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

**CRIMINAL APPEAL NO. AAU 124 of 2022**

**BETWEEN** : **ZUHAIR FARHAAD DEAN**

***Appellant***

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

***Respondent***

**Coram** : **Mataitoga, RJA**

**Counsel** : **Sen, A for the Appellant**
: **Semisi, K for the Respondent**

**Date of Hearing** : **30 September 2024**

**Date of Ruling** : **29 October 2024**

# RULING

1. The appellant [Zuhar Farhaad Dean] was charged with another, for following charges, 1 count of Arson contrary to section 364(a) of Crimes Act 2009, 1 count of Attempted Murder contrary to sections 44(1) and 237 of the Crimes Act 2009 and 3 counts of murder contrary to section 237 of the Crimes Act 2009.

2. The appellant and his co-accused pleaded not guilty to all the charges and the trial proceeded. The State called 18 witnesses and tendered 40 exhibits and documents. At the close of the prosecution case, the trial judge was satisfied that a prima facie case was establish and the appellant was asked to present his defence. The appellant did not give evidence but did call witnesses.

3. Following the trial, the appellant and his co-accused were found guilty and convicted of the all charges brought against him on a judgement dated 28 October 2022. On the 11 November 2022, the appellant was sentenced to life imprisonment and he must serve 18 years before a pardon may be considered.

**Notice of Appeal**

4. Solicitors for the Appellant filed Notice to Appeal on 9 December 2022 with 8 grounds of appeal against conviction. The court accepts this as a timely appeal, being only 8 days late.

**Jurisdiction and Principles**

5. Pursuant to section 21 (1)(a) of the Court of Appeal Act (Act), the appellant may appeal to the court of appeal on any question involving questions of law alone and do not require leave of the court. However, leave of the court is required if the grounds of appeal involve questions of mixed law and fact, under section 21(1)(b) of the Act.

6. The appellant has submitted grounds of appeal which he claims involve question law alone and some grounds which involve questions of law and fact. The court will review each of these grounds and decide whether the questions raised therein is one purely of law or mixed questions of law and fact as was decided in **Jason Zhong v State [2014**] FJCA 108 (AAU 044 of 2013)

> *"[13] At the outset it needs to be clearly stated that the mere fact that the ground of appeal is stated in the notice to raise an error of law does not necessarily mean that the ground involves a question of law alone. In **Hinds –v- R** (1962) 46 Cr. App. R 327 Winn J at page 331 when commenting on section 3(a) of Criminal Appeal Act 1907 (the terms of which are similar to section 21 (1) (a) of the Court of Appeal Act) noted:*
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> *"The court is very clearly of the opinion that the proper construction of those words (against conviction "on any ground of appeal which involves a question of law alone") is that there must be, in order that the right given by*

*that subsection can be claimed, a ground of appeal raised which is a question of law, and that the section cannot be effectively invoked merely by raising a ground which the grounds of appeal or the submissions of counsel at any later stage describe as a ground of law."*

*[14] That each ground of appeal against conviction is described as an error in law does not in any way assist this Court to determine whether any ground against conviction involves a question of law alone. As the Court of Criminal Appeal noted in the* ***Hinds*** *decision (supra) at page 333:*

*"Whether or not such a ground so stated is to be regarded as a question of law alone or whether it is a ground of law mixed with fact or of mixed law and fact may, in any particular case, not be an easy question to determine."*

*[15] The Court of Criminal Appeal in* ***Hinds*** *(supra) relying on the ground of appeal under discussion in that case provided a most useful example of the difference between a ground of appeal involving a question of law alone and a ground of appeal involving a question of law mixed with fact or a ground of mixed law and fact at page 333:*

*"If the question were: Is hearsay evidence admissible on a criminal trial in England? that would plainly be a pure question of law or a question of law alone. If the question were: Was hearsay evidence admitted at this trial, or did the answers given by a witness on page so-and-so and so-and-so of the transcript constitute hearsay? then it might be that the natural approach would be to suppose that there were questions of fact to be determined, and after the determination of those facts the law of hearsay evidence, including the proper definition of hearsay, would have to be applied to those facts."*

7. For leave to be granted as required under section 21(1)(b) of the Act, the test is that the ground of appeal submitted, has reasonable prospect of success: **Caucau v. State [2018] FJCA 171; Saudrugu v State [2019] FJCA.**

**Grounds of Appeal**

8. On 25 June 2024, Sen Lawyers for the appellant submitted the following grounds of appeal. In so doing the lawyers have designated ground 1 and 2 as raising question of law only. These will be dealt with first.

**Ground 1**

9. The trial judge erred in law in his explanation and application of the joint enterprise principle in respect of the appellant [second accused at the trial] given the totality of the circumstantial evidence before the Court.

**Assessment**

**Joint Enterprise**

10. The trial judge explained the principle of joint enterprise in the judgement, in the context of the evidence to be proven by the prosecution in these terms:

"*Joint Enterprise*

> *Although not explicit in the information or opening remarks by the State Counsel, the Prosecution was running this case on the basis of the principle of joint enterprise. Accordingly, the Prosecution must prove beyond reasonable doubt that Saimumu Dean (Poli) and Zuhair Farhaad Dean (Zuhair) committed these offences in the company of each other and each participated in some form in the commission of each offence, irrespective of the degree of his participation. Where two or more persons commit a criminal offence acting together as part of a joint plan or agreement to commit that offence, each one of them will be guilty of that offence. However, no formal plan or agreement is required. An agreement to commit an offence may arise on the spur of the moment. The essence of joint enterprise for a criminal offence is that each accused shared a common intention to commit the offence and played some part to achieve the aim. However, it is important that I look at each of the six charges against each accused separately. They are each quite distinct crimes and the evidence is different*

*on each. Each charge is, in effect, its own trial, and separate consideration and verdicts are required. However, in deciding whether a particular charge is proved, I am entitled to draw on all of the evidence in the case."*

11. In **Rasaku v State [2013] FJSC 4,** the Supreme Court stated:

*45] The doctrine of common enterprise has been applied consistently in a large number of criminal cases in England and other common law jurisdictions, including those such as Fiji in which the Penal Code is structured on the foundations of the Common Law of England. The formation of a joint enterprise may be spontaneous, and the fact that the participants acted on the spur of the moment does not negative their criminal liability on the basis of joint enterprise. As Lord Lane CJ explained in R v Hyde [1991] 1 QB 13435-136–*

*There are, broadly speaking, two main types of joint enterprise cases where death results to the victim. The first is where primary object of the participants is to do some kind of physical injury to the victim. The second is where the primary object is not to cause physical injury to any victim, but, for example, to commit burglary. The victim is assaulted and killed as a (possibly unwelcome) incident of the burglary. The latter type of case may pose more complicated questions that the former, but the principle in each is the same. A must be proved to have intended to kill or to do serious bodily harm at the time he killed. As we pointed out in Slack [1989] QB 775; 775; at 781, B, to be guilty, must be proved to have lent himself to a criminal enterprise involving the infliction of serious harm or death, or to have an express or tacit understanding with A that such harm or death should, if necessary, be inflicted.*

*[46] While the decisions of R v Lovesey and Peterson (1969) 53 CrR 461; [1970] 170] 1 QB 352 and Kumar v R [1987] FJCA 1; [1987] SPLR 131 (13 March 1987) fall within the second category of cases mentioned by Lord Lane CJ., the instant case belongs to the fist type of cases referred to by him. In this case, two witnesses, namely, Isei Levita, who lived in a*

*house within 35 meters of the Tomuka Junction Bus Shelter, and Semisi Waqa, who passed the point of the incident in a taxi, have testified that they saw some part of the incident which led to the death of Sukamanu Kitione. The first of these witnesses testified that he saw "two boys punching a third, and he was lying on the ground". He also saw them dragging the man who was on the ground."*

12. There is error in the way the trial judge summarized the principle of joint enterprise to be applied in the case. I have underlined this in paragraph 11 above. Given that the case was prosecuted purely on circumstantial evidence, the evidence that may involve the appellant in a joint enterprise must be more certain. The principle set by the Supreme Court in **Rasaku** (supra) but not relied on by the trial judge, needs to be addressed.

13. This aspect of ground 1, needs to be reviewed on appeal and I will allow this ground to go to the court of appeal.

**Ground 2**

*Circumstantial Evidence*

14. The trial judge erred in law in his explanation, application and finding of circumstantial evidence in respect of the primary evidence, the court considered had to be proven by the prosecution in respect of the appellant (second accused at the trial) and in not considering other plausible theories and reasonable possibilities that were inconsistent with guilt.

15. What was the trial judge's explanation of the circumstantial evidence in the trial? These are set out in paragraphs 8 to 11 of the Judgement in these terms:

> *"8. This case is entirely based on circumstantial evidence and there is no direct evidence or eye witness accounts as to how the death of each deceased was caused. Circumstantial evidence can, and often does, clearly prove the commission of a criminal offence, but two conditions must be met. First, the primary facts from which the inference of guilt is*

*to be drawn must be proved. No greater cogency can be attributed to an inference based upon particular facts than the cogency that can be attributed to each of those facts. Secondly, the inference of guilt must be the only inference which is reasonably open on all the primary facts which are so proved. The drawing of the inference is not a matter of evidence: it is solely a function of this court based on its critical judgment of men and affairs, common sense, experience and reason. An inference of guilt can safely be drawn if it is based upon primary facts proved and if it is the only inference which is reasonably open upon the whole body of primary facts.*

*9. In a circumstantial case, the fact-finder must look to the combined effect of a number of independent items of evidence when considering each charge. While each separate piece of evidence must be assessed as part of the inquiry, the ultimate verdict on each charge will turn on an assessment of all items of evidence viewed in combination. The underlying principle is that the probative value of a number of items of evidence is greater in combination than the sum of the parts. The analogy that is often drawn is that of a rope. Any one strand of the rope may not support a particular weight, but the combined strands are sufficient to do so. The logic that underpins a circumstantial case is that the accused is either guilty or is the victim of an implausible, unlikely series of coincidences.*

*10. When assessing the evidence in a circumstantial case, it is not sufficient to evaluate each separate strand of evidence in isolation and then stop. Having considered each strand of evidence separately, it is necessary for the decision-maker to then stand back and assess the cumulative effect of all of the different strands of evidence. Consideration of the onus and standard of proof only occurs at the second stage of the process. The individual strands of evidence do not have to be proved beyond reasonable doubt. The onus and standard of proof only comes into play once the combined weight of all of the strands of evidence is being considered.*

*11. All of the charges require the Prosecution to prove the defendant's state of mind at the time of the alleged offending. This requires the drawing*

*of an inference, based on all of the circumstantial evidence that is relevant to the issue of intention or recklessness. Obviously one cannot see into another's mind. The fact finder must draw inferences as to the accused's state of mind from facts proved. The drawing of inferences inevitably involves the application of common sense and of the fact finder's knowledge of the world and of how it works to prove facts."*

16. In assessing the above explanation of circumstantial evidence in this case, the guidance of the Supreme Court in **Naicker v State [2018] FJSC 24**

> *"33. There is no prescribed form of direction when the prosecution's case against the defendant is based on circumstantial evidence alone. So long as the judge gets the essence of it, that is sufficient. The essence of it is that the prosecution is relying on different pieces of evidence, none of which on their point directly to the defendant's guilt, but when taken together leave no doubt about the defendant's guilt because there is no reasonable explanation for them other than the defendant's guilt. Although I may have used slightly different language from that which the judge used in this case, it sufficiently captured the essence of what the assessors had to be sure of before they were able to express the opinion that Naicker was guilty.*
>
> *34. Mr Singh's broad contention was that the Court of Appeal, which had used the analogy of strands of a rope, had been wrong to do so. Instead, it should have talked of links in a chain. That led Mr Singh to submit that there were a number of missing links in the chain in this particular case which had caused the chain to break which (a) the judge should have reminded the assessors about but which he did not, and (b) should have caused both the judge and the assessors to have a reasonable doubt about Naicker's guilt. The argument falls at the first hurdle. The judge did not talk about the rope analogy at all! Bandara JA in the Court of Appeal did, but not the judge, and the true focus should be on what the judge said in his summing-up.*
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> *35. Leaving that aside, though, and concentrating on what the missing links in the chain were said to be, there were three of them according to Mr Singh: (i) the dock identifications which should never have been made, (ii) an important difference between what Naqaruqara had said in evidence and what he had said in his witness statement to the police before the trial, and (iii) the absence of fingerprints in the taxi, the absence of any evidence about any forensic examination of the blood samples taken from the taxi, and the absence of evidence about the knife or Naicker's trousers being found.*
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> *36. As for (ii), Naqaruqara had said in his witness statement that what he had seen the man he was chasing throw away was a long kitchen knife. In his oral evidence in court, on the other hand, all he said was that he had seen the man throw something away. He did not say what it was, and does not appear to have been asked anything more about it. When he was cross-examined, one*

*passage in his witness statement was put to him, but not this passage. So the assessors never knew that about what his statement had said on the topic. So if this was a missing link in the chain, it was not one which came out in the evidence, and it was therefore one which the trial judge could not tell the assessors about. But the important point is that this is not a missing link in the chain which somehow does not fit into the theory that it was Naicker who killed Mishra. It just means that the prosecution was not able to rely on a strand of the evidence which it would otherwise have relied on. That also explains why the reliance on (i) in this context is just as misconceived. The dock identifications were not a missing link in the chain. They were just features of the evidence which the prosecution should not have been allowed to rely on."*

17. In setting out the above passages from the **Naicker** (supra) it shows that in the remaining grounds of the grounds of appeal each raise. For example, in ground 3 the evidence pertaining to the DNA test and the process followed were according to the appellant not properly proven to the required standard for beyond reasonable doubt. The same arise in ground 4 as regards the evidence of the accelerant allegedly use by the appellant and the co-accused.

18. The evidence of Vilimone Vumalumalumu, a prosecutions witness, had inconsistencies in his statement in the evidence especially the hat allegedly belonging to the appellant, he gave at the trial which were vital in covering the appellant's participation or not.

19. Part of the difficulty in the trial judge's assessment was due to the lack of clear statement regarding the guiding principles of law applicable when evaluating circumstantial evidence in prosecution where there are no direct evidence touching the essential elements of the charged offence. The danger of how one ascribes the level of probative value of the evidence is real yet difficult to apply.

20. I am satisfied that ground 2 involves question of law which should be considered by the full court on appeal, Leave to appeal is granted.

**<u>Grounds 3 to 8</u>**

21. In light of the need to get clarity on the principles of law applicable in dealing with Joint Enterprise in criminal cases and how to evaluate circumstantial evidence in cases

entirely depended on such kind of testimony in a trial, the issues raised in these grounds of appeal are best refused leave to appeal.

22. I would encourage the appellant to have these grounds submitted in a renewed application to the full court under section 35 (3) of the Court of Appeal Act.

**ORDERS:**

1. Leave is granted on grounds 1 and 2.
2. Leave is not granted for ground 3 to 8.

COURT OF APPEAL
FIJI

**Hon Justice Isikeli Mataitoga**
**Acting President**