

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

CRIMINAL APPEAL NO. AAU 0126 OF 2022
[Lautoka High Court: HAC 09 of 2016]

BETWEEN : **APISAI LOMANI** ***Appellant***

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

Coram : Qetaki, RJA

Counsel : Mr T. Cati, Mr E. Navuda for the Appellant
Mr S. Seruvatu for the Respondent

Date of Hearing : 27 February, 2025

Date of Ruling : 14 March, 2025

RULING

Background

[1] The Appellant, who was first accused during trial was charged with multiple counts in the High Court, the Information reads:

Count 1

Unlawful Cultivation of An Illicit Drug: Contrary to section 5 (a) of the Illicit Drugs Control Act 2004.

Apisai Lomani Junior together with another, between 1st day of August 2018 and the 26th day of December 2018 at Waikoloa Farm, Nakasaleka Kadavu in the Southern Division unlawfully cultivated 23 plants of Indian hemp botanically known as Cannabis Sativa, an illicit drug weighing 10.5 kg.

Count 2

Murder: Contrary to section 237 of the Crimes Act 2009.

Apisai Lomani Junior and **Leone Naisake** on 26th day of December 2018 at Waikoloa Farm, Nakasaleka, Kadavu in the Southern Division murdered **Filipe Lomani Junior**.

Count 3

Giving False Information To a Police Officer: Contrary to section 201 of the Crimes Act 2009.

Apisai Lomani Junior between the 26th day of December 2018 and 29th day of December 2018 at Kadavu in the Southern Division gave false information to W/CPL 3654 Moli, a Police Officer, knowing it to be false.

- [2] In a judgment dated 2nd November 2022 the Appellant was acquitted on Count 1 and convicted on Counts 2 and 3. He was sentenced on 16th November 2022 to Life Imprisonment with a minimum term of 18 years (Count 2) whilst the sentence for Count 3 was made concurrent to the Life Imprisonment sentence.
- [3] The Appellant filed a timely notice of appeal against conviction and sentence dated 13 December 2022, and subsequently counsel for the Appellant filed an amended notice of appeal against conviction and sentence on 29th July 2024.
- [4] On 25th January 2025, the Appellant filed The Appellant’s Submission for Leave.

Brief Facts

- [5] The following brief facts is adopted from the Respondent’s version in its written submissions:

“On 26 December 2018 at Vacalea Village, Kadavu, the two appellants and a few others carried on a drinking party which started after lunch on Christmas Day.

Alcohol was consumed and the party lasted throughout the night up to sometime after midday on 26 December 2018 when the group, led by the appellant, left for Wailoaloa farm. At the top of the hill overlooking the farm, the men were divided into two groups, descending on both sides of the deceased's farm house. Though the appellant had said for no one to assault the deceased, things changed when the group descended on the farm at Wailoaloa.

The deceased, upon seeing the men approaching, ran from his farm house. The co-appellant gave chase and immediately dealt heavy, forceful blows to the deceased's head, face and chest, swearing at the deceased as he was doing so. The group led by the appellant heard the deceased scream. When the appellant arrived where the co-appellant was assaulting the deceased, he too punched the deceased on the head and chest and hit the deceased's body with the flat surface of the cane knife he was holding. The appellant stomped and kicked the deceased on the chest and abdominal area.

The deceased was left at the farm injured and bleeding and the group returned to the village. It was the last time anyone would see the deceased alive.

A postmortem examination revealed the cause of death as being severe bleeding within and underneath the second covering of the brain, or brain injury due to severe blunt force trauma to the head. Bleeding and bruising between the last layers of the skin over the skull indicated severe force applied to the head.”

Grounds of Appeal (As Amended and filed on 29th July 2024)

[6] The Amended grounds are as follows:

Against Conviction

Ground 1- *That the learned Judge erred in law and in fact in failing to properly and lawfully consider the contradictions in the prosecution evidence, which were largely in the form of recent concoctions at trial, in respect of the alleged unlawful conduct of the Appellant on the count of Murder.*

Ground 2- *That the learned trial Judge erred in law and in fact in finding that the Appellant had embarked on a common purpose with the co-accused to assault and murder*

the deceased when there were clear admissions from the Prosecution witnesses that the Appellant had strictly instructed everyone that the accused was not to be assaulted.

Ground 3- *That the trial Judge being in error of law and fact therefore arrived at a guilty verdict on the Appellant, on the charge of murder that was not supported by the entire evidence before the Court.*

Against Sentence

Ground 1- *That the non-parole period on the sentence ordered by the learned trial Judge, given the entire circumstances of the case was manifestly harsh and excessive.*

Test For Leave to Appeal

[7] The test applicable for granting leave to appeal to the Full Court may be stated as follows:

“To succeed in an application for leave to appeal, all that is required of the appellant is, to demonstrate arguable grounds of appeal”: **Chand v State** AAU0035 of 2007;19 September 2008 [2008] FJCA 53.

[8] Other formulation of the test are: “sufficiently arguable ground” in **Bailey v Director of Public Prosecutions** [1988] HCA 19; (1988) 78 ALR 116;(1988) 62 ALJR 319; (1988) 34 A Crim R 154 (3 May 1988); having a “real prospect of success” in **R v Miller** [2002] QCA 56 (1 March 2002), and “No prospect of success” and “reasonable prospect of success” have also been used in other cases.

Case for the Appellant

[9] The Appellant’s submissions on Court’s discretion to grant leave and arguments in support of the grounds contained in paragraphs 10 to15 (Appellant’s Submissions) are reproduced below for ease of reference and discussion.

“10. The Court must delve into whether the grounds of appeal submitted by the Appellant are meritorious and worth consideration by the full Court. In order for it to exercise its discretion for leave, whether the grounds of appeal have any real prospects of success. So in the instance of this Court finds that the grounds of appeal lack merit, it will refuse leave to appeal for the Appellant.

11. *The grounds of appeal are in 3 limbs as stated in appellate grounds of appeal. The first one is to deal with the material inconsistencies by both the prosecution civilian witness during trial .That the inconsistencies or omissions by PW2 Aminiasi Seru during trial affects his credibility.*

12. *That the omissions by PW2 boosted the entire investigations to the allegations of murder which happened back in 2018. This ground of appeal rests on the entire copy record during trial after that court had ruled out admissions by the appellant in his caution interview.*

13. *The second limb to this appeal was there was no common purpose or joint enterprise in the commissioned of the unlawful act that led to the death of the deceased. That through the evidence of both PW1 and PW2 during trial they both confirmed that the appellant's instructions was not to harm or assault the deceased.*

14. *There wasn't any common purpose to assault the deceased nor there any meeting of the minds that resulted in the death of the deceased back in 2018. Therefore, this leave to appeal relies on the concoctions and material inconsistencies of evidence alluded during trial.*

15. *In the supreme court decision of Ram v State [2012] FJSC 12; CAV0001.2011 (9 May 2012) the court in its deliberations on the issue of inconsistencies referred to the common law principles as stated in paragraph 60 as follows:*

“We find the above quoted direction is proper and fair. It is also consistent with the principle of the common law as expressed by Lord Parker CJ in Regina v Golder [1960] 1WLR 1169 at page 1172 that “when a witness is shown to have made previous statements inconsistent with the evidence given by the witness at the trial, the jury should be directed that the evidence given at that trial should be disregarded as unreliable.” There may be exceptional circumstances in which the testimony of such witness may be regarded as reliable notwithstanding the prior inconsistent statement, such as where the witness is able to give convincing explanation for the inconsistency, and is also noteworthy that in Regina v Governor of Pentonville Prison, exp.Alves [1993] AC 284, Lord Goff of Chieveley, with whom other Law Lords agreed stressed that “the credibility of

evidence given by a witness inconsistent with a statement previously made was a matter for the jury to consider, subject to a proper warning by the Judge of the weight to be attached to the evidence.”

- [10] On leave to appeal against sentence, the Appellant submits that the sentence was harsh and excessive taking into account the guiding principles in the case **Kim Na Bae’s** case (supra).

Case for the Respondent

- [11] **Ground 1-** In replying to the Appellant’s submission that there were material inconsistencies in the evidence of both the prosecution witnesses during trial, the Respondent submits that the Appellant was represented at the trial by two Senior Counsels from the private Bar, who cross-examined the prosecution direct witnesses. However, the accounts of PW2 and PW3 were consistent in that they saw the appellant assaulting the deceased.

- [12] The Respondent submits that the learned trial judge had dealt with the sworn evidence of PW2 and PW3 in paragraphs 63 to 75 of the judgment. For the purpose of the Ruling, paragraphs 73 to 75 only of that portion of the judgment are set out below :

“73. On the evidence before the Court, I do not consider the witnesses Timoci Nauagunu and Aminiasi Seru are accomplices.

74. I have also considered Timoci Nauagunu’s evidence that the Police had told him that he needed to give a statement in relation to the accused persons otherwise they would pin the murder charge on him and he would never see his family again. He denied being told to blame the accused persons or he would be blamed. Being told to give a statement in relation to the accused persons is not the same thing as to blame them for the alleged offences. Notwithstanding, I treat with some caution his evidence.

75. Having done so, I found him to be a reliable and truthful witness. I believe his evidence that the 2nd Accused had punched the deceased numerous times on the face and chest, and stomped and kicked the deceased’s chest. I believe his evidence

that when 1st Accused arrived at the scene, he too punched the deceased on the head and chest, and hit his chest with the flat side of the cane knife.”

[13] Later, the Respondent submits, at paragraph 78 and 79 of the judgment, the trial judge stated:

“78. I have considered the evidence of Aminiasi Seru. In his evidence, he apologized for giving incorrect evidence in Court by saying that he had been sent by the 1st Accused to get the deceased to the farmhouse, and also for the inconsistency between his Police statement and his evidence on oath. The inconsistencies in my opinion are on peripheral matters and do not shake the basis of the prosecution case. He said before the groups descended on the farm, the 1st Accused had told them not to do anything to Filipe. He gave evidence exonerating the 1st Accused from a plan to assault the deceased, and also evidence that the 2nd Accused and 1st Accused had punched the deceased on the head and on the chest. His evidence of the assault was consistent and unshaken.

79. Similarly, any inconsistencies between the evidence of Timoci and Aminiasi do not in my opinion shake the basis of the prosecution case. Each gave evidence of what they saw and as they remember the events that happened. They were in different groups as they descended and so would have seen events from different places and angles.

[14] The Respondent submits that the Court had directed itself on the issues of inconsistencies highlighted at the trial, and held it did not shake the basis of the prosecution case. PW2 and PW3 were direct witnesses to the deceased’s murder, and the Court had considered their sworn evidence and the veracity of the defence cross-examination and found them credible as witnesses. It submits, that the Appellate Courts have always agreed with the observations in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) in which the Court of Appeal stated:

“It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weigh and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.

We are not able to usurp the functions of the Lower Court and substitute our own opinion.”

[15] For the above reasons, the Respondent submits this ground has no reasonable prospect of success.

[16] **Ground 2-** The Respondent submits that when dealing with the issue of “*joint enterprise*”, the learned trial Judge had considered the totality of the evidence, and especially the sworn evidence of PW2 and PW3 who were direct witnesses to the deceased’s murder. That the learned trial Judge had formulated her reasoning on the concept of joint enterprise and its application, as set out in paragraphs 80 to 91 of the judgment. The learned Judge stated:

“83. The second Accused apprehended and punched the deceased on the face and chest. When the 1st Accused arrived, he too punched the deceased on the head and hit his body with the flat surface of the cane knife. The 2nd Accused stomped and kicked the deceased on the chest and abdominal area.

84. There can be no doubt that in assaulting the deceased together in this way, the accused persons were committing an unlawful act together and in concert with each other. The fact that they acted spontaneously on the same spur of the moment by no means negatives the criminality of their assault on the basis of joint enterprise. There was a shared intention to assault the deceased and their actions demonstrated this. Under the doctrine of joint enterprise, they are equally liable regardless of who did what.

.....
.....

87. The Prosecution says the accused persons were reckless in causing the death of the deceased.

88. A person is reckless with respect to a result if he or she is aware of a substantial risk that the result will occur and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

.....

90. *In joining the 2nd Accused in the act of assaulting the deceased, the 1st Accused demonstrated he shared the same intention to assault the deceased and actively participated in an unlawful purpose. Causing the death of the deceased was a probable consequence of the heavy and forceful punches to his head. Under the doctrine of joint enterprise, both accused persons are deemed to have committed the offence.*

91. *I feel sure of the accused persons' guilt and am satisfied beyond reasonable doubt that they had engaged in conduct, namely the punching of the deceased person's head and face. I feel sure that this conduct caused the death of the deceased and that the accused persons were reckless by their conduct."*

[17] The Respondent submits, that Ground 2 has no reasonable prospect of success.

[18] **Ground 3-** The Respondent contends that the Appellant's submission has not addressed this ground of appeal, and it is unclear what the ground attempts to address. In **Pal v State** [2020] FJCA 179; AAU145.2019 (24 September 2020) paragraph [19] of Ruling states:

"[19] It is clear that the appellant's grounds of appeal have been framed in very general terms and all of them allege shortcomings in the summing-up. The written submissions also render very little help in that regard as they lack elaboration and sufficient details in that the instances which constitute the alleged deficiencies raised in the grounds of appeal from the summing-up have not been pointed out. The appellate court cannot be expected to go on a voyage of discovery to find out what purported errors on the part of the trial judge have given rise to an appellant's ground of appeal or the factual or legal foundations thereof. As stated in Silatolu v The State [2006] FJCA 13; AAU0024.2003S (10 march 2006) it would not be an unfair description to suggest that the counsel has used a 'scatter gun' approach in drafting the grounds of appeal and not substantiated them with sufficient details at least in the written submissions."

[19] The Respondent submits that this ground has no reasonable prospect of success.

- [20] In relation to the ground against sentence, the Respondent submits that it is unclear from the Appellant's submission how the sentence was harsh and excessive. The Respondent points to **Vuniwai v State** [2024] FJCA 100; AAU176.2019 (30 May 2024) which sets the minimum term in cases such murder cases, and in this case the category of seriousness is 'Extremely High' in the category of- "*6. A murder committed with extreme brutality, cruelty, depravity or callousness or cold-blooded execution.*"
- [21] The Respondent submits that considering the facts of the case, a feature that is present in the extremely high range is present in this appeal in the manner the Appellant and another brutally caused the death of the deceased. However, his ultimate sentence fell in the 'High range'. Respondent submits that this ground has no reasonable prospect of success.

Analysis

- [22] In analyzing the judgment and in considering the grounds of appeal, I am mindful of the facts of this case, the legal principles applicable to the consideration of whether or not to grant leave to appeal against conviction and sentence, the legal authorities relevant to the grounds and the respective submissions/case of the parties to this appeal.
- [23] I find that the Appellant has not addressed the core and gist of the three grounds, of appeal against conviction. He has failed to demonstrate that each of the ground is arguable or that they have reasonable prospects of success, and the reasons. The Appellant's submissions on these grounds are too general, without consideration and analysis of the relevant parts /aspects of the judgment. This requires the Appellant to discuss the judgment and specifically point to the respective paragraphs of the judgment, and demonstrate/illustrate with facts and legal authority where, why and how the learned trial judge had faulted in law and in fact.
- [24] I agree with the submissions of the Respondents as relates to Grounds 1, 2 and 3. While it is understandable that at this stage the Appellant does not have the benefit of having the Record of the High Court proceedings, the Appellant is required to demonstrate that the grounds are arguable, and he has failed to do. The Respondent has adequately replied to the Appellant's grounds of appeal against conviction-see paragraphs [12] to [19] above. I accept the Respondent's submissions and conclusions. In my view, the learned trial judge

has properly assessed, evaluated and weighed all the evidences, especially the evidences of PW2 and PW3, and had arrived at a decision to convict the Appellant for his part in the serious crime of Murder.

Grounds 1, 2 and 3 are not arguable. They do not have merit.

[25] The sentence appeal also fails as the Appellant has not shown that the ground is arguable. The Appellant has failed to satisfy the requirements established and applied in numerous cases including **Naisua v State** [2013] FJSC 14; **House v King** [1936] HCA 40;(1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No. AAU0015. I agree with the Respondent's submissions in reply-see paragraph [20] to [21] above. The crime committed is categorized as "Extremely High" under **Vuniwai v State** (supra), and fits into "6. A murder committed with extreme brutality, cruelty, depravity or callousness or cold-blooded execution". The Starting point is 25 years imprisonment and the Minimum term range is 20-30 years imprisonment. However, the Appellant's sentence for Murder is Life Imprisonment, with a minimum term of 18 years, which is below the minimum for "Extremely High" category. The sentence ground is not arguable. It has no merit.

Order of Court

1. *Application for leave to appeal against conviction is refused.*
2. *Application for leave to appeal against sentence is refused.*



A handwritten signature in blue ink, appearing to be "Alipate Qetaki", is written over a horizontal line.

Hon. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL