IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION: CAV 0015 OF 2022
[Court of Appeal No: AAU 6/2016]
High Court No: HAC 89/2010]

CRIMINAL PETITION: CAV 0016 OF 2022
[Court of Appeal No: AAU 48/2016]
High Court No: HAC 89/2010]

CRIMINAL PETITION: CAV 0017 OF 2022
[Court of Appeal No: AAU 7/2016]
High Court No: HAC 89/2010]

CRIMINAL PETITION: CAV 0018 OF 2022
[Court of Appeal No: AAU 97/2016]
High Court No: HAC 89/2010]

CRIMINAL PETITION: CAV 0019 OF 2022
[Court of Appeal No: AAU 166/2015]
High Court No: HAC 89/2010]

BETWEEN : **SIRELI LILO**
EPARAMA TAMANIVAKABAUTA
ILIESA VAKABUA
ILIVASI NAVUNICAGI
RAFAELE NOA

Petitioners

AND : **THE STATE**

Respondent

Coram : The Hon. Mr Justice William Calanchini, Judge of the Supreme Court
The Hon. Mr Justice Terence Arnold, Judge of the Supreme Court
The Hon. Madam Justice Lowell Goddard, Judge of the Supreme Court

Counsel: Petitioners in Person
Ms S. Naibe and Ms R. Uce for the Respondent

Date of Hearing: 4 and 15 April 2024

Date of Judgment: 25 April 2024

JUDGMENT

Calanchini, J

Introduction

1. The Petitioners seek leave to appeal the decision of the Court of Appeal delivered on 27 May 2022 dismissing their appeals against their convictions.

2. The Petitions have been listed in the order in which they were filed in this Court. However I propose to consider the petitions in the order in which they were listed in the High Court trial. I shall also refer to each Petitioner by his first name for ease of reference.

3. The Petitioners were each charged with one count of murder and one count of aggravated robbery. On the count of murder under section 237 of the Crimes Act 2009 it was alleged that the five petitioners between 21 and 22 August 2010 murdered John Leonard Dass. On the count of aggravated robbery under section 311(1)(a) of the Crimes Act 2009 it was alleged that the five petitioners, between 21 and 22 August 2010, in the company of each other, robbed John Leonard Dass of property to the total value of $3,790.00 being the property of John Leonard Dass. The victim was 71 years old. The offences occurred in Lautoka.

4. The Post Mortem report dated 28 September 2010 stated that the cause of death was Asphyxia as a consequence of manual strangulation. The post mortem examination of

the deceased had taken place on 23 August 2010. Notes prepared by the Forensic Pathologist dated 1 October 2010 stated that there were multiple scratch abrasions on both sides of the neck consistent with nail marks that indicate that pressure had been exerted on the neck of the deceased with hands. Deeper bruising of the muscles of the neck and bruising of the thyroid gland also confirmed that pressure was exerted on the neck. The pathologist confirmed her conclusion that death was caused by Asphyxia due to manual strangulation. The report was tendered by Associate Professor Ramaswamy Goundar who testified as to his experience as a forensic pathologist.

5. He testified also as to his experience in performing post mortem examinations. Under cross examination he stated that the deceased was strangled by one person using both hands. He also stated that in his opinion, the strangulation was not accidental. The injuries indicated that force was deliberately applied to the deceased's neck, resulting in death by strangulation.

High Court Proceedings

6. The trial commenced on 17 November 2015. The delay of almost 5 years appears to have been due to a number of factors including one or more of the Petitioners absconding at various times, attempting to secure legal aid representation and service of the disclosures.

7. A voir dire hearing commenced on 17 November and concluded on 20 November 2015. Apart from Rafaele, the four remaining petitioners through their Counsel challenged the admissibility of their caution interviews and charge statements on the basis that admissions contained therein were not voluntary. They claimed that they had been assaulted and threatened by the police to confess while they were in police custody. The allegations were denied by the police witnesses. Each of the four petitioners, who were present, gave evidence in the voir dire about the assaults and subsequent complaints that were allegedly made to the Magistrate and in the High Court. However, the Court record makes only one reference to a complaint made by Ilivasi (accused No.4) and Eparama (accused No.5) to the presiding judicial officer on 16 September 2010. However the two complaints were not before the Court at the trial. The trial Judge ruled the interviews

admissible on the basis that the evidence established beyond reasonable doubt that the admissions in their interviews had been made voluntarily.

8. The trial commenced on 20 November 2015 at Suva before a Judge sitting with three assessors. The Petitioners each pleaded not guilty to both counts. The Petitioner Ilivasi was tried in his absence. He had absconded on 30 October 2013 and had not appeared in Court after that date. It would appear that he was well aware of the proceedings as he had appeared in Court prior to 30 October 2013. All appropriate measures had been taken to ensure that Ilivasi was aware of the proceedings. The trial proceeded on the basis that he had voluntarily chosen not to attend. The remaining four petitioners were each represented separately by Counsel.

9. The Prosecution alleged that at about midnight on 21 August 2010 the five petitioners assembled outside the victim's compound. They then climbed the fence and entered the compound. It was alleged that the wooden shutters were removed, the burglar mesh wire cut and two louvre blades removed from the window. It was alleged that Eparama (accused No.5) climbed through the window and opened the door to enable the others to enter the house.

10. The prosecution also alleged that Iliesa (accused No.3) was directed to stand at the compound gate and act as a look-out. The other four petitioners went from room to room ransacking and removing the items particularized in count 2. According to the prosecution it was Ilivasi (accused No.4) who strangled the victim assisted by Eparama (accused No.5) and Sireli (accused No.2). The prosecution relied on the admissions made by the Petitioners and circumstantial evidence. It would appear that count 2 was amended by consent during the trial. At page 97 of the Record the witness Marlene Nair identified some of the items stolen as belonging to herself and her husband.

11. At the conclusion of the prosecution case the Petitioners submitted that there was no case to answer. The learned Judge, relying on the admissions by each of them (including the absent Ilivasi) in their caution interviews and their charge statements together with

circumstantial evidence, ruled that there was a case to answer for all the petitioners on both counts.

12. When called upon the Petitioners (other than the absent Ilivasi) indicated that they would give sworn evidence and make closing submissions but would not be calling any witnesses. Ilivasi was deemed by his absence to have remained silent.

13. The out of court interviews and statements will be considered later in this judgment. It need only be noted that the typed English version of the caution interview and the charge statement of each petitioner was tendered into evidence and marked accordingly as exhibits:

<u>Rafaele Noa</u>				
Caution interview	-	handwritten	-	Ex PE 1(A)
		typed	-	Ex PE 1(B)
Charge statement	-	handwritten	-	Ex PE 5
		typed	-	?
<u>Sireli Lilo</u>				
Caution interview	-	handwritten	-	Ex PE 20 (A)
		typed	-	Ex PE 20 (B)
Charge statement	-	handwritten	-	Ex 21(A)
		typed	-	Ex 21 (B)
<u>Iliesa Vakabua</u>				
Caution interview	-	handwritten	-	Ex PE 7(A)
		typed	-	Ex PE 7(B)
Charge statement	-	handwritten	-	Ex 22(A)
		typed	-	Ex 22 (B)
<u>Ilivasi Navunicagi</u>				
Caution interview (translated)	-	handwritten iTaukei typed English		Ex PE 6(A) Ex PE 6(B)
Charge statement (translated)	-	handwritten typed		Ex PE 23(A) Ex PE 23(B)

Eparama Tamanivakabauta			
Caution interview -	handwritten	-	Ex PE 15(A)
(English translation)	typed	-	Ex PE 15(B)
Charge statement -	handwritten	-	Ex PE 24(A)
(English translation)	handwritten	-	Ex PE 24(B)

14. At the conclusion of the evidence the learned trial Judge delivered his summing up (pages 141 – 158 of the Record of the High Court). At page 113 of the Supplementary Record of the High Court the learned Trial Judge has noted that there was no request for a re-direction made by Counsel for the Petitioners.

15. The three assessors returned mixed opinions in respect of the five Petitioners in relation to the two counts. I propose to summarise the Court's verdict in respect of each Petitioner. Rafaele, Ilivasi and Eparama were convicted on both counts 1 (murder) and 2 (aggravated robbery). Sireli was acquitted on the count of murder but convicted for the alternative offence of manslaughter and was convicted on the count of aggravated robbery. Iliesa was acquitted on the count of murder and the alternative offence of manslaughter but was convicted on the count of aggravated robbery. Apart from Ilivasi the convictions on count one were based on joint enterprise under section 46 of the Crimes Act 2009.

Court of Appeal Proceedings

16. The Petitioners, apart from Iivasi, filed timely notices of appeal against their convictions and sentences. Ilivasi's notice was three months late. He was subsequently granted leave to appeal against conviction on one of his grounds of appeal. The appeals against sentence will be discussed later in the judgment.

17. Each Petitioner was represented by Counsel at the leave hearing before a Judge of the Court. Each Petitioner was also represented by Counsel at the appeal hearing before the Court of Appeal.

Rafaele's Appeal in the Court of Appeal

18. Rafaele sought leave to appeal against the conviction for murder on two grounds. The first ground was that the totality of the evidence did not support the conviction for murder.

The second ground related to the place of trial and the provisions of section 35(1) and 37 of the Criminal Procedure Act 2009. Leave was granted on ground one and refused on ground two.

19. Rafaele relied on the same ground, for which leave had been granted, before the Court of Appeal. Counsel filed written submissions in support of that ground. Rafaele did not dispute the voluntariness or truthfulness of his admissions relating to his involvement in the aggravated robbery offence. It was argued that those admissions alone were not sufficient to support a conviction for murder on the basis of joint enterprise. This Petitioner did not challenge the learned trial Judge's directions to the assessors on the principle of joint enterprise. The Court of Appeal concluded that, in the course of his admitted involvement in the aggravated robbery and his proximity to the assaults inflicted on the deceased, it was probable, once he became aware that the residence was inhabited, that violence and injury resulting in homicide came within the contemplation of Rafaele as a probable consequence of the unlawful purpose. The appeal against conviction on this ground was dismissed.

Sireli's Appeal

20. Sireli sought leave to appeal against both convictions on six grounds. Leave was granted to appeal the conviction for manslaughter on the basis of inconsistent verdicts. Leave was refused to appeal the conviction for aggravated robbery. In addition to the ground for which leave had been granted, Sireli renewed his application for leave to appeal on three of the grounds for which leave had initially been refused. The first ground claimed that Sireli's case had not been put to the assessors in a fair, balanced and objective manner. The second related to the place of trial relying on sections 35(1) and 37 of the Criminal Procedure Act 2009. The third ground challenged the admission into evidence of Sireli's caution interview and charge statement. Counsel filed written submissions in support of those grounds.

21. The Court of Appeal referred to the evidence presented at the trial against Sireli and concluded that the trial Judge had adequately summarized the evidence against Sireli and

had specifically considered his case. Furthermore, Sireli was represented by private counsel at the trial. There was no request made to the trial judge for a re-direction to the assessors.

22. The Court also noted that there was no injustice identified by Sireli to support a conclusion that the trial had miscarried as a result of being transferred to Suva. There had been sufficient time before the trial to make an application for change of venue. The record disclosed that no such application had been made for a transfer back to Lautoka. The Court also noted that, in relation to the allegation of Police brutality, there was no indication in the record that any complaint had been made either to the Magistrate or to the Judge of the High Court prior to the voir dire. The appeal against the convictions for manslaughter and aggravated robbery was dismissed.

23. Sireli had filed an application with supporting affidavits to lead fresh evidence. Under the Court of Appeal Rules such an application is considered by the Court of Appeal. In this case the application was considered during the course of the appeal hearing. The Court concluded that the application failed to meet the accepted legal requirements and refused the application.

Iliesa's appeal

24. Iliesa sought leave to appeal against sentence on the grounds that the final sentence of 13 years imprisonment, with a non-parole term of 12 years, imposed for the conviction for aggravated robbery, was harsh and excessive, in the circumstances of the case. He was granted leave to appeal. Iliesa relied on the same ground when his appeal came before the Court of Appeal. His submission related to his minor role in the offence of aggravated robbery. His role was to remain at the gate outside the compound and act as a "*look out.*" The Court dismissed the appeal relying on the principles discussed in **Wallace Wise –v- The State** [2015] FJSC 7; CAV 4 of 2015 (24 April 2015).

Ilivasi's appeal

25. Ilivasi sought an enlargement of time to file an appeal against conviction. The extension of time was granted and leave to appeal was granted on the ground 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 when a co-accused was convicted of manslaughter. Leave was refused on four other grounds.

26. The appeal proceeded before the Court of Appeal on this ground alone. The Court noted that the evidence (his admissions) established that it was Ilivasi who actually "*strangled*" the victim to death. His culpability was not dependent on the doctrine of joint enterprise. The appeal was dismissed.

Eparama's appeal

27. Eparama sought leave to appeal against the convictions for murder and aggravated robbery on five grounds. Leave to appeal the conviction for aggravated robbery was refused. Leave to appeal against conviction for murder was granted on the ground that the learned trial Judge caused a miscarriage of justice, in failing to fairly and objectively apply the principle of joint enterprise to convict Eparama of murder, while a co-accused was convicted of manslaughter. Leave to appeal on four other grounds was refused.

28. The Court considered the admissions made by Eparama in his out of court statements and concluded that there was a distinction between his role in the offence and that of Sireli who was convicted for manslaughter. Eparama had physically assaulted the deceased by punching him in the chest and admitted the offence of murder. The court concluded that the evidence of his involvement supported the conviction for murder based on joint enterprise. Eparama also challenged the conviction for murder on the ground that it was based solely on the confession in his caution interview. The Court rejected this ground relying on the decision in **Dass v The State** [2018] FJCA 67; AAU 59 of 2014 (1 June 2018).

Supreme Court Proceedings

Introduction

29. Pursuant to section 98(4) of the Constitution an appeal from a final judgment of the Court of Appeal may not be brought to the Supreme Court unless the Supreme Court has granted leave to appeal under section 7(2) of the Supreme Court Act 1998. Leave to appeal must not be granted unless (a) a question of general legal importance is granted; (b) a substantial question of principle affecting the administration of criminal justice is involved; or (c) substantial and grave injustice may otherwise occur. It is for the Petitioner to establish that the appeal comes within one of the requirements specified before the appeal can proceed. In accordance with the Supreme Court's usual practice the hearing of the petition for leave will if necessary, be treated as the hearing of the appeal in order to expeditiously exercise the jurisdiction of the Court set out in section 7(1) of the Supreme Court Act.

Preliminary issues

30. There are two preliminary issues arising from the Petitions filed by each of the Petitioners. The first issue is the practice of raising grounds of appeal that were not considered by either the Judge of the Court of Appeal at the leave hearing or the Court at the hearing of the appeal. The second relates to grounds of appeal challenging the non-direction or inadequate directions by the trial Judge to the assessors when no request for a re-direction was made by trial Counsel.

31. The practice of raising new grounds in a petition for leave was considered by this Court in **Tawadokai –v- The State** [2022] FJSC 13; CBV 8 of 2019 (29 April 2022). Keith J indicated at para. 13 that:

> *"___ The Supreme Court is very reluctant to allow new grounds of appeal to be argued in the Supreme Court for the first time. It may do so exceptionally if the new ground of appeal raises a pure issue of law on which no further evidence is necessary ___."*

Again at para.14:

> *"I accept that the Supreme Court should allow a new ground to be argued if substantial and grave injustice might occur if the new ground was not considered."*

32. I agree with that approach and can indicate that any new ground raised by any of the Petitioners shall only be considered if the guidelines outlined above are satisfied.

33. The practice of raising grounds of appeal in a petition that allege non-direction or inadequate direction has also been the subject of comment by the appeal courts in Fiji. This issue arises when trial counsel have not requested a re-direction when given the opportunity to do so by the trial judge. The Court records show that trial counsel, representing the Petitioners, did not raise with the trial judge any of the complaints now being made, when the opportunity to request a re-direction was accorded to them after the summing up. In **Raj –v- The State** [2014] FJSC 12; CAV 3 of 2014 (20 August 2014) Gates CJ observed at para. 35:

> *"The raising of direction matters [by way of re-direction] in this way is a useful trial function and in following it, counsel assist in achieving a fair trial. In doing so they act in their client's interest. The appellate courts will not look favourably on cases where counsel have held their seats, hoping for an appeal point, when issues in directions should have been raised with the judge ---."*

34. In these proceedings I accept that the Petitioners cannot be said to have contemplated this course of action. Whether trial counsel should have sought re-directions is a different issue.

The Court Records

35. At an early stage in the current sitting of the Court it became apparent that there were problems with the record and the submissions. The Petitions came on for hearing before the Supreme Court on Thursday 4 April 2024. The Respondent had filed their written submissions in the Registry earlier that morning. The explanation provided by Counsel for the Respondent was that the office file had only been returned to Lautoka two days earlier, i.e. on Tuesday 2 April 2024.

36. The end result was that the Petitioners had no time to consider the Respondent's submissions and no time to prepare any necessary response. Consequently the hearing was adjourned part heard to Monday 15 April 2024.

37. In the period of time that elapsed between those two dates a number of omissions were noted in the Record of the Court of Appeal. During the trial the typed English version of the caution interview and the charge statement made by each of the five petitioners were tendered at the trial by the relevant police witnesses and admitted into evidence as exhibits. They are listed in paragraph 13 of this judgment. These documents were significant in the sense that they contained the only admissible evidence by way of admissions that implicated each of the Petitioners in the offences set out in counts 1 and 2 of the charge. However the documents that were made available to this Court are listed at page 177 (and repeated at pages 178) of the Court of Appeal Record as:

a) Typed Record of Caution Interview in English of Rafaele Noa.
b) Handwritten Charge Statement in English of Rafaele Noa.
c) Handwritten Caution Interview in English of Sireli Lilo.
d) Handwritten Charge Statement in English of Sireli Lilo.
e) Typed Caution Interview in English of Iliesa Vakabua.
f) Handwritten Charge Statement in English of Iliesa Vakabua.
g) Handwritten Caution Interview in Fijian of Ilivasi Navunicagi.
h) Handwritten Charge Statement in Fijian of Ilivasi Navunicagi.
i) Typed Caution Interview in English (pages not in order) of Eparama Tamanivakabauta.
j) Hand written Charge Statement in Fijian of Eparama Tamanivakabauta.

38. This collection of documents was in reality of little assistance to the Court for the following reasons:

a) The handwritten English versions were partially illegible, particularly after repeated photocopying.
b) The Fijian versions could not be understood.

c) Critical admissions in respect of Ilivasi and Eparama could not be verified let alone analysed as a result of incomplete documents.

39. An email was sent on 10 April 2024 to the Supreme Court Registry requesting that all the typed English versions of the caution interviews and charge statements be made available to the Court. This was followed up by telephone requests. As at the time of writing this judgment those documents have not been made available to the Court. It must be noted that the documents listed above appears to be the only documents upon which the Court of Appeal relied at the hearing of the appeal.

Court of Appeal

40. One of the grounds of appeal filed by Ilivasi Navunicagi is that the Court of Appeal had failed to consider his application for fresh evidence. The application was filed on 1 December 2021 and was supported by an affidavit sworn by Ilivasi Navunicagi and also filed in the Court of Appeal Registry on 1 December 2021. It is clear from a reading of the judgment of the Court of Appeal that the application was not considered by the Court.

41. The application is of some significance. There is exhibited to the affidavit an extract from proceedings in the High Court at Lautoka. The extract shows that Ilivasi complained to Mr Justice Madigan that he had been subjected to assault by the Police. The extract relates to file number HAC 119 of 2010. The appearance was on 16 September 2010. Ilivasi had been arrested on 1 September 2010 at Vatukoula and taken to Lautoka Hospital on 6 September 2010. He complained to the Judge who noted that he claimed to have been assaulted by the Police Strike Back Team. He claimed that he had a medical report from Lautoka Hospital and that his injuries consisted of a broken leg, injuries on the right shoulder and 2 broken ribs. Action HAC 119 of 2010 no longer exists and the details of any consolidation do not appear in the Record.

42. If this application had been considered by the Court of Appeal and the evidence admitted, then that Court may have taken a different view of the voluntariness of the admissions in the Charge Statement. It was on the basis of those admissions that the trial judge had

convicted Ilivasi of murder. As the principal in relation to the murder, Ilivasi's liability was relevant to joint venture liability and the complex questions it can raise. However, for whatever reason, it was not considered, and although the extract from the Court file need not be formally admitted into evidence, it may nevertheless require further consideration.

43. In the same affidavit there is a claim that there was a medical report from Lautoka Hospital which was not available, as the file had been discarded. It was not clear when it was discarded by the hospital, although it must be conceded that at the time of filing his application ten years had elapsed. There was also a reference to having received medical attention at Natabua Corrections Centre. Such evidence from the person named in the affidavit would have added weight to the claim of Police assaults.

44. It is doubtful whether the Court of Appeal can consider the application at this stage as it must now be considered "*functus officio*." In order to ensure that a grave and substantial miscarriage of justice does not occur, this Court is left with no choice but to deal with the matter on the basis that the Court of Appeal had erred in failing to consider the application.

45. For all of the above reasons, the Court has decided to adjourn part heard the hearing of the four Petitioners for leave to appeal conviction. The Court is in a position to consider the material filed by Iliesa Vakabua in his petition for leave to appeal his sentence. After a consideration of that Petition the Court will conclude with some necessary observations concerning the status of the sentence appeals filed by the Petitioners in the Court of Appeal.

Iliesa Vakabua's Petition for leave to appeal sentence

46. Iliesa filed a timely petition seeking leave to appeal against sentence. Following his conviction on the count of aggravated robbery he was sentenced to 13 years imprisonment with a non-parole term of 12 years. The Petitioner now relies on 3 grounds of appeal:

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

2. *That the Judges of Appeal erred in law and in fact when they appear not to have considered the extent of the involvement in the commission of aggravated robbery.*

3. *That the Judges of Appeal erred in law and in fact when they failed to consider that the Appellant has played a minor or peripheral role during the course of the robbery. This should be regarded as a mitigating factor."*

47. The trial judge selected 15 years as the starting point. He did so on the basis of the decision of this Court in **Wallace Wise –v- The State** [2015] FJSC 7; CAV 4 of 2015 (24 April 2015). The Court had fixed the range at 8 – 16 years for this type of offence. The Court at paragraph 26 listed a number of factors that may enhance the sentence. It is not clear whether all or some of those factors should be considered when fixing the starting point or whether they are to be regarded as aggravating factors. To some extent the crucial point is that there should be no double counting. By that it is meant that any one factor should not be considered when determining the starting point within the range and as an aggravating factor.

48. In selecting 15 years as the starting point, the Judge did not give any reasons for that selection. Furthermore, the judge did not refer to any aggravating circumstances. Therefore, in any event there is no issue as to double counting.

49. The judge deducted 3 months on account of good behavior in the preceding 10 years as a mitigating factor. What is apparent is that the judge has not considered Iliesa's minor role in the aggravated robbery. The undisputed evidence was that he climbed the fence to enter the victim's compound. He entered the victim's residence after entry had been facilitated by others and was then told to act as look out. He then left the house and climbed back over the fence and remained outside the compound to act as a look out. That was the limit of his involvement and as such ought to have been considered.

50. Under the circumstances it is apparent that the exercise of the sentencing discretion has miscarried. The sentencing judge has failed to consider a matter that ought to have been considered. As a result the sentence imposed is excessive under the circumstances.

Without engaging in the exercise that is the duty of the sentencing judge, I would select a head sentence of 11 years. A deduction of 1 year and 9 months for time served reduces the sentence to 9 years and 3 months with a non-parole term of 8 years.

Remaining Sentence Appeals

Rafaele Noa

51. Rafaele was sentenced to the mandatory sentence of imprisonment for life for the murder conviction. He was ordered to serve a minimum term of 20 years before a pardon may be considered. For the conviction on the aggravated robbery count, he was sentenced to 13 years imprisonment to be served concurrently.

52. He had filed a timely notice of appeal against conviction and sentence in the Court of Appeal on 1 December 2015. On 8 August 2019 Rafaele applied in writing to abandon his appeal against sentence under Rule 39 of the Court of Appeal Rules. On 30 August 2019 the single Judge of the Court of Appeal ordered that the application to abandon the appeal against sentence be listed for hearing with the appeal against conviction. That did not happen as the Court of Appeal in its written judgment dated 27 May 2022 does not refer to the application to abandon the sentence appeal. The application is still pending.

Sireli Lilo

53. Sireli was sentenced to 4 years 4 months imprisonment for manslaughter and 14 years imprisonment for aggravated robbery. The sentences were ordered to be served concurrently, together with any term then being served, with a non-parole term of 13 years.

54. On 24 December 2015 Sireli filed a timely notice of appeal against conviction and sentence. On 8 August 2019 he applied in writing to abandon his appeal against sentence. The Judge ordered that the application to abandon the sentence appeal be listed before the Court of Appeal with the appeal against conviction. However as with Rafaele Noa, his application has not been dealt with by the Court of Appeal and awaits a hearing date as a pending application. In his Petition for leave to appeal Sireli seeks to re-activate his

sentence appeal. However this Court has no jurisdiction to consider the application. When the application to abandon his sentence is called before the Court of Appeal. Sireli may confirm his application to abandon his appeal and if he does, then the Court will proceed in accordance with the process outlined by the Supreme Court in **Masirewa v. The State** [2010] FJSC 5, CAV 14 of 2008 (17 August 2010). Alternatively he may indicate to the Court of Appeal that he seeks to withdraw his application to abandon the appeal and the Court will give directions accordingly.

Ilivasi Navunicagi

55. Ilivasi Navunicagi did not seek leave to appeal against sentence in the Court of Appeal.

Eparama Tamanivakabauta

56. Eparama was sentenced for murder to mandatory life imprisonment with a minimum term of 20 years before a pardon may be considered. He was sentenced to a term of 14 years for the aggravated robbery conviction. Eparama filed a timely notice of appeal against conviction and sentence on 7 December 2015. On 23 August 2019 he applied in writing to abandon his appeal against sentence. On 30 August 2019 the Judge ordered that the application be listed with the hearing of the conviction appeal. The application is still pending before the Court of Appeal.

Listing the Applications

57. In order to clear the sentence appeals it is necessary that the Registrar of the Court of Appeal lists each of the applications to abandon the sentence appeals before the Court of Appeal.

58. In the Court of Appeal each petitioner can either confirm the application to abandon the appeal or apply to withdraw the application to abandon the sentence appeal. In either case the Court will then give appropriate directions as to the next step in the Court of Appeal.

CONCLUSION:

59. For the reasons stated above, I would grant leave to the Petitioner Iliesa Vakabua to appeal his sentence. I would allow the appeal, set aside the order of the Court of Appeal dismissing his sentence appeal and quash the sentence imposed in the High Court. In its place I would sentence Iliesa to 9 years 3 months with a non-parole term of 8 years.

60. I would adjourn part heard the petitions for leave to appeal conviction filed by the remaining four petitioners. Furthermore, I consider it appropriate that the application to call fresh evidence filed by Ilivasi Navunicagi should be listed for hearing before the Supreme Court at the next sitting of the Court together with the petitions for leave to appeal conviction. The remaining appeals against sentence should be listed in the Court of Appeal in order to hear and determine the applications to abandon the sentence appeals. Finally it is essential that the Registry includes in a supplementary record the exhibits that have been listed in paragraph 13 of this judgment.

Arnold, J

61. I have read the judgment of Calanchini J in draft and agree with the orders proposed for the reasons he gives.

Goddard, J

62. I have had the advantage of reading the judgment of Calanchini J and agree with the reasoning, conclusions and the proposed orders.

Orders:

1) Leave to appeal against sentence is granted to Iliesa Vakabua.
2) Appeal against sentence is allowed.
3) The decision of the Court of Appeal dismissing Iliesa Vakabua's appeal against sentence is set aside.
4) The sentence imposed by the High Court is quashed.

5) Iliesa Vakabua is sentenced to a term of imprisonment of 9 years 3 months with a non-parole term of 8 years.

6) The hearing of the four petitions for leave to appeal conviction is adjourned part heard and is to be relisted for further hearing in the June session of the Court.

7) The application to lead fresh evidence filed by Ilivasi Navunicagi is to be listed for hearing before this Court in the June session.

8) The remaining appeals against sentence are to be listed in the Court of Appeal to determine the applications to abandon the appeals against sentence.

9) The Supreme Court Registrar is to finalise a supplementary record containing the exhibits listed in paragraph 13 of this judgment no later than the 24 May 2024.

The Hon Justice William Calanchini
JUDGE OF THE SUPREME COURT

SUPREME COURT FIJI

The Hon Justice Terence Arnold
JUDGE OF THE SUPREME COURT

Hon Justice Lowell Goddard
JUDGE OF THE SUPREME COURT