IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 30 OF 2015

STATE

-v-

1. **MANASA TALALA**
2. **SERUVI CAQUSAU**
3. **KELEVI SEWATU**
4. **PENAIA DRAUNA**
5. **FILISE VERE**
6. **VILIAME VEREIVALU**
7. **JONA DAVONU**
8. **PITA MATAIRAVULA**
9. **SENITIKI NATAKASAVU**

Counsel: : **Mr. Lee Burney with Ms. J. Fatiaki for the State**

: **Mr. I. Khan for Accused**

Dates of Hearing : **02nd November 2016**

Date of Ruling : **07th November 2016**

RULING ON RECUSAL APPLICATION

1. The 1st accused (hereinafter referred to as the Applicant) on behalf of all the other accused persons filed this Notice of Motion supported by an affidavit seeking following orders:

a. *That the learned Trial Judge recuses himself from hearing the Applicant's criminal case No. HAC 30-2015*

b. *That another judge be appointed to hear the matter against the Applicant so that they do not have the suspicion, actual or apprehension of bias against them by the learned Trial Judge.*

2. The Applicant deposes that the learned Trial Judge took only the submissions made by the Prosecution into consideration and failed to take into consideration the submissions made by the Defence at the close of the Prosecution case *('no case stage')* in delivering the Ruling dated 1st day of November 2016 which held that there is a case to answer against all the accused persons, hence he is not confident that he will get a fair trial and the learned Trial Judge is biased against him.

3. The Applicant stated the following grounds in his affidavit:

a. That whilst the learned Trial Judge gave the said ruling he had only taken submissions made by the Prosecution only regarding all the charges and did not take into consideration submissions made by the Defense in particular all the legal authorities which would have shown to the learned Trial Judge that the Prosecution's evidence fell far short of the ingredients of the offence that the State was required to prove.

b. That the learned Trial Judge while discussing the laws on Aiding and Abetting, Joint Enterprise and Common Purpose only considered the legal authority submitted by the Prosecution.

c. That the Learned Trial Judge did not consider written submissions made by the Defence consisting of over 157 pages including authorities regarding **AIDING A ND ABETTING, KNOWLEDGE, INTENTION TO HELP OR ENCOURAGE, OFFENCE COMMITTED IN PROSECUTION OF**

COMMON PURPOSE, ACQUITAL, JOINT CRIMINAL ENTERPRISE, MEAR PRESENSE, PARTICIPATION, JOINT ENTERPRISE/COMMON DESIGN.

d. That if the learned Trial Judge had taken into consideration the above submission then he would definitely have distinguished the cases cited by the Prosecution.

4. Having stated his grounds in the affidavit, the Applicant requested for me (hereinafter referred to as the Trial Judge) to recuse myself in hearing his case and appoint another High Court Judge.

5. The learned Counsel of the Prosecution stated that he does not intend to file any affidavit in opposition, but objected to the application. I accordingly, invited the learned Counsel to make their respective submissions. Having carefully considered the affidavit and the respective submissions of the Applicant, I dismissed the application on the 2nd of November, 2016. I now proceed to pronounce my ruling with reasons as follows.

The Law

6. The rule against bias derives from the one of the fundamental principles of the Common Law system, that the conduct of adversarial trial by an independent and impartial tribunal. This rule is incorporated in Section 15 (1) of the Constitution of the Republic of Fiji which states that every person charged with an offence has a right to have fair trial before a court of law. It is impartiality that gives legitimacy to the decisions of the courts. Public confidence in the system of administration of justice is guaranteed by independent and impartial courts. Based on these principles, the common law provides for grounds for disqualification of a judge so that both the public perception of impartiality and public confidence in the system of justice is maintained.

7. The first legitimate ground for disqualification is when a judge has an interest in the

outcome of the case, unless the rule of necessity applies (see ***United States v Will***, *[1980] USSC 207; 449 US 200 (1980)*. The Applicant does not suggest that I have an interest in the outcome of his case, and therefore, he does not rely on this ground. The second ground for disqualification is based on actual and apparent bias. The applicant relies on this ground to seek my recusal.

8. In ***Regina v Gough*** **(1993, A.C 647)** Lord Goff observed:

> *"In any event, there is an overriding public interest that there should be confidence in the integrity of the administration of justice, which is always associated with the statement of Lord Hewart CJ in Rex v. Sussex Justices; Ex parte McCarth, that it is of fundamental importance that it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".*

9. His Lordship further observed;

> *"I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as there personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state that test in term real danger rather than real likelihood, to ensure that the court is thinking in term of possibility rather than probability of bias. Accordingly having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him".*

10. It appears that ***Gough*** *(supra)* has expounded a more subjective approach with much

focus on court's view than the public perception. The Gough's approach is mainly founded on real likelihood or possibility and not on the probability.

11. Meson CJ in ***Webb & Hay v R*** **(1994) HCA 30, (1994) 181 CLR 41)** has expressed his concerns on the Gough's approach, where his lordship found that;

> *"The test enunciated in R v Gough tends to emphasis the court's view of the facts and placed inadequate emphasis on the public's perception of irregular incident".*

12. Gleeson CJ in ***Ebner v Official Trustee in Bankruptcy*** **(2000) HCA 63, (2000) 205 CLR 337,** preferred to reflect on public's perception than on the court's own view, where his Lordship observed;

> *"The application of the test of apparent bias requires two steps. First it requires to identification of what it is said might lead a judge (or Juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on merits. The bare assertion that a judge (or juror) has an interest in litigation or an interest in party to it, will be of no assistance until the nature of the interest and the asserted connection with the possibility of departure from impartial decision making is articulate".*

13. House of Lords in ***Porter v Magill*** (2002) 2 AC 357, at 494) has adopted an approach on the issue of apparent bias in line with the developments in other Commonwealth and European jurisdictions, where Lord Hope of Carighead held that;

> *"In my opinion however it is now possible to set this debate to rest. The Court of Appeal took the opportunity in In re Madicaments and Related Classes of Goods (No 2) (2001) 1 WLR 700 to consider the whole questions. Lord Phillips of Worth Mattavers MR, giving the judgment of the court.....summarised the court's*

conclusion, at pp 726-727;

"When the Strasbourg jurisprudence is taken in to account, we believe that a modest adjustment of the test in R v Gough is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. ***The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased"*** *(emphasis added)*

I respectfully suggest that your lordships should now approve the modest adjustment of the test in R v Gough set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias".

14. The test employed in New Zealand on the issue of apparent bias has been discussed in ***Muir v Commissioner of Inland Revenue*** **(2007) NZCA 334,** (2007) NZLR 495) in a comprehensive manner, where the Court of Appeal in New Zealand held that;

"in our view, the correct enquiry is a two stage one, first it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the judge was or may be seen to be biased. This factual inquiry should be rigorous in the sense that complainants cannot lightly throw the "bias" ball in the air. The second inquiry is to then ask whether those circumstances as established might lead a fair minded lay observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case. This standard emphasized to the challenged judge that a belief in her own purity will not do, she must consider how others would view her conduct".

15. Having discussed the applicable test on the issue of apparent and actual bias in three main Commonwealth Jurisdictions of England, Australia and New Zealand, I now draw my attention to the approach taken by the Courts in the Jurisdiction of Fiji.

16. The Supreme Court of Fiji in ***Amina Koya v the State*** (1998) FJSC 2, upon consideration of the tests adopted in England, Australia and New Zealand, found that there is no much difference between asking whether a reasonable and informed person would consider there was a real danger of bias and asking whether a reasonable and informed observer would reasonably apprehend or suspect bias. However, the two approaches of real danger of bias and reasonable apprehension of bias has brought into a harmony in ***Porter v Magill*** *(supra).*

17. Justice Gounder in ***Mahendra Pal Chaudhry v The State*** (2010) FJHC 531 HAM 160.2010 (19 November 2010) adopted the objective test of whether a fair-minded and informed observer having considered all the actual circumstances would conclude that there is a reasonable apprehension on bias.

18. Justice Calanchini in ***State v Citizens Constitutional Forum Ltd, ex parte Attorney General*** **[2013] FJHC 220;** HBC195.2012 (3 May 2013) while adopting the test articulated in ***Porter v Maghill*** *(supra)* held that;

> *"Consistent with the decision in Porter –v- Magill (supra) the Court of Appeal in Patel and Mau –v- Fiji Independent Commission Against Corruption (unreported criminal appeal AAU 39 and 40 of 2011 delivered 12 September 2011) adopted a two stage enquiry. The first stage involved establishing the actual circumstances which have a direct bearing on a suggestion that the judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias" ball in the air. The second stage is to determine whether those circumstances as established might lead a fair-minded lay-observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case. This*

involves an objective determination in the sense that it requires an enquiry as to how others would view the judge's position".

19. The Supreme Court of ***Fiji in Patel v Fiji Independent Commission Against Corruption*** [2013] FJSC 7; CAV0007.2011 (26 August 2013) has adopted the test enunciated in Porter v Maghill *(supra).*

Analysis

20. Having discussed the relevant legal authorities governing the notion of apparent and actual bias, I now proceed to apply the two stage test and endeavor to ascertain all the circumstances which have a bearing on the suggestion that the trial judge was biased. Then I ask myself whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger that the trial judge was biased.

21. The Applicant complains that the Trial Judge did not take into consideration the submissions made by the Defence in particular all the legal authorities which would have shown to him that the Prosecution's evidence fell far short of the ingredients of the offence that the State was required to prove.

22. It should be emphasised at the outset that the test at the 'no case stage' is whether or not there is some relevant and admissible evidence, direct or circumstantial, touching on all elements of the charge, the weight and credibility of such evidence not being matters for assessment in a High Court trial: The State v George Shiu Raj & Another, Criminal Appeal No. AAU 0081 of 2005, Fiji Court of Appeal; The State v Brian Singh, Criminal Appeal No. AAU 0097 of 2005, Fiji Court of appeal, Sisa Kalisoqo v Reginam, Criminal Appeal No. 52 of 1984, Fiji Court of Appeal and State v Anesh Ram, Criminal Case No. HAC 124 of 2008S, High Court, Suva.

23. It appears that the Applicant does not complain that aforementioned test applied by the

trial judge is wrong or its application by Court is in contrast to his legal submission. Rather his complaint is based on the premise that the trial judge did not take into account the case law cited by him and the relevant legal principles discussed therein in respect of AIDING AND ABETTING, KNOWLEDGE, INTENTION TO HELP OR ENCOURAGE, OFFENCE COMMITTED IN PROSECUTION OF COMMON PURPOSE, ACQUITAL, JOINT CRIMINAL ENTERPRISE, MEAR PRESENSE, PARTICIPATION, JOINT ENTERPRISE/COMMON DESIGN and, if they were in fact taken into consideration the result would have different.

24. It is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias" ball in the air. Therefore, I take all the case authorities cited by the Applicant in his submission one by one to show that all the relevant case law /legal principles he wished this Court to consider had been given due consideration by the Trial Judge in coming to his decision.

AIDING AND ABETTING

25. The Applicant had cited New Zealand case law on the basis that SECTION 66 OF THE CRIMES ACT 1961 (NZ) SECTION is identical to Section 45 and 46 OF THE CRIMES DECREE OF FIJI. This court conceded the fact that the legal principles articulated by New Zealand case law are applicable in Fiji.

26. Under the heading **JOINT CHARGES AND PROOF OF GUILT** the Applicant submitted ....

> *"Where two persons are jointly charged with the commission of an offence but all that can be proved is that the offence was committed either by one or the other, both must be acquitted:* ***SMITH AND HOGAN Criminal law (8th ed), 1996, p.136,*** *approved in* ***R v WITIKA (1991) 7 CRNZ 621 (CA).*** *Although it is not necessary for the Prosecution to identify the precise part played by each person, it*

must be proved that the offence was actually committed by one as the principal party with the other person aiding or abetting etc. as a secondary party, or that both were principal parties. ***WITIKA*** *(above);* ***R v. RENATA*** ***[1992] 2 NZLR 346 ; (1991) 7 CRNZ 616 (CA);*** ***R v. PHAM*** ***6/7/98,*** *Williams J, HC Auckland 198/98; see also* ***R v. LANE*** *(1985) 83 Cri App R 5:* ***R v. RUSSELL*** ***(1987) 85 Cr App. R 388;*** ***COLLINS v. CHIEF CONSTABLE OF MERSEYSIDE*** ***[1988] Crim LR 247; Griew,*** *"It must have been one of them"* ***[1989] Crim LR 129; G Williams,*** *which of you did?" (1989) 52 MLR 179".*

27. The Trial Judge in fact considered the legal principles discussed in all these authorities and in particular ***R v. Russell (1987) 85 Cr App. R 388,*** one of the authorities that the Applicant was relying on to support his legal argument. He gave reasons as to why he was not bound by that judgment in view of ***R v. Forman and Ford*** [1988] Crim. L.R. 677 which was more appropriately applicable to the facts of the case before him.

I quote the relevant portion of Ruling of the Trial Judge: *(para 53)*

> *"At the close of the prosecution case, both counsel for the defence submitted that there was no case to answer, relying upon Abbott (1955) 39 Cr. App. R. 141 and* ***Russell and Russell*** *(1987) 85 Cr. App. R. 388, i.e. if two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty in the case of both. (emphasis added)*
>
> *Rejecting the submissions, the judge gave the following judgment and subsequently directed the jury in similar terms:*
>
> *I. If one police officer, despite being in the presence of another officer, has the added confidence to assault their joint prisoner because he can and does rely on the second officer neither to intervene to prevent nor afterwards to report that offence, and the second officer in fact refrains from intervening and from reporting the offence, then it does not matter*

which of them struck their prisoner and which of them in that way encouraged him to do it. Both of them are guilty of the assault.

2. *If the jury find that T was assaulted while in the cell alone with the two defendants but are not sure which of them assaulted him, both must be acquitted* ***unless the jury are sure in respect of each of them that if he himself did not commit the assault he encouraged the other to do so by failing to intervene or to report the offence in the way described at 1. In that event both would be guilty.*** *(emphasis added) (para 54)*

28. Going further, the Trial Judge expounded the said legal principle in the context of Section 45 of the Crimes Decree, 2009 and stated:

> *"According to this judgment, if the prosecution can prove only that the crime must have been committed either by A or by B, both must obviously be acquitted. If however they can prove that one of them committed the crime and the other aided and abetted him in doing so, so, then both may be convicted. It is immaterial that it is impossible to identify the principal offender for, by the Section 45 of the Crimes Decree 2009, one who aids, abets, counsels or procures the commission of an offence may be indicted, tried and punished as a principal offender"(Para 55)*

29. The Prosecution is relying on the legal concepts described in Sections 45 and 46 of the Crimes Decree 2009, namely, complicity in crime by aiding and abetting and joint enterprise to prove the first four charges against the Applicant and the co-accused jointly charged with him.

30. There was evidence that all the accused persons were present at the crime scene. **There was also *prima facie* evidence that accused were acting in concert.** Therefore, even the principle enunciated in ***Russell and Russell*** *(1987) 85 Cr.App.R. 388,* (the authority cited by the Applicant), was applied, a conclusion different from the one the trial judge reached in his 'no case ruling' could possibly have been reached.

31. Under the heading **AIDING** (s 66 (1) (b) P. 183, the Applicant submitted:

> *"Aiding means assisting, helping or giving support to. Although s 66 (1) (b) stipulates only that a person does or omits an act "for the purpose of aiding", the mere commission of an act intended to have that effect is sufficient. To sustain a conviction for aiding there must be proof of "actual" assistance:* ***LARKINS v. POLICE [1987] 2 NZLAR 282 ; (1987) 3 CRNZ 49.***

32. Although this particular judgment had not been cited, the Trial Judge considered the principle discussed in that judgment and stated:

> *"Now I proceed to consider whether there is evidence that each accused aided or abetted (assisted or encouraged)* ***in the commission of those offences with knowledge of what the principal offender/s were doing with the intention of assisting or encouraging*** *the principal offender/s in that activity. (para 48)"(emphasis added)....*
>
> *..."According to* ***Robsan*** *(supra) two things must be proved before an accused can be held to be guilty of aiding and abetting the commission of the offence;*
>
> - *He must have full knowledge of the facts which constitute the offence.*
> - ***There must be some form of voluntary assistance in the commission of the offence.*** *(para 50)"*

33. Under the heading **KNOWLEDGE P. 193** the Applicant submitted:

> *"The judgment of McGechan J in* ***COOPER v. MOT [1991]*** *2 NZLR 693 contains a valuable review of the authorities on the degree of knowledge of "essential matters" required to establish secondary liability. The following proposition emerge from the judgment.*

The required mental element is not satisfied by proof only of suspicion or negligence in the sense of failing to pursue such inquiries as reasonable person would have made to ascertain the facts: see also ***R v. BAINBRIDGE [1960] 1 QB 129; R v. MAXWELL [1978] 1 WLR 1350; GIORGIANNI v. R [1985] 156 CLR 473 (HCA)".***

CARTER'S CRIMINAL LAW OF QUEENSLAND (12th edition) [s 7.40]

"It is necessary that the accessory to know what offence was or might be committing: ***BORG v. R [1972] WAR 194 at 199; R v. BECK [1990] 1 Qd 30; 43 A Crim R 135; R v. JERVIS (1991) 56 A Crim R 374***

It is actual knowledge of the essential facts of the principal offence which is required; recklessness will not suffice: ***GIORGIANNI v. R [1985] 156 CLR 473, 58 ALR 64; 59 ALJR 461.*** *The accessory must not only be aware of the physical acts done by the principal offender but also of the existence of any state of mind on the part of the principal offender which must be established to prove his or her commission of the offence :* ***R v. STROKES & DIFFORD (1990) 51 A Crim R 25 at 38.***

34. The legal principle discussed in these judgments cited by the Applicant in his submission was given due consideration by the Trial Judge in following terms:

"Now I proceed to consider whether there is evidence that each accused aided or abetted (assisted or encouraged) ***in the commission of those offences with knowledge of what the principal offender/s were doing with the intention of assisting or encouraging*** *the principal offender/s in that activity. (para48)" (emphasis added)*

"According to ***Robsan*** *(supra) two things must be proved before an accused can be held to be guilty of aiding and abetting the commission of the offence;*

- ***He must have full knowledge of the facts which constitute the offence.***
- *There must be some form of voluntary assistance in the commission of the offence. (para 50)" (emphasis added)*

35. Under the heading **INTENTION TO HELP OR ENCOURAGE P. 194** the Applicant submitted:

> *"Apart from knowing the essential facts of the principal offences, a secondary party must also intend to help or encourage the principal party; "the essence of aiding and abetting is intentional help"; **R v. SAMUELS** [1985] 1 NZLR 350 (CA); **CARDIN LAURANT LTD v. COMMERCE COMMISSION** [1990] 3 NZLR 563; (1989) 3 TCLR 470; **INNES v. POLICE** 24/4/91, Williamson J, HC Invercargill AP17/91.*
>
> *"As an elementary requirement, intention involves proof of an act of help **or encouragement done intentionally or voluntarily.** In addition, a secondary party must also act for the purpose of helping or encouraging the principal party to do the act that constitutes the offence. This requirement is explicit under s 66(1)(b) where the act or omission must be done "for the purpose of aiding" another person to commit the offence. The reference to purpose "superimpose[es] a requirement in that respect upon the need for proof that the accused intentionally did an act which had the effect of aiding". **LARKIN v. POLICE** [1987] 2 NZLR 282; (1987) 3 CRNZ 49.*

36. The legal principle discussed in these judgments cited by the Applicant in his submission was given due consideration by the trial judge in following terms:

> *"Now I proceed to consider whether there is evidence that each accused aided or abetted (assisted or encouraged) in the commission of those offences with knowledge of what the principal offender/s were doing **with the intention of assisting or encouraging the principal offender/s in that activity.** (para 48)"(emphasis added)*

*"According to **Robsan** (supra) two things must be proved before an accused can be held to be guilty of aiding and abetting the commission of the offence;*

- *He must have full knowledge of the facts which constitute the offence.*
- ***There must be some form of voluntary assistance in the commission of the offence.** (para 50)"*

37. Under the headings of **OFFENCE COMMITTED IN PROSECUTION OF COMMON PURPOSE** – subs (2) P. 198 and **ACQUITTAL** - P. 203 the Applicant submitted:

*"For secondary liability to arise under s 66(2) there must be proof that one of the parties to the common intention committed the offence charged, although that person need not have committed the offence: **R v. ZANINI [1967] SCR 715; CA 66.09. For example, if s 66 (2)** is invoked to sustain a murder charge in a case involving several persons, the particular elements of murder as charged must be established against one before there is any basis for attaching secondary liability to the others: **R v. NATHAN [1981] 2 NZLR 473.** The offence must also have been committed "in the prosecution of the common purpose", although this does not mean that it must have been committed in order to effect that purposes.*

*In **R v. TEMONI [1998] 1 NZLR 641; (1997) 15 CRNZ 439 (CA),** the Court of Appeal held that the "prosecution" of the common purpose encompasses everything that a secondary party contemplates as a reasonable, but not remote, adjunct of the core of the unlawful enterprise. So in a case of bank robbery the prosecution of the common purpose is not confined to events between the robbers' entry onto the premises and the moment the offence is completed. By way of illustration, the Court of Appeal in **Te Moni** considered that the prosecution of the common purpose would include anything ordinary contemplated as inherent in, or apt to occur during any plan for a robbery, such as the possibilities that the robbers might be challenged before entering the premises or might encounter*

resistance within the premises or in making their escape. Thus in ***Te Moni*** *the original common purpose continued from the detention of hostages within the bank, which commenced at the start of the robbery, until the homicide which incurred half an hour later.*

In those circumstances it was immaterial that the principal party responsible for the homicide may have been simultaneously pursuing his own plan or "private agenda", whether contingent on failure of the robbery or combined with it. ***Te Moni*** *was applied in* ***R v. PHAM*** *6/7/98, Williams J, HC Auckland T98/98, where the infliction of bodily injury likely to cause death was considered a reasonable adjunct to the core of the unlawful purpose of burglary, kidnapping and robbery.*

The 'prosecution' of the common purpose in Australian code jurisdiction has also been held to include not only necessary acts before the commission of the offence, such as acquiring weapons and proceeding to the scene, but also acts subsequent to those actually comprising the unlawful purpose, such as departing from the scene and resisting attempts to pervert escape: see ***R v. RAW*** ***(1984) 12 A Crim R 299, (WA CA),*** ***R v. SEIFFERT*** ***(1999) 104 A Crim R 238.***

However, it was accepted in ***Te Moni*** *(above) that s 66 (2) would not apply where the principal party departed completely from the common purpose and acted in a way that no order party to that purpose could have suspected, for example by committing a rape while engaged in a "routine" robbery. Although in such a case the common purpose would continue, the commission of rape could not be said to have occurred in its "prosecution".*

In other situations, the common purpose may have already been achieved so that the offence charged was an unrelated and independent act committed by the principal party "for an entirely different motive or purpose": ***R v. HUBBARD*** ***(1990) 6 CRNZ*** *80. See also* ***R v. MORRISON*** ***[1968]*** *NZLR 156 (CA) ;* ***Te Moni*** *(above).*

Similarly, if the common purpose has been abandoned or frustrated, any subsequent offence may fall outside s 66 (2): see ***HENDERSON v. R*** *[1949] 2 DLR 121; (1948) 91 CCC 97 (SCC) :* ***R v. MILLER*** ***[1977] 2 SCR 680; (1976) 31 CCC (2d) 177 (SCC).***

In some circumstances an alleged secondary party may not be criminally responsible for the culpable homicide committed by another party to an unlawful common purpose. In terms of the requirements of s 66(2), acquittal of a secondary party might be justified on the basis that the homicide was not committed "in the prosecution of the common purpose" or was not foreseen by a secondary party as a "probable consequence" of prosecuting that purposes.

As an illustration of this kind of case, if a group of persons embarks on a fight involving only punching and kicking but one of them kills the victim with a weapon, the other parties to the common purpose will not be criminally responsible under s 66 (2) for the killing if they were unaware that weapons were being carried by a member of the group. ***R v. HIRAWANI*** ***30/11/90, CA 134/90; CA 165/90; CA 172/90.*** *Similarly, in* ***R v. POWELL: R v. ENGLISH*** ***[1999] AC 1; [1997] 4 All ER 545 (HL),*** *a secondary party's conviction for manslaughter could not be sustained where the principal party departed completely from the common design and committed murder with a weapon, the presence of which was unknown to the secondary party. See also* ***R v. PERMAN*** ***[1996] 1 Cr App R 24 (CA);*** ***R v. GREATEX*** ***[1999] 1 Cr App R 126 (CA);*** ***R v. UDDIN*** ***[1999] QB 431; [1998] 2 All ER 744 (CA).***

In such cases a secondary party's lack of awareness that the principal party had the fatal weapon has been a significant if not decisive factor in excluding the secondary party's liability. For an exportation of the applicable principles in such cases, see ***R v. UDDIN*** *(above) at p 441; p 751,* ***R v. GREATEX*** *(above).*

However, the question is not simply whether the secondary party knew the principal party had the weapon or the type of weapon with which the murder was committed, but whether the principal party's act was entirely different from the type of act contemplated by the secondary party. Even if the secondary party knew that the principal party had the fatal weapon, the secondary party should not be criminally responsible for a killing if the principal party's use of the weapon was criminally responsible for a killing if the principal party's use of the weapon was fundamentally different from the type of act contemplated by the secondary party. See ***R v. Gamble*** *[1989] NI 268, where the secondary party contemplated that a weapon would be used to "kneecap" the victim but the principal parties murdered the victim by cutting his throat with a knife and shooting him in the head. See also* ***R v.Te Moni*** ***[1998] 1 NZLR 641; (1997) 15 CRNZ 439 (CA); CA 66.24."***

38. The legal principle discussed in these judgments cited by the Applicant in his submission was given due consideration by the Trial Judge in following terms:

> *"Under the concept of joint enterprise, when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.* ***Prosecution must prove that each accused person agreed (either impliedly or expressly) beforehand or shared a common intention to sexually assault and Rape Soko and Boila*** ***or in the prosecution of a common purpose, each accused foresaw that commission of sexual assault and/or rape would be probable consequences".*** *(Para10) (emphasis added)*

39. There was clear evidence before the Trial Judge that offences of Rape and Sexual Assault had been committed by the principle offender or offenders at the crime scene. There was also ample evidence of assaults during interrogation. Prosecution was running the case on the basis that rapes and sexual assaults were either part and parcel of the joint enterprise agreed upon by the accused or foreseeable probable consequences of their joint

enterprise. Alleged joint enterprise was interrogation of suspects by torture. Therefore, the Trial Judge directed his mind to the case law submitted by the Defence in deciding the case at the 'no case stage'

40. Under the heading **JOINT CRIMINAL ENTERPRISE,** the Applicant submitted:

> *"A joint 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". **McAULIFFE v. R (1995) 183 CLR 108; 130 ALR 26; ALJR 621 at CLR 113.***

41. The legal principle discussed in these judgments cited by the Applicant in his submission was given due consideration by the trial judge in following terms:

> *"Under the concept of joint enterprise, when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. **Prosecution must prove that each accused person agreed (either impliedly or expressly) beforehand or shared a common intention to sexually assault and Rape** Soko and Boila or in the prosecution of a common purpose, each accused foresaw that commission of sexual assault and/or rape would be probable consequences".(para 10)*

42. There was *prima facie* evidence before the Trial Judge that the Accused were acting in concert to commit a crime. Therefore, the Trial Judge directed his mind to the case law submitted by the Defence in deciding the case at the 'no case stage'

43. Under the headings **MERE PRESENCE [s.7.50] AIDING BY ENCOURAGEMENT and PARTICIPATION** [ARCHBOLD ON CRIMINAL PLEADING EVIDENCE & PRACTICE (2001)] the Applicant submitted:

"Mere presence at the commission of an offence will not of itself be sufficient to constitute aiding. There must be, at least, positive encouragement: ***R v. COREY (1882) 8 QBD 534.*** *In* ***R v. CLARKSON, CARROL AND DODD [1971] WLR 1402; 3 All ER 344; (1971) 55 Cr App R 445,*** *it was held on a charge of aiding and abetting rape on the basis of continuing and non-accidental presence, that the prosecution must establish actual encouragement of the commission of the offence, as well as an intention to encourage".*

In the case of ***WATI v. STATE [2004] FJCA 6; AAU0006.95S (19th March 2004)*** *wherein it is stated "that mere presence does not itself constitute aiding and abetting and he ought to have gone on to set out those circumstances upon which the prosecution relied in order to establish both that the present appellant did some act or acts which could properly be categorized as aiding and abetting and in doing so had the necessary criminal intention."*

44. The legal principle discussed in these judgments cited by the Applicant in his submission was given due consideration by the Trial Judge in following terms:

"It is trite law that mere presence at the scene of crime does not constitute aiding and abetting" *(para 49).*

45. However, in view of ***Tuck v Robsan*** [1970] 1All ER 1171 at 1175 one of the judgments cited by the Prosecution, the Trial Judge was obligated, in the circumstances of the case and evidence placed before him, to consider the legal principle discussed therein and stated:

"Prosecution is relying on ***Tuck v Robsan*** *[1970] 1All ER 1171 at 1175 to support its assertion that there are instances where even mere presence could constitute aiding and abetting and that, in the circumstances of this case, the presence of the accused persons at the crime scene at the material time, in itself constitute aiding and abetting the commission of the offences".(para 49)*

46. Prosecution led evidence and submissions were made on the basis that the Applicant (1st accused) was the Commander of the Western Crime Division of the Fiji Police Force and the 2nd accused was the team leader of the Lautoka Strikeback Unit and, therefore, they were in a position to control other accused persons and their continued presence in the crime scene provided a 'positive encouragement' to others to commit the offences.

47. There was evidence before court that the accused persons were present at the crime scene at the material time. There was evidence that the 1st accused directed to interrogate the suspects (victims) who were located 5-10 m away from him about other accomplices and in turn received important information as a result of interrogation. *(answers given in caution interview to Q 57-Q 61)* 2nd accused admitted in his caution statement having seen, in the process of interrogation, a rape and sexual assaults.

48. In view of aforementioned evidence, the Trial Judge considered, in the process of discovering relevant evidence available against each accused, the following observation of Slade J.'s dissenting judgment in ***National Coal Board v Gamble*** [1958] 3AllER 203 at 210 1QB 11 at 25 [which was later approved in Tuck v Robsan *(supra)*] as being relevant to the case before him.

> *"mere passive acquiescence is sufficient only, I think, where the alleged aider and abettor has the power to control the offender and is actually present when the offence is committed". (para 51)*

49. Prosecution led evidence and made submissions on the basis that other police and military officers present at the crime scene (3-9 accused) at the material time with knowledge of alleged crimes being committed and their inaction or passivity positively encouraged the commission of offences as they were duty bound, by virtue of their office as law enforcement officers, to prevent crimes.

50. In view of the above, the Trial Judge was obligated to apply the legal principle enunciated in ***R v. Forman and Ford*** [1988] Crim. L.R. 677 not only because it was

directly relevant to the evidence led in the trial, but also this particular principle had been accepted and adopted in Fiji.

51. Having accepted the principle enunciated in ***R v. Forman and Ford***, Shameem J. *in* ***State v Vulaca*** [2008] FJHC 389; HC HAC0120.2007 (16 April 2008) observed:

> "*State counsel has also referred me to* ***R v. Forman and Ford*** *[1988] Crim. L.R. 677 a case of two police officers prosecuted for assaulting a suspect, occasioning him actual bodily harm. The suspect was placed in a cell and handcuffed. He was then assaulted once on the back of his head. There were two police officers in the cell and he was unable to say which of the two had assaulted him. The jury was directed that where one police officer assaults a prisoner and the other does not intervene, nor does he report the offence, it does not matter which of them struck the blow and which encouraged the other. They are both guilty of assault. This direction was upheld on appeal. As a matter of law, police officers have a duty to prevent the commission of crimes, and when they fail to intervene when a person is assaulted, that is capable of amounting to aiding and abetting. The prosecution need only prove that the* ***assault must have been committed*** *by either officer or both.*

52. True, as opposed to two, there were nine accused persons jointly charged in the case before the Trial Judge, still this legal principle was applicable at the 'no case stage' as there was clear evidence that all of them as law enforcement officers were present at the crime scene at the material time and Prosecution adduced circumstantial evidence and invited the assessors to draw the only inference that it was the accused who committed the crimes.

53. Therefore, the emphasis by the Applicant on the premise that there must have been participation in the act and the quotation from ***R v. Borthwick*** (1779) 1 Dough 207: which 1 reproduce below were to be understood by the Trial Judge in light of the circumstances of the case especially in light of the duty cast on the accused persons in

law to prevent crimes and the principle enunciated in ***R v. Forman and Ford*** *(supra).*

> *"for even if a man is present whilst an offence is committed, if he takes no part in it and does not act in concert with those who commit it, he does not become an aider and abettor merely because he does not endeavor to prevent the offence, or fails to apprehend the offender:* ***1 HALE 439; FOST 350; R v. FRETWELL (1862) L & C. 161; and R v. ATKINSON (1869) 11 Cox C.C. 330.*** *See also* ***SMITH v. BAKER [1971] R.T.R. 350, DC; R v. SEARLE [1971] Crim. L. R. 592, CA; and R v. BLAND, 151 J. P 857, CA."***

54. Therefore, the allegation that *'the Learned Trial Judge would have found out from the above authorities that when relying on* ***Tuck v Robsan*** *[1970] All ER 1171 at 1175 to support its assertion that there are instances where even mere presence could constitute aiding and abetting.....The court should have gone further that the Prosecution had to prove knowledge and necessary criminal intention'* is misconceived and not founded on a valid basis.

55. Under the heading **JOINT ENTERPRISE / COMMON DESIGN** the Applicant submitted:

> *"Where two or more persons embark on a joint enterprise each is liable for the acts done in pursuance of that joint enterprise.* ***That includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise.*** *However, if a participant in the venture goes beyond what has been tacitly agreed as part of the common enterprise the other participants are not liable for the consequences of that unauthorized act. I tis for the jury to decide whether what was done was part of the joint enterprise or was or may have been an unauthorized act and therefore outside the scope of the joint enterprise:* ***R v. ANDERSON AND MORRIS [1966] 1 Q.B. 110, 50 Cr. App. R 216, CCA ; R v. LOVESEY AND PETERSON [1970] 1 Q.B 353, 53 Cr. App. R. 461, CA; R v. POWELL AND ANOTHER, R v. ENGLISH [1999] AC .1. HL."***

56. Once the legal concept of joint enterprise /common design is explained to the assessors in the summing up, it is open for them to decide whether the accused persons were in fact acting on a joint enterprise or in concert of a common design or plan and whether rape and sexual assault were probable consequences of that enterprise /plan. What is expected of a trial judge in a High Court at the 'no case stage' was to explore the availability of circumstantial evidence of joint enterprise /common design which he did in paragraph 43 of his ruling. Therefore, the allegation that the Trail Judge failed to consider the Applicant's submission does not hold water.

57. The subject of main controversy is ***Tuck v Robsan*** *(supra).* The Applicant does not say that the legal authority acted upon by Court (Tuck v Robsan) is not relevant to his case or had been wrongly decided. His complaint is premised on the argument that the Trial Judge should have gone further and ruled that the Prosecution had to prove knowledge and necessary criminal intention on the part of the accused and mere presence was not sufficient to attract criminal liability.

58. As described earlier, the Trial Judge had in fact considered this argument and emphasised the need to prove knowledge and criminal intention *(para 48).* Whether each accused had knowledge of the full facts of the offences that were being committed and whether their continued presence at the crime scene as law enforcement officers and their passivity constituted positive encouragement (as manifestation of criminal intention) are a question of fact to be decided by assessors. Therefore, the allegation that the *'Learned Trial Judge was relying only on prosecution's submissions and not defence submissions'* is not founded on valid basis.

59. The Applicant further complains that the Learned Trial Judge in his ruling only considered Prosecution witnesses' evidence in chief and not took into consideration the answers given by all the Prosecution witnesses as a result of cross examination by the Defence Counsel.

60. Answers given by Prosecution witnesses in evidence-in-chief was evidence before the Trial Judge how much untrustworthy they would have been. Whether the credibility of evidence produced by them in their evidence–in-chief had been impeached in cross examination was not a question to be decided by a trial judge at the 'no case stage' in a High Court trial. It is not for the court at this stage to assess credibility or reliability of evidence, although if the evidence is "inherently vague or incredible" that would not satisfy the Section 231 (of the Crimes Decree) test. (***State v. George Shiu Raj and Shashi Shalendra Pal*** [2006] AAU0081/05S).

61. The Applicant further complains that *'in particular the Learned Trial Judge did not take into consideration that Boila who gave evidence on oath stated that none of the 9 accused persons assaulted him or Soko.*

62. Having considered an application by the Prosecution, witness Boila was made a hostile witness and the Prosecution was allowed to cross examine him on his previous statements made to Police. He had stated to police that Pita (9th accused) with assistance of other officers were inserting a piece of stick into Soko's anus. He denied in Court having told in his statement dated 20th September 2016 that at one point he could see Pita and the other officers from the Strike Back Team Suva and officers from Lautoka assaulting Soko.

63. Although Boila, a hostile witness to the Prosecution, said that none of the 9 accused persons assaulted him, there was ample evidence that all the nine accused were present at the crime scene at the material time. Prosecution was relying on circumstantial evidence to prove that it was these nine accused persons and no one else committed the alleged offences. The Trial Judge at the 'no case stage' had to assess the evidence in its totality and to satisfy himself whether some evidence was available against each accused. Therefore, the allegation that the *Learned Trial Judge did not take into consideration that Boila who gave evidence on oath stated that none of the 9 accused persons assaulted him or Soko* is baseless.

64. The Applicant also complains that the Learned Trial Judge did not take into consideration answers given by Prosecution witnesses as to several statements were given by witnesses which were either not true, or not theirs or false or given under threat.

65. It is not for the Court at the 'no case stage' to assess credibility or reliability of evidence, although if the evidence is "inherently vague or incredible" that would not satisfy the test contemplated by Section 231 of the Crimes Decree. Therefore, this complaint is not founded on a valid basis.

66. The Applicant alleges that *the Learned Trial Judge in his ruling at page 13 on evidence relied by the prosecution included* ***"one accused from the Lautoka strikeback team got chilies from the Sigatoka Market." There was no evidence before the court of this fact no submissions were made by the State on this fact and it follows that the Learned Trial Judge took into consideration the above fact without any evidence before him.***

67. 9th accused Senitiki in his caution statement answering questions from 109 to 112 stated the following:

Q 109.	*At the scene, when asked where the chilies are brought from, you stated that B got the chilies from Sigatoka Market. What can you say about that?*
A.	*Yes, that is true.*
Q. 110.	*When did B get the chilies from the Sigatoka Market?*
A.	*When we were sweeping around the Sigatoka town.*
Q. 111.	*Did B personally get chilies himself?*
A.	*Yes, he went alone.*
Q 112.	*When was the first time that you saw the chilies that B brought from the market?*
A.	*When he was walking towards the fleet, I saw him it in hands.*

68. There is clear evidence before the Trial Judge that one accused from the Lautoka strike back team got chilies from the Sigatoka Market. Although the name of that particular

accused was suppressed and substituted with a letter of the alphabet to prevent any prejudice being caused to him, 9th accused had stated that B was in his Lautok astrike back team that headed for Sigatoka. He had also stated that B rubbed chilies on Boila and Soko. The only inference that could be drawn from the 9th accused's caution interview is that *"one accused from the Lautoka strike back team got chilies from the Sigatoka Market."*

69. Therefore, the allegation that ***'there was no evidence before the court of this fact no submissions were made by the State on this fact and it follows that the Learned Trial Judge took into consideration the above fact without any evidence before him'*** is baseless and misconceived. Although the Counsel for State had not made any submission on this piece of evidence, it is for the Trial Judge to examine all the evidence before him to ascertain whether a *prima facie* case is established against each accused.

70. Therefore the Applicant's suspicion that Learned Trial Judge is biased in his ruling and their feeling that they will not be able to have a fair trial is baseless and misconceived.

71. Now I turn to the second test based on objectivity. The second inquiry is to ask whether alleged circumstances if established might lead a fair-minded lay-observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case. In applying this test I bear in mind that this standard emphasizes not my belief in my own purity; I must consider how others would view my conduct.

72. The Applicant has failed to establish the facts alleged in his affidavit. Therefore, an independent and fair minded lay observer knowing all these circumstances would not reasonably apprehend bias.

73. Before I depart I would like to highlight two important things, one drawn from Gounder J.s Ruling in ***Mahendra Pal Chaudhry v State*** *(supra)* and the other from Applicant's Counsel Mr. Iqabal Khan's legal submission.

74. Gounder J observed:

> *"In criminal cases, judges have to make pre-trial rulings and decisions during the trial. Not all rulings that a judge makes may be favourable to the accused. The mere fact that a judge has ruled against the interest of an accused is not a ground for disqualification. To do so will set a dangerous precedent because as soon as a judge makes an unfavourable decision he or she is disqualified from trying the accused and no case will ever be heard. The result will be contrary to the public interest to see all those who are charged with criminal offences are tried in accordance with the law.*

75. Legal Submission of Mr. Khan in Para 18 states:

> *"It is well accepted that an application for recusal must be made after careful observation of the facts and the law. Such consideration is due primarily to the traditional deference that one gives to a judicial officer and the office that he or she holds in the discharge of his or her duties".*

76. ***"If after examination of the facts the court thinks that there is a suspicion of unfairness there should be a new trial, but not if the suspicion is wiped out. <u>David Syme & Co. Swinburn</u>*** (1909 10CLR 34 at 47 Isaacs J)

77. Now the suspicion is wiped out. There is no evidence of actual or apparent bias against the Applicant. Therefore, no grounds for my disqualification exist in fact or in law. I decide to hear the Applicant's case. The application is dismissed.

HIGH COURT OF FIJI LAUTOKA

Aruna Aluthge

Judge

AT LAUTOKA

7th November, 2016

Counsel: **Office of the Director of Public Prosecution for Prosecution**

Iqbal Khan & Associates for the Accused