matter for you."

[88] This ground of appeal lacks merit.

Grounds of appeal in relation to the 3rd Appellant

[89] The single judge of appeal in his ruling dated the 30th August 2019, granted leave to proceed, to the 3rd Appellant, on the following single ground of appeal against the sentence:

> *"1. THAT the final sentence imposed is harsh and excessive in the circumstances of the case."*

[90] The 3rd Appellant appearing in person, advanced the foregoing ground of appeal before the full court.

[91] The 3rd Appellant was acquitted of the offence of murder. However, he was convicted on count 2 for the Aggravated Robbery and sentenced to a period of 13 years with a non-parole period of 12 years.

[92] The tariff for Aggravated Robbery is well settled. As held by the Supreme Court in ***Wallace Wise v The State*** (2015) FJSC7; CAV0004.2015 (24 April 2015) the range of sentence for the offence of Aggravated Robbery should fall between 8 to 16 years. In the present case the sentence is well within the tariff for the offence of Aggravated Robbery.

[93] Section 4 (1) of the *Sentencing and Penalties Act 2009* sets out the following sentencing guidelines.

> *4. — (1) The only purposes for which sentencing may be imposed by a court are—*
> *(a) to punish offenders to an extent and in a manner which is just in all the circumstances;*
> *(b) to protect the community from offenders;*
> *(c) to deter offenders or other persons from committing offences of the same or similar nature;*
> *(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;*
> *(e) to signify that the court and the community denounce the commission of such offences; or*
> *(f) any combination of these purposes.*

[94] Paragraph 27 of the summing up states that *the "Accused No. 3 was told by the group to stand at the house gate, and act as the look-out. He was to warn the group if anyone approached the crime scene".* On that basis the 3rd Appellant claims that he played a minor role in the robbery and hence the sentence passed on him is excessive. However, the fact remains, the trial proceeded against all five Appellants on the principle of joint enterprise, the principles of which have been addressed elsewhere in this judgment (vide paras 45 – 51above). When a group of accused are charged with a crime committed with similar intentions, in a situation that falls within the ambit of joint enterprise, the part played by each, whether minute or substantial is not a matter that merits a favorable consideration.

[95] In ***Wallace Wise v The State*** (supra) the Supreme Court observed that;

> "……*it is our duty to make clear these types of offences will be severely disapproved by the courts and be met with appropriately heavy terms of imprisonment. It is a fundamental requirement of a harmonious civilized and secure society that its inhabitants can sleep safely in their beds without fear of armed and violence intruders…."*

Furthermore, the Supreme Court held the fallowing as additional aggravating factors, which, would enhance sentence:

(i) Offence committed during a home invasion.
(ii) In the middle of night when victims might be at home asleep.
(iii) Carried out with premeditation, or some planning
(iv) Committed with frightening circumstances such as the smashing of windows, damage to the house property, or the robbers being masked.
(v) The weapons in their possession were used and inflicted injuries to the occupants or anyone else in their way.

[96] Many of the aggravating factors mentioned above are present in the instant case as discussed in the foregoing paragraphs, which do not warrant interference with the sentence passed by the trial judge on the 3rd Appellant.

[97] This ground of appeal lacks merit.

Ground of appeal in relation to the 4th Appellant

[98] The 4th Appellant had filed a leave to appeal application before this court setting out five grounds of appeal.

[99] The single judge of appeal had granted leave only on the following ground of appeal against the conviction:

> *"THE learned Trial Judge caused a miscarriage to justice in failing to fairly to and objectively apply the principle of joint enterprise to convict the Appellant of murder whilst a co-accused was convicted of manslaughter."*

[100] The 4th Appellant further had filed a notice of renewal in relation to the following ground of appeal:

> *"THAT the Learned Trial Judge cause a miscarriage of justice by convicting the Appellant solely on the confession contained in the caution interview of the Appellant."*

[101] The 4th Appellant also had filed an application to adduce fresh evidence.

Consideration of the ground of appeal on which leave was granted

[102] The conviction against the 4th Appellant was based on his admissions in his record of interview and his statement in his charge statement. The 4th Appellant in the said statements had admitted to the robbery and the murder of the deceased.

[103] As addressed elsewhere in this judgement (vide paras 45 – 51 above) the prosecution presented its case on the principle of joint enterprise. The 4th Appellant was clearly involved in the group attack of the deceased's house and the manner of his participation in the crime makes him equally culpable of the murder of the deceased.

[104] The Trial Judge in his judgment had given the following reasons for his decision to convict the 4th Appellant of murder:

> *"8. As for Accused No. 4 and 5, both accused in their charge statements, admitted count no. 1 and 2 of the information. In their police caution interview statements, both Accused No. 4 and 5 admitted aggravated robbery, but denied murder. Given their confessions in their charge statements, I reject their denial of murder in their police caution interview statements. I find that they voluntarily gave their confessions in the charge statements, and the same was given with their own free will, and the confessions they made were true. I also accept that their confessions on aggravated robbery in their caution interview statements were given voluntarily and out of their own free will, and the same were true. I reject their denials of murder in the same, and rule the denials as untrue."*

[105] On paragraphs 18 of the summing up the Trial Judge had directed the assessor's on the distinction between murder and culpable homicide. What each Appellant had done in the course the offending was amply set out in the paragraphs 27 and 28 which are as follows:

> *"27. According to the prosecution, Accused No. 3 was told by the group to stand at the house gate, and act as the look-out. He was to warn the group if anyone approached the crime scene. The other four accuseds went into Mr. Dass's house, ransack the same, and stole the items mentioned in count no. 2 of the information. Accused No. 1 went into the empty bedroom, sitting room, kitchen and Mr. Dass's room. Accused No. 2 went into Mr. Dass's room, the girl's room, kitchen and sitting room. Accused No. 4 went into Mr. Dass's room, the girl's room, the vacant room, sitting room and kitchen. Accused No. 5 went into the girl's bedroom and other parts of the house.*
>
> *28. According to the prosecution, Accused No. 4 strangled Mr. Dass to death, and he was assisted by Accused No. 5 and Accused No. 2. Accused No. 2, when he entered the house, went into Mr. Dass's room. Mr Dass was asleep, and Accused No. 2 went and held him, while two others were punching him in the chest. He assisted in the tying of Mr. Dass, and his been taken to the girl's room. Accused No. 4, No. 5 and No. 2 subdued Mr. Dass in his daughter's room. He died later in the same. After ransacking and stealing Mr. Dass's properties, the five accused fled the crime scene."*

[106] Having regard to the acts committed by the 2nd Appellant in the course of the offending a clear demarcation could be made as to the reasons why the latter was convicted of manslaughter.

[107] The Trial Judge had well considered the evidence led at the trial in relation to the admissions contained both in the record of interview and the charge statement of the 4th Appellant. The following paragraphs of the summing are worthy of note in this regard.

> *33. As for Accused No. 4, because of his non- attendance, he was deemed to have chosen to remain silent. He was caution interviewed by police on 2 September 2010, and was formally charged on 6 September 2010. In his charge statement he admitted two charges against him.*
>
> *43. Accused No.4's police caution interview statements were tendered as Prosecution Exhibit No. 6 (A) and 6(B), and his charge statements as Prosecution Exhibit No. 23(A) and 23 (B). In questions and answers 19,25,27,28,35 to 38,45 to 4 , 51 to 59 ,62 to 77, 80 to 92 ,98 to 100 and 104 of Prosecution Exhibit No. 6 (B). Accused No.4 admitted count No. 2 (aggravated robbery), but denied murder. He admitted been near to the old man in questions and answers 68 to 71, 81 to 84 and 37 of Prosecution Exhibit No. 6 (B). However, in his charge statement, Accused No.4 admitted both aggravated robbery and the murder of the deceased.*
>
> *49. Accused No. 4 and 5 had confessed to the murder (count No.1) of Mr. Daas, and the aggravated robbery (count No.2) against him, at the material time, in charge statements.*

[108] Furthermore the Trial Judge had clearly set out the reasons substantiating the conviction of the 2nd Appellant of manslaughter in paragraph 10 of the judgment, which reads:

> *"10. As for Accused No. 2, I accept Assessors No. 2 and 3's opinion that he is not guilty of murder, but guilty of the lesser offence of manslaughter. I reject Assessor No. 1's opinion that he's guilty of murder. On oath, Accused No. 2 denied both count no. 1 and count no. 2. In his caution interview and charge statement he denied murder. However, in his interview statements, he admitted he participated in the attack on the old man, at the material time. He admitted when he broke into Mr. Dass's house, he went into his bedroom, saw him asleep, forcefully held him to prevent him from struggling and shouting, did nothing when two of his friends were*

> *punching Mr. Dass in the ribs, assisted in tying his hands and legs, and then carried him to the girl's bedroom. It would appear the assessors accepted that he gave the above statements voluntarily and they were the truth. I accept the above position, and I accept the majority view that Accused No. 2 is not guilty of murder, but guilty of the manslaughter of Mr. Dass. I also accept that he confessed to aggravated robbery in his interview and charge statements, and I accept the same were given voluntarily and they were the truth."*

[109] In paragraph 28 of the summing up the Trial Judge observes that according to the prosecution version it was the 4th Appellant who strangled the deceased to death.

Consideration of the ground of appeal in the notice of renewal

[110] There is no legal impediment to convict an accused solely on a confession contained in the caution interview.

[111] In ***Dass v State*** [2018] FJCA 67; AAU 59 .2014 (1 June 2018) the Court of Appeal has held that

> "*As it had been decided in the cases of **Mohammed Alfaaz v. State** Criminal Appeal No. AAU 0030 of 2014 (8 March 2018) and in the case of **Hassan v. Reginam**, Criminal Appeal No. 57 of 1977; 28 July 1978 [1978] FJCA18, it is possible in law to find an accused person guilty of even a charge of murder, solely based on the admissions contained in a caution statement".*

[112] As addressed elsewhere in this judgement (vide paras 86,103,104 and 106 above) the Trial Judge had dealt with the issues, pertaining to evidence presented by the prosecution at the trial, in relation to admissions both in the record interview and the charge statements of the Appellants.

[113] Having regard to the foregoing I hold that both grounds of appeal lack merit.

[114] The appellant's application to lead fresh evidence, does not satisfy the criteria set out by the authorities mentioned in paragraph 81 above. Hence the application to lead fresh evidence is refused.

Grounds of appeal in relation to the 5th Appellant

[115] As addressed elsewhere in this judgement (vide paras 45 to 51 above) the prosecution presented its case on the principle of joint enterprise. The 5th Appellant was clearly involved in the group attack of the deceased's house and the manner of his participation in the execution of the crime makes him equally culpable of the murder of the deceased on the basis of the said principle.

[116] The 5th Appellant had filed a leave to appeal application before this court advancing five grounds of appeal. The single judge of appeal by his ruling dated 30th August 2019 had granted the Appellant leave only on ground five which is as follows:

> *"THAT the Learned Trial Judge caused a miscarriage of justice in failing to fairly and objectively apply the principle of joint enterprise to convict the appellant of murder whilst a co-accused was convicted of manslaughter."*

[117] The foregoing ground of appeal of the 5th Appellant is a verbatim reproduction of the first ground of appeal advanced by the 4th Appellant. Therefore, the legal and factual analysis made in relation to the first ground of appeal advanced on behalf of the 4th Appellant, on the issue of applicability of criminal liability, on the basis of joint enterprise, specifically the basis on which the Trial Judge made a distinction on liability to convict the 2nd Appellant of manslaughter, is valid for consideration herein too (vide paras 103,104 and 105 above).

[118] Whilst the trial proper was in progress the 5th Appellant had been absent and a bench warrant was issued on him. The attempts made by the police to locate him failed and the state had taken steps to notifying the Appellant of his date of trial through an advertisement of a local newspaper. Ultimately, the trial had proceeded against him in absentia.

[119] The following passages of the summing up of the Trial Judge, reflect the role played by the 5th Appellant in the impugned crime, which imputes criminal liability on him, of both robbery and murder on the basis of joint enterprise.

> *"28. According to the prosecution, Accused No. 4 strangled Mr. Dass to death, and he was assisted by Accused No. 5 and Accused No. 2. Accused No. 2, when he entered the house, went into Mr. Dass's room. Mr Dass was asleep, and Accused No. 2 went and held him, while two others were punching him in the chest. He assisted in the tying of Mr. Dass, and his been taken to the girl's room. Accused No. 4, No. 5 and No. 2 subdued Mr. Dass in his daughter's room. He died later in the same. After ransacking and stealing Mr. Dass's properties, the five accused fled the crime scene."*
>
> *"Accused No. 5:*
>
> *44. Accused No. 5's police caution interview statements were tendered as Prosecution Exhibit No. 15(A) and 15(B), while his charge statement as Prosecution Exhibit No. 24(A) and 24(B). In questions and answers 33, 36 to 38, 43, 49, 58, 60, 61, 63, 70 to 75, 77, 78, 88, 91, 93 and 98 Prosecution Exhibit No. 15(B), Accused No. 5 admitted count no. 2 (aggravated robbery), and denied murder in question and answer 66. However, in his charge statement, Accused No. 5 admitted count no. 1 (murder) and count no. 2 (aggravated robbery) in question and answer 6 of Prosecution Exhibit No. 24(A) and 24(B)."*
>
> *49…….Accused No. 4 and 5 had confessed to the murder (count No.1) of Mr. Daas, and the aggravated robbery (count No.2) against him, at the material time, in charge statements*

[120] As addressed elsewhere in this judgement (vide paras 86,103,104 and 106 above) the Trial Judge had dealt with the issues, pertaining to evidence presented by the prosecution at the trial, in relation to admissions both in the record interview and the charge statements of the Appellants.

[121] The foregoing findings amply substantiate the Trial Judge's decision to convict the 5th Appellant of murder, making a clear demarcation in criminal liability with that of the 2nd Appellant's, which led the latter to be convicted of manslaughter.

[122] The ground of appeal advanced by the 5th Appellant lacks merit.

Order

1. Appeals of all five Appellants dismissed.

Hon. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice W. Bandara
JUSTICE OF APPEAL