**IN THE COURT OF APPEAL, FIJI**
**ON APPEAL FROM THE HIGH COURT OF FIJI**

**CRIMINAL APPEAL NO. AAU 97 OF 2016**
**(High Court HAC 89 of 2010 at Lautoka)**

**BETWEEN** : **ILIVASI NAVUNICAGI**

***Appellant***

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

***Respondent***

**Coram** : **Calanchini P**

**Counsel** : **Ms S Ratu for the Appellant**
**Mr S Babitu for the Respondent**

**Date of Hearing** : **8 August 2019**

**Date of Ruling** : **30 August 2019**

# RULING

[1] Following a trial in the High Court at Suva the appellant was convicted in his absence on one count of murder and one count of aggravated robbery. He was one of five accused (the other four were present at trial) tried on charges of murder and aggravated robbery. Each was convicted on at least one count and each has applied for leave to appeal against

conviction and or sentence. There are five separate rulings in respect of their applications.

[2] On 1 December 2015 the appellant was sentenced in his absence to the mandatory sentence of imprisonment for life for murder. The trial Judge directed that the appellant serve a minimum term of 20 years before a pardon may be considered under section 237 of the Crimes Act 2009. For the conviction for aggravated robbery he was sentenced to 13 years imprisonment to be served concurrently.

[3] The appellant filed a notice of appeal dated 30 March 2016 that was late by about 3 months. Leave was sought to appeal conviction only. The appellant subsequently applied for an enlargement of time pursuant to section 26 of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Acts gives to a single judge of the Court power to enlarge time.

[4] The factors to be considered for an enlargement of time are (a) the length of the delay, (b) the reason for the failure to file within time, (c) whether there is a ground of merit justifying the appellate court's consideration and where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed and (d) if time is enlarged, will the respondent be unfairly prejudiced: **Kumar and Sinu –v- The State** [2013] FJSC 17; CAV 1 of 2009, 21 August 2012.

[5] The explanation for the 3 months delay is set out in the supporting affidavit sworn on 1 July 2019 by Ilivasi Navunicagi. The reason that the appellant puts forward is the delay by the Corrections Service in forwarding his notice of appeal to the Court of Appeal Registry. There is on the file a typed notice of appeal dated 30 March 2016. Although the handwritten version is not on file the usual practice is for the Corrections Department to type a notice of appeal verbatim including the date that appears on the draft handwritten by the appellant. The explanation in the affidavit relates to the delay between 30 March 2016 and when the typed notice was filed in the Court Registry on 28 April 2017. The 3 months delay in drafting his notice is not explained by the appellant in

his affidavit. In the absence of such an explanation, the appellant is required to establish that his grounds of appeal against conviction establish issues that are somewhat stronger than arguable.

[6] The grounds of appeal upon which the appellant relies in the event that an enlargement of time is granted are set out in the amended notice of leave to appeal out of time filed on 5 August 2019. They are:

> *"1. The learned trial Judge failed to direct the assessors and himself in terms of weight to be given to the admissions contained in the caution interview.*
>
> *2. The learned trial Judge's directions on circumstantial evidence that the test when relying on circumstantial evidence lacked fairness and objectively required for a fair trial.*
>
> *3. The learned trial Judge caused a miscarriage of justice by convicting the appellant solely on the confession obtained in the caution interview of the appellant.*
>
> *4. The learned trial Judge erred in law and in fact when he accepted the version of the prosecution without the burden of proof being discharged which caused a miscarriage of justice to the case of the appellant.*
>
> *5. The learned trial Judge caused a miscarriage of justice in failing to fairly and objectively apply the principle of joint enterprise to convict the appellant of murder whilst a co-accused was convicted of manslaughter."*

[7] In relation to ground one the learned Judge has considered the admissions and denials made by the appellant in his caution interview and charge statement. He has considered voluntariness and truthfulness. In the absence of any contradicting evidence this ground is not arguable.

[8] In relation to ground 2, the Judge relied on the admissions made by the appellant. He did not consider it necessary to address the issue of circumstantial evidence.

[9] In relation to ground 3 it may be argued that the trial Judge did not touch upon the need to exercise caution when relying on admissions alone to convict the appellant. However the circumstances of this case were such that it was unnecessary to do so.

[10] The issue in ground 4 arises from the Judge's acceptance of the admissions made by the appellant. In his summing up the learned Judge identified the standard of proof in paragraph 5. In his judgment he confirmed that he had directed himself in accordance with his summing up. This ground fails.

[12] Ground five raises the issue of inconsistent verdicts and for which leave is given. The appellant was convicted for murder on the basis that he actually strangled the deceased assisted by the appellant Lilo and the appellant Tamanivakabauta. The issue that arises is the verdict of manslaughter for the appellant Lilo whilst Navunicagi and Tamanivakabauta were convicted for murder. The appellant Vakabua was found not guilty of murder and manslaughter.

*Orders:*

1). *Leave to appeal is granted on ground 5 of the appellant's ground of appeal.*

2). *Leave is refused on grounds 1 – 4.*

COURT OF APPEAL FIJI

W. Calanchini

Hon Mr Justice W D Calanchini
**PRESIDENT, COURT OF APPEAL**