IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

Crim. Case No: HAC 114 of 2022

STATE

vs.

1. **ERONI CARASOBU**
2. **JOELI ROKORASEI**
3. **JOELI ROKOTUIWAILEVU**
4. **MANASA KOROIVERE**

Counsel:	Ms. N. Ali with Mr. H. Nofaga for the State
	Ms. N. Lomaiviti for 1st, 2nd and 3rd Accused
	Mr. W. Navuni for 4th Accused
Dates of Hearing:	13th, 14, 15th, 16th and 19th February 2024
Date of Closing Submission:	27th February 2024, and 24th April, 2024
Date of Judgment:	07th June 2024

JUDGMENT

Introduction

1. The Acting Director of Public Prosecution on the 15th of February 2024, filed this Amended Information, charging the first and the second Accused, Mr. Eroni Carasobu and Mr. Joeli Rokorasei with one count of Criminal Intimidation, contrary to Section 375 (1)

(a) (i) (iv) (2) (a) of the Crimes Act, the first Accused with one count of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act, the first, second and the third Accused with one count of Act Intended to Cause Grievous Harm, contrary to Section 255 (a) of the Crimes Act, and the first, second, third and the fourth Accused with one count of Wrongful Confinement, contrary to Section 286 read with Section 46 of the Crimes Act. The particulars of the offences are:

COUNT ONE

Statement of Offence

CRIMINAL INTIMIDATION: *Contrary to Section 375 (1) (a) (i) (iv) (2) (a) of the Crimes Act 2009.*

Particulars of Offence

ERONI CARASOBU *and* ***JOELI ROKORASEI*** *on the 7th day of August 2021 at Suva in the Central Division, without lawful excuse and with intent to cause alarm, threatened to cause grievous hurt to* ***LAISENIA VEISEYAKI*** *with a baton.*

COUNT TWO

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: *Contrary to Section 275 of the Crimes Act 2009.*

Particulars of Offence

ERONI CARASOBU *on the 7th day of August 2021 at Suva in the Central Division, assaulted* ***LAISENIA VEISEYAKI*** *by punching him inside a parked Toyota Hilux motor vehicle with registration number JP: 297 and thereby caused him actual bodily harm.*

COUNT THREE

Statement of Offence

ACTS INTENDED TO CAUSE GRIEVOUS HARM: *Contrary to Section 255 (a) of the Crimes Act 2009.*

Particulars of Offence

ERONI CARASOBU, JOELI ROKORASEI *and* ***JOELI ROKOTUIWAILEVU*** *on the 7th day of August 2021 at Suva in the Central Division, with the intent to cause grievous harm to* ***LAISENIA VEISEYAKI,*** *unlawfully wounded the said* ***LAISENIA VEISEYAKI*** *by continuously assaulting him inside a moving vehicle.*

COUNT FOUR

Statement of Offence

WRONGFUL CONFINEMENT: *Contrary to Section 286 read with Section 46 of the Crimes Act 2009.*

Particulars of Offence

ERONI CARASOBU, JOELI ROKORASEI, JOELI ROKOTUIWAILEVU *and* ***MANASA KOROIVERE*** *on the 7th day of August 2021 at Suva in the Central Division, wrongfully confined* ***LAISENIA VEISEYAKI*** *inside a moving vehicle.*

2. Subsequent to the plea of not guilty entered by all four Accused persons, the matter proceeded to the hearing. The hearing commenced on 13.02.2024 and concluded on 19.02.2024. The Prosecution presented the evidence of four witnesses. The four Accused persons gave evidence for the Defence. The Court then heard the oral submissions of the parties. In addition to their oral submissions, the learned Counsel for the parties filed written submissions. I am grateful for the comprehensive written submissions filed by the parties, especially the Counsel for the Prosecution, on the issue of joint enterprise.

3. Having carefully considered the evidence adduced during the hearing and respective oral and written submissions of the parties, I now pronounce the judgment on this matter.

Burden and Standard of Proof

4. I first draw my attention to the burden and standard of proof. The Accused persons are presumed innocent until each of them is proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the Accused persons are presumed to be innocent until they are proven guilty. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that each Accused is guilty of the offence without any reasonable doubt.

The Admitted Facts

5. The four Accused persons filed the following admitted facts pursuant to Section 135 of the Criminal Procedure Act.

1st Accused Eroni Carasobu's Admitted Facts

1. ***THAT Eroni Carasobu*** *is educated up to Form 4 and was 40 years old at the time of the alleged offence.*
2. ***THAT Eroni Carasobu*** *is a Police Officer by profession and has joined Fiji Police Force in year 2005.*
3. ***THAT*** *the alleged offence took place on the 7th August, 2021, between 3.30pm to 5.00 pm.*
4. ***THAT*** *at the time of the alleged offence* ***Eroni Carasobu*** *was based at the Fiji Police, Narcotics Bureau at Totogo Police Station, Suva.*
5. ***THAT Eroni Carasobu*** *was present at Vitivou, Rewa Street in Suva on the 7th August 2021 at about 3.30pm.*
6. ***THAT*** *on the 7th August, 2021, at about 3.30pm,* ***Eroni Carasobu****, PC 7407 Joeli Rokorasei, PC 3331 Joeli Rokotuiwailevu and PC 7190 Manasa Koroivere were conducting drug raid in Vitivou, Rewa Street, Suva using a black twin cab vehicle registration number JP 297 and silver grey vehicle registration number GP 956.*

7. ***THAT*** *as of 7th August, 2021,* ***Eroni Carasobu*** *was conducting drug raid in civilian clothes as he was wearing green round neck t-shirt with a black short pants.*

8. ***THAT Eroni Carasobu*** *and PC 7407 Joeli Rokorasei pursued the Complainant in black twin cab vehicle registration number JP 297 driven by PC 7190 Manasa Koroivere to MaxValue Supermarket in Flagstaff.*

9. ***THAT Eroni Carasobu*** *and PC 7407 Joeli Rokorasei seized the Complainant from MaxValue Supermarket, Suva, and placed him into the black twin cab vehicle registration number JP 297 driven by PC 7190 Manasa Koroivere.*

10. ***THAT*** *the contents of the following documents are not in dispute and may be tendered by consent:*

    i) *CCTV footage obtained from Flagstaff MaxValue Supermarket on 7th August 2021;*
    ii) *CCTV footage screen shot booklet of Flagstaff MaxValue Supermarket;*
    iii) *GPS Track line Disc of vehicle registration number JP 297;*
    iv) *GPS report of vehicle registration number JP 297;*
    v) *Analysis of GPS report of vehicle JP 297 and*
    vi) *Vehicle running sheet of JP 297.*

2nd Accused Joeli Rokorasei's Admitted Facts

1. ***THAT Joeli Rokorasei*** *is educated up to Form 5 at Naiyala Secondary School.*

2. ***THAT Joeli Rokorasei*** *was 45 years old at the time of the alleged offence and is residing at Naduru road, Nausori.*

3. ***THAT Joeli Rokorasei*** *is a Police Officer by profession and has joined Fiji Police Force in year 1999.*

4. ***THAT*** *the alleged offence took place on the 7th August, 2021, between 3.30 pm to 5.00 pm.*

5. ***THAT*** *at the time of the alleged offence* ***Joeli Rokorasei*** *was based at the Fiji Police, Narcotics Bureau at Totogo Police Station, Suva.*

6. ***THAT*** ***Joeli Rokorasei*** *was present at Vitivou, Rewa Street in Suva on the 7th August 2021 at about 3.30pm.*

7. ***THAT*** *on the 7th August, 2021, at about 3.30pm,* ***Joeli Rokorasei****, PC 4650 Eroni Carasobu, PC 3331 Joeli Rokotuiwailevu and PC 7190 Manasa Koroivere were conducting drug raid in Vitivou, Rewa Street, Suva using a black twin cab vehicle registration number JP 297 and silver grey vehicle registration number GP 956.*

8. ***THAT*** *as of 7th August, 2021,* ***Joeli Rokorasei*** *was conducting drug raid in civilian clothes as he was wearing red round neck t-shirt with a ¼ black short pants.*

9. ***THAT*** ***Joeli Rokorasei*** *and PC 4650 Eroni Carasobu pursued the Complainant in black twin cab vehicle registration number JP 297 driven by PC 7190 Manasa Koroivere to MaxValue Supermarket in Flagstaff.*

10. ***THAT*** ***Joeli Rokorasei*** *and PC 4650 Eroni Carasobu seized the Complainant from MaxValue Supermarket, Suva, and placed him into the black twin cab vehicle registration number JP 297 driven by PC 7090 Manasa Koroivere.*

11. ***THAT*** *the contents of the following documents are not in dispute and may be tendered by consent:*

    i) *CCTV footage obtained from Flagstaff MaxValue Supermarket on 7th August 2021;*
    ii) *CCTV footage screen shot booklet of Flagstaff Max Value Supermarket;*
    iii) *GPS Track line Disc of vehicle registration number JP 297;*
    iv) *GPS report of vehicle registration number JP 297;*
    v) *Analysis of GPS report of vehicle JP 297 and*
    vi) *Vehicle running sheet of JP 297.*

3rd Accused Joeli Rokotuiwailevu's Admitted Facts

1. ***THAT*** *Joeli Rokotuiwailevu was 48 years old at the time of the alleged offence and is residing at Tacirua Village.*
2. ***THAT*** *Joeli Rokotuiwalevu is employed by the Fiji Police Force as a Constable whose batch number is 3331.*
3. ***THAT*** *Joeli Rokotuiwailevu has joined Fiji Police Force on 4th May, 1999, as a Special Constable.*
4. ***THAT*** *the alleged offence took place on the 7th August, 2021, between 3.30 pm to 5.00 pm.*
5. ***THAT*** *at the time of the alleged offence Joeli Rokotuiwalevu was based at the Fiji Police, Narcotics Bureau at Southern Division.*
6. ***THAT*** *Joeli Rokotuiwailevu was present at Vitivou, Rewa Street in Suva on the 7th August 2021 at about 3.30pm.*
7. ***THAT*** *on the 7th August, 2021, at about 3.30pm, Joeli Rokotuiwailevu, PC 4650 Eroni Carasobu, PC 7407 Joeli Rokorasei and PC 7190 Manasa Koroivere were conducting drug raid in Vitivou, Rewa Street, Suva using a black twin cab vehicle registration number JP 297 and silver grey vehicle registration number GP 956.*
8. ***THAT*** *the contents of the following documents are not in dispute and may be tendered by consent:*

    i) *CCTV footage obtained from Flagstaff MaxValue Supermarket on 7th August 2021*
    ii) *CCTV footage screen shot booklet of Flagstaff MaxValue Supermarket;*
    iii) *GPS Track line Disc of vehicle registration number JP 297;*
    iv) *GPS report of vehicle registration number JP 297;*
    v) *Analysis of GPS report of vehicle JP 297 and*
    vi) *Vehicle running sheet of JP 297.*

4th Accused Manasa Koroivere's Admitted Facts

1. ***THAT*** ***Manasa Koroivere*** *was 32 years old at the time of the alleged offence and is residing at Lot 28 Sekoula Road, Laucala Beach, Suva.*
2. ***THAT*** ***Manasa Koroivere*** *is employed by the Fiji Police Force as a Police Constable whose Police batch number is 7190.*
3. ***THAT*** ***Manasa Koroivere*** *has joined Fiji Police Force in year 2009.*
4. ***THAT*** *the alleged offence took place on the 7th August, 2021, between 3.30 pm to 5.00 pm.*
5. ***THAT*** *at the time of the alleged offence* ***Manasa Koroivere*** *was attached to Task Force team at Totogo Police Station, Suva, and was also an authorized driver for the Fiji Police Force.*
6. ***THAT*** *on 7th August, 2021, at about 3.30 pm* ***Manasa Koroivere****, PC 4650 Eroni Carasobu, PC 7407 Joeli Rokorasei and PC 3331 Joeli Rokotuiwailevu were conducting drug raid in Vitivou, Rewa Street, Suva, using a black twin cab vehicle registration number JP 297 and a silver grey vehicle registration number GP 956.*
7. ***THAT*** *on 7th August, 2021,* ***Manasa Koroivere*** *was driving the black twin cab vehicle registration number JP 297 for Fiji Police Force.*
8. ***THAT*** *PC 7407 Joeli Rokorasei and PC 4650 Eroni Carasobu seized the Complainant from Max Value Supermarket, Suva, and placed him into the black twin cab vehicle registration number JP 297 driven by* ***Manasa Koroivere.***
9. ***THAT*** *the contents of the following documents are not in dispute and may be tendered by consent:*

    i) *CCTV footage obtained from MaxValue Supermarket in Flagstaff on 7th August 2021;*
    ii) *CCTV footage screen shot booklet of MaxValue Supermarket [Flagstaff];*
    iii) *GPS Track line Disc of vehicle registration number JP 297;*
    iv) *GPS report of vehicle registration number JP 297;*

v) *Analysis of GPS report of vehicle JP 297;*

vi) *Vehicle running sheet of JP 297.*

Evidence of the Prosecution

6. The Prosecution's main witness is Mr. Laisenia Veiseyaki, whom I would refer to as Laisenia in this judgment. Laisenia explained the incident that occurred on the 7th of August 2021 in his evidence. He was a student at FNU in 2021 and was staying with his uncle at Berkley Crescent. On that particular day, he was asked by a neighbour to go and buy beer and BBQ for them to consume. The neighbour gave him his ATM card to withdraw money to buy the beer and BBQ. Laisenia was accompanied by one of his friends, Maika. He first went to Max Value Supermarket at Flagstaff but found the place was crowded. Laisenia and Maika then went to Vitivou to buy BBQ. At Vitivou, he found no BBQ stall that day. However, he went in and enquired where he met the first accused. Laisenia found some people inside Vitivou, and a few vehicles were parked nearby.

7. The first Accused questioned Laisenia, asking him why he came to Vitivou. He then grabbed Laisenia's mobile phone and kept it inside the parked twin cab. The first accused was wearing a green T-shirt. According to Laisenia, the first Accused did not introduce himself, nor did he explain the reasons for questioning Laisenia and taking his phone. The first Accused told Laisenia to stay there until he finished his work inside the house and returned. All this time, Maika stood on the other side of the road.

8. Laisenia did not follow the order of the first Accused. Instead, he opened the door of the twin cab when the first Accused went inside the house, picked up his mobile phone, and ran away. He ran to MaxValue Supermarket with Maika. The first and second accused followed Laisenia in the black twin cab driven by the fourth Accused, who was the designated driver of that vehicle.

9. The fourth Accused stopped the vehicle blocking the entrance of the Supermarket, and the first and second Accused got out of the vehicle and went into the Supermarket, where they found Laisenia standing near the liquor section. They got hold of him and forcefully took

him out of the Supermarket. The second Accused then forcefully put him into the vehicle through the back door. The second Accused also got into the vehicle through the same door. The first accused walked to the other side of the vehicle and got into it when the vehicle was about to reverse.

10. As per the evidence given by Laisenia, he was assaulted by the first and second Accused when he was pushed into the vehicle. The first Accused punched him while the 1st Accused was standing outside the vehicle, and the second Accused punched him in his face when the 2nd Accused sat next to him in the back passenger seat of the vehicle. They then took him to Vitivou, where the first and second Accused put Laisenia into another twin cab. Laisenia was seated in the middle of the back passenger seat; the first Accused was sitting on his right, and another was on his left. The second Accused was the driver of the vehicle, and the third Accused was seated in the front passenger seat. The fourth Accused's participation in this incident ended at this point.

11. The first, second and third Accused persons then took Laisenia in the second vehicle to an unknown location. During that journey, they continuously assaulted him. The second Accused, who was the driver of the vehicle, punched Laisenia with his elbow when Laisenia put his head down to avoid a punch from the first Accused. The third Accused, who was seated in the front passenger seat, also punched him. The first Accused then asked Laisenia about his mobile phone. When he refused to give his mobile phone, the first Accused took a baton and threatened Laisenia that he would put the baton on his backside, causing alarm of further grievous harm. The first Accused then assaulted him with the baton on his shoulder blade and the back of his head.

12. After taking Laisenia in the second vehicle to an unknown location in Suva, the three Accused persons asked him to get out of the vehicle and find his way back home. Laisenia testified that he did not know the location and that it was close to 6 p.m. He was worried about whether he could go back before the 6 p.m. curfew. Laisenia asked the Accused to drop him back home, but they refused. Laisenia then managed to find a taxi and reached home.

13. Once he reached home, Laisenia was taken to the hospital and then reported the matter to the Police. He was medically examined, and the medical report prepared by the Doctor was tendered in evidence. Further to his medical examination, he had an X-ray test.

14. Mr. Leone Matai, the Security Officer at MaxValue Supermarket, gave evidence explaining what he observed when the first and second Accused came and captured Laisenia inside the Supermarket. Maika, the friend who accompanied Laisenia to Vitivou also gave evidence regarding what he had witnessed. The Doctor who conducted the medical examination of Laisenia in her evidence explained the medical findings she found during the medical examination.

Evidence of Defence

15. The four Accused persons vehemently denied these allegations. They admitted that they all went to Vitivou for a drug raid. The first, second and fourth Accused further admitted that they went to MaxValue Supermarket and captured Laisenia after he ran away with the mobile phone. He was then put in the second vehicle, driven by the second accused. The first, second and third Accused did not dispute that they were in the second vehicle with Laisenia. They said that Laisenia was initially taken to the Military Camp as he claimed his father was a military officer. At the gate of the Camp, Laisenia admitted that he lied and his father was not an army officer. The three Accused claimed that they did not arrest Laisenia but detained him for the purpose of gathering intelligence for their drug operations, and that was the reason they kept him in the second vehicle and questioned him. Once the relevant intelligence was obtained from him, they offered to take Laisenia back to his home, but Laisenia declined. Hence, they dropped him along the road. All three Accused persons specifically denied this allegation and stated that they never assaulted Laisenia on the 7th of August 2021.

16. The fourth Accused testified that he was not aware of anything that happened between Laisenia and the first Accused. He was only asked to drive the vehicle to chase him as he ran away from Vitivou. He only assisted two of his colleagues in the team that came to raid

Vitivou to arrest a person who ran away. He specifically stated that he had no idea or knowledge of what had occurred after Laisenia was taken away in the second vehicle.

Analysis

17. Considering the evidence presented during the hearing and the admitted facts tendered by the four Accused persons, I find the main issue is whether the three Accused persons assaulted and intimidated Laisenia. At the same time, whether he was wrongfully confined in the vehicle by the four Accused persons.

Joint Enterprise

18. For convenience, I shall first draw my attention to the first, third and fourth counts. The learned Counsel for the Prosecution submitted during the closing submissions that the Prosecution presented its case against the four Accused in respect of the first, third and fourth counts on the basis of the principle of joint enterprise as stipulated under Section 46 of the Crimes Act. Hence, it is prudent to briefly discuss the scope and the boundaries of the principle of joint enterprise as enunciated under Section 46 of the Crimes Act in order to properly comprehend the criminal liabilities of the offenders who embarked on a joint unlawful enterprise and then committed a crime.

19. Section 46 of the Crimes Act states that:

> *"When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."*

20. Accordingly, if two or more Accused persons formed a common intention to carry out an unlawful purpose and in prosecuting that unlawful purpose if a crime was committed, each of them is in *pari delicto* irrespective of who did what.

21. The Supreme Court of Fiji in **Rasaku v State [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013)** adopted the definition of the boundaries of joint enterprise outlined by Lord Lane CJ in **R v Hyde (1991) 1 QB 134**. Lord Lane CJ adverted in **R v Hyde (supra)** that:

> *"There are, broadly speaking, two main types of joint enterprise cases where death results to the victim. The first is where the 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 than 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 was pointed out in R v Slack, (1989) 3 All ER 90 at 94, [1989] QB 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 had an express or tacit understanding with A that such harm or death should, if necessary, be inflicted."*

22. Though Lord Lane CJ's above dictum was in relation to a crime committed in joint enterprise resulting in death, it could be equally applicable to any other form of crime committed in the execution of joint enterprise.

23. The Supreme Court of Fiji in **Vasuitoga v State (2016) FJSC1; CAV001.2013 (29 January 2016)** compared Section 22 of the repealed Penal Code, which had stipulated the principle of joint enterprise, with Section 66 (2) of the Crimes Act of New Zealand. The Court found that the New Zealand approach to secondary liability corresponds closely with Section 22 of the Penal Code. This comparison could be safely extended to Section 46 of the Crimes Act, as Section 46 is the replica of Section 22 of the repealed Penal Code.

24. Section 66 (2) of the Crimes Act 1961 of New Zealand states that:

> *"Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose."*

25. The Supreme Court of New Zealand in **Ahsin v R (2015) 1 NZLR 493 (Elias CJ, McGrath, William Young, Glazebrook and Tipping JJ)** discussed the scope and the boundaries of the principle of joint enterprise as stated under Section 66 (2) of the Crimes Act of New Zealand. Based on the comparison made by the Supreme Court of Fiji in **Vasuitoga v State (supra)**, I find the guidelines outlined in **Ahsin v R (supra)** are of persuasive assistance in comprehending the boundaries of Section 46 of the Crimes Act.

26. McGrath J in **Ahsin v R (supra)** set forth the scope of the joint enterprise, stating that:

> *"An issue that arose in this Court was whether s 66(2) applies where the offence that occurs is an intended offence, such as one which was the very object of the common purpose, or only to offences that were not intended by the party but that were known to be a probable consequence of the joint enterprise. We are satisfied that s 66(2) applies in either context."*

27. Considering McGrath J's observation, it is clear that Section 46 covers the offence that was the obvious objective of the unlawful purpose as well as the offences that were not intended by the parties to the enterprise but known to them as probable consequences of carrying out their unlawful purpose.

28. McGrath J in **Ahsin v R (supra)** then proceeded to explain the definition of " probable consequence of the prosecution of the common purpose", where McGrath J observed that:

"[100] Counsel's criticism is directed at established law on the requirements of s 66(2). In R v Gush, the Court of Appeal, construing the words "probable consequence" in the provision purposively and in their context, held that they meant an event that could well happen rather than one which is more probable than not. In R v Piri, Cooke P reiterated that "the words do not require proof that the accused thought that the result which in fact eventuated was more likely than not". He added that while no single formula is "preferable or adequate", the degree of foresight required to be proved may be referred to as "a real risk, a substantial risk, v something that might well happen". (emphasis added)

[101] These decisions have been consistently followed since in New Zealand. The Judge's direction in this case is entirely in accordance with them and the present case does not require reconsideration of this aspect of the law.

29. Elias CJ in **Ahsin v R (supra)** explained the fault elements that is required under the joint enterprise, stating that:

[17] ..... For guilt under s 66(2), the two states of mind that must be proved are an intention in common with others to prosecute and assist in an unlawful purpose, and knowledge that the crime charged is a probable consequence (in the sense that it was known to be something that might well happen in the prosecution of the common unlawful purpose)

30. Elias CJ then stated that the question of probable consequence is not one for objective assessment after the event but depends on the actual knowledge of each accused when prosecuting the common intention.

31. In recapitulating, McGrath J outlined the main elements of the principle of joint enterprise as follows:

[102] To summarise, in order to establish party liability under s 66(2), the Crown must prove beyond reasonable doubt that:

(i) the offence to which the defendant is alleged to be a party was committed by a principal offender;

(ii) there was a shared understanding or agreement to carry out something that was unlawful;

(iii) the person(s) accused of being parties to that agreement had all agreed to help each other and participate to achieve their common unlawful goal;

(iv) the offence was committed by the principal in the course of pursuing the common purpose; and

(v) the defendant intended that the offence that eventuated be committed, or knew that the offence was a probable consequence of carrying out the common purpose. This requires foresight of both the physical and mental elements of the essential facts of the offence.

32. The Supreme Court of Fiji in **Vasuitoga v State (supra),** having considered the approaches adopted by the Courts in England, Australia and New Zealand, found the fault element of the secondary party that the Prosecution is required to prove is that the secondary party contemplated and foresaw the probability of commission of the offence in the execution of the planned unlawful purpose. It is a subjective test. The Supreme Court in **Vasuitoga v State (supra)** held that:

[40] In case of murder, the subjective element that the prosecution is required to prove is that the secondary party contemplated and foresaw the probability of death or infliction of serious harm on the deceased in the execution of the planned unlawful purpose. This principle was enunciated by the Privy Council in Chan Wing-siu and others v The Queen [1984] UKPC 27; [1984] 3 ALL ER 877 and followed by the courts in Fiji in Kumar and others v R [1987] S.P.L.R. 131, 134, Pauliasi Nacagilevu v The State

unreported Cr App No. AAU0058 of 2010: 14 August 2015 at [23] and Eparama Niume and another v The State unreported Cr App No. AAU0106 of 2011; 2 October 2015 at [23].

[41] Various tests have been formulated by the courts to determine what was contemplated by the secondary party in pursuance of an unlawful purpose. In Johns v R [1980] HCA 3; (1980) 143 CLR 108, 130-13, the High Court of Australia endorsed the test as "an act which might be done in the course of carrying out the primary criminal intention – an act contemplated as a possible incident of the originally planned particular venture". In a later case of Miller v R (1980) 55 ALJR 23, the High Court of Australia spoke of contemplation by the parties of a substantial risk that the killing would occur. In R v Gush [1980] 2 NZLR 92, the New Zealand Court of Appeal preferred the test "an event that could well happen".

[42] In Chan Wing-siu, the Privy Council considered the various tests and concluded that no one test is exclusively preferable because the question is not one of semantics. Sir Robin Cooke who wrote the principal judgment said that all that is required is that the prosecution must prove the necessary contemplation beyond reasonable doubt, although that might be done by an inference from all the admissible evidence led at the trial including any explanation the accused gave in evidence or in a statement put in evidence by the prosecution. At the end of the day, it can only be for the jury to determine any issue of that kind on the facts of the particular case.

33. The Fiji Court of Appeal in **Tapoge v State [2017] FJCA 140; AAU121.2013 (30 November 2017)** held that:

*[37] .....But to impute secondary liability for murder under the doctrine of **joint enterprise** , the fault element that the prosecution was required to prove was that the accused contemplated or foresaw death when they carried out their common intention to assault the deceased (Vasuitoga and*

Qurai v The State unreported Cr App No CAV001 of 2013; 29 January 2016).

34. Both **Vasuitoga v State (supra)** and **Tapoge v State (supra)** were held after the Supreme Court of England in **R v Jogee [2016] UKSC 8** reversed the previous case law on the applicable principle of determining the fault element of joint enterprise. Keith J in **Rokete v State [2022] FJSC 11; CAV002.2019, CAV003.2019, CAV004.2019 (29 April 2022)** ascertained that the principle enunciated in Jogee has not yet been considered in Fiji properly, hence, the applicable test is still the foreseeability. Keith J held that:

> *"113. The final topic relates to one aspect of the judge's summing-up on what the prosecution has to prove when the charge is murder. Aluwihare J has set out in his judgment the directions which the judge gave. One of those directions was that the petitioner whose case the assessors were considering had to have known that what he was doing would cause death or very serious harm, but went on to do it regardless. That direction amounted to a direction that, even if the petitioner did not intend to cause death or very serious harm, it would be sufficient to convict him of murder if he knew that death or very serious harm was a forseeable consequence of what he was doing. By making foreseeability of death or very serious harm an alternative to intending to cause either of those things, the trial judge was said by Rokoua's counsel to have given a direction inconsistent with the well-known decision of the Supreme Court in the UK in R v Jogee [2016] UKSC 8. In Jogee, it was held that the courts had taken a wrong turn when they had equated intention with foreseeability. The test was still intention, with forseeabilty of death or very serious harm merely being of evidential value, albeit very considerable evidential value, in determining what the defendant's intention had really been.*
>
> *114. The correctness of Jogee has been widely debated in the common law world. It has not been followed in some jurisdictions. Unquestionably, the issue will arise at some stage for consideration by the Supreme Court in*

Fiji. We were told that the issue has already arisen in the Court of Appeal. But the issue does not arise in this case. The killing of the deceased took place while the Penal Code was in force, and the Penal Code required malice aforethought to be proved for a defendant to be convicted of murder. Section 202 provided that malice aforethought would be deemed as established if the defendant intended to kill or cause the deceased very serious harm, or if the defendant knew that the act or omission causing death would probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether grievous bodily harm is caused or not, or by a wish that it may not be caused."

In other words, the Penal Code itself gave foreseeability of death or very serious harm as an alternative to intending to kill or cause very serious harm as the mens rea for murder. It follows that the judge's direction was correct on the state of the law as it was at the time of the killing of the deceased.

Elements of the Offences

35. In applying the above-discussed legal principles *mutatis mutandis* with the facts of this matter, I could recapitulate the main elements of the first, third and fourth counts as charged as follows:

First Count of Criminal Intimidation:

i) The first and second Accused persons formed a common intention to prosecute an unlawful purpose of intimidating Laisenia to obtain his mobile phone,

ii) In the prosecution of that unlawful purpose, one of them committed the offence of criminal intimidation,

iii) The other accused person contemplated or foresaw that the offence of criminal intimidation was a probable consequence of carrying out the common purpose. This requires contemplation/foresight of both the physical and mental elements of the offence.

The third count of Act Intend to Cause Grievous Harm:

i) The first, second and third Accused persons formed a common intention to prosecute an unlawful purpose of assaulting Laisenia,

ii) In the prosecution of that unlawful purpose, one of them committed the offence of Act Intended to Cause Grievous Harm,

iii) The other two accused persons contemplated or foresaw that the offence of Act Intended to Cause Grievous Harm was a probable consequence of carrying out the common purpose. This requires contemplation /foresight of both the physical and mental elements of the offence.

36. The Prosecution presented the fourth count based on the first part of the definition of joint enterprise given by McGrath J in **Ahsin v R (supra)**, where the Prosecution alleged that the four Accused persons formed a common intention to prosecute an unlawful purpose of wrongfully confined Laisenia, and in conjunction with each other, they committed the offence of wrongful confinement as charged in the Information.

37. I am mindful that the Court is required to consider charges against each Accused separately. It is crucial to note that forming a common purpose does not necessarily require a formal or verbal agreement. This common purpose can arise spontaneously, in the heat of the moment, through the participants' conduct.

Evaluation of Evidence

38. Having considered the relevant legal principles pertaining to the principle of joint enterprise, I shall now proceed to evaluate the evidence presented by the parties in this matter. In evaluating the evidence, the Court must determine the testimonial

trustworthiness of the evidence given by the witnesses based on the credibility and reliability of their evidence. In doing that, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. **(vide; Matasavui v State [2016] FJCA 118; AAU0036.2013 (the 30th of September 2016, State v Solomone Qurai (HC Criminal - HAC 14 of 2022).**

First Count

39. Laisenia testified in his evidence that the first accused asked him where his mobile phone was while they were taking him to an unknown location in the second vehicle. He then took a baton and threatened him, stating that he would put it to his anus if he did not give him the mobile phone. There is no evidence to suggest that the second Accused joined the first Accused in chasing Laisenia and then captured him at the MaxValue Supermarket with the knowledge of recovering the mobile phone. Hence, I am not persuaded to accept that the second Accused had a common intention with the first Accused to obtain or recover the mobile phone from Laisenia.

40. I accept the evidence of Laisenia regarding his testimony that the first Accused threatened him with a baton, saying that if he did not give him the mobile phone, he would put the baton into his anus. I accordingly find the Prosecution proved beyond a reasonable doubt that the first accused had threatened Laisenia with the baton, intending to cause alarm, but failed to establish the criminal responsibility of the second Accused for this offence.

Third Count

41. As discussed above, it is the onus of the Prosecution to prove that the principal offender who committed the offence of Act Intend to Cause Grievous Harm had committed the offence with the necessary mental element. Hence, I shall first consider the main elements of the offence as stated under Section 255 (a) of the Crimes Act. The main elements of Act Intended to Cause Grievous Harm are:

i) The Accused,

ii) With intend to maim, disfigure, or disable any person, or to do some grievous harm to any person,

iii) Unlawfully wound or does any grievous harm to any person,

iv) by any means.

42. The defining element of this offence is the intention of the person rather than the result of the said intention. The Court of Appeal of England in **R v Frank Purcell (1986) 83 Cr App R** outlined the applicable approach in determining the intention to grievous bodily harm, where the Lord Chief Justice held:

> *"The direction which the judge would have given on intend had he had the opportunity (which the judge in this case did not) would have been as follow: "You must feel sure that the defendant intended to cause serious bodily harm to the victim. You can only decide what his intention was by considering all the relevant circumstances and in particular what he did and what he said about it". ....*

43. In this matter, the Prosecution did not specifically state in the Information who the principal offender who committed the offence was while prosecuting the common intention he formed with others to prosecute the unlawful purpose of assaulting Laisenia. Under such circumstances, it is important to consider the alleged conduct of each of the three Accused persons.

44. According to Laisenia, the first Accused seated next to him and continuously assaulted him, punching on his face and head. He then took the baton and assaulted Laisenia on the back of his head and shoulder blade with it. The second Accused had punched him once using his elbow. The third Accused also punched Laisenia while seated in the front passenger seat.

45. The Doctor who examined Laisenia and then examined the X-ray report explained that she found a fracture of the left clavicle on the X-ray report. The Prosecution did not produce the x-ray report as evidence nor disclose who obtained it. Nevertheless, Defence made no issues with the correctness of evidence given by the Doctor regarding the x-ray report and her findings based on the x-ray report. Accordingly, it is safe to conclude that Laisenia had suffered a fracture on his left clavicle after this incident. Laisenia testified that the first Accused assaulted him on his shoulder blade with the baton. This evidence of assaulting with a baton should be considered along with the conduct of the first accused throughout this episode.

46. The three Accused, in their respective evidence, completely denied the allegation of assault. Each of them, in their evidence, said that they only questioned Laisenia in order to gather intelligence regarding drugs and never assaulted him, as claimed by Laisenia. However, considering the close proximity of time between this alleged assault and the conduct of medical examination, finding the injuries as explained by the Doctor, I am unconvinced to accept the evidence of the first, second and third Accused as the truth or maybe the truth, hence, their evidence failed to create any reasonable doubt about the evidence given by Laisenia and the Doctor.

47. In view of this evidence, I am convinced that the first Accused had gone beyond their common plan of assaulting Laisenia and assaulted him with a baton with the intention of causing some grievous harm. The second and third Accused were present when the first Accused assaulted Laisenia with the baton; hence, I am satisfied that they knew or foresaw that the offence of Acts Intended to Cause Grievous Harm was a probable consequence of carrying out the common purpose.

48. I accordingly find the Prosecution has proven the third count as charged in the Information beyond a reasonable doubt.

Fourth Count

49. As I mentioned above, the fourth count of Wrongful Confinement is founded on the allegation that all four Accused persons formed a common intention to prosecute an unlawful purpose of wrongfully confined Laisenia, and in conjunction with each other, they committed the offence of wrongful confinement.

50. There is no evidence before the Court to establish that the fourth Accused knew what had occurred between the first Accused and Laisenia at Vitivou. According to his evidence, he stayed in his vehicle while the others conducted the raid at Vitivou. The first and the second Accused persons asked him to chase the two boys and he obliged to the request. He took the first and second Accused persons to MaxValue and brought Laisenia back to Vitivou. I accept the version of evidence given by the fourth Accused that he was unaware of the reasons for detaining Laisenia and did not take part any further after returning to Vitivou.

51. Based on the evidence discussed in the above paragraph, there is a reasonable doubt whether the fourth Accused only performed legitimate Police duty of assisting his two fellow officers in detaining a suspect who fled from the scene of their operation. Hence, I am unable to conclude that the fourth Accused formed a common purpose with the other three Accused persons to prosecute an unlawful purpose of wrongfully confining Laisenia.

52. .I am not persuaded by the evidence given by the first, second and third Accused, saying that they only confined Laisenia for the purpose of obtaining vital information for their drug raids. Considering my above finding that the three Accused assaulted Laisenia inside the vehicle in prosecuting of an unlawful common purpose of assaulting, I do not find any legality of confining the free movement of Laisenia. Hence, it was not a legitimately executed police duty. Therefore, I find the first, second and third Accused persons have committed the offence of Wrongful Confinement as charged under count four of the Information.

Second Count

53. In respect of the second count, the Prosecution alleged that the first Accused punched Laisenia inside the parked vehicle when he was put into the said vehicle after he was captured at MaxValue. According to Laisenia, the first Accused punched him when the vehicle was still parked. According to the Security Officer at MaxValue, it was the second Accused who assaulted Laisenia, and the first Accused was still standing outside the vehicle. Maika said that he saw the first Accused punched Laisenia before the first Accused got into the vehicle. Laisenia further explained that both the first and second Accused persons assaulted him inside the vehicle when it was parked.

54. According to the CCTV footage tendered in evidence, it appears that the first Accused got into the vehicle from the right-side back door when the fourth Accused, the driver, got in and started to reverse the vehicle. There is no visual footage suggesting that the first Accused punched Laisenia, who was already inside the vehicle before he entered.

55. As evidence unfolded at the hearing, this alleged incident occurred suddenly and rapidly. The Security officer and Maika witnessed this incident from different locations under different circumstances. It is not unusual to observe inconsistencies in the evidence given by such eyewitnesses, recalling a rapid and sudden event they observed from different locations and directions. The incident of the two Accused persons entering the MaxValue supermarket, grabbing Laisenia, and pushing him into the vehicle occurred rapidly and suddenly. Naturally, Laisenia, who encounters such a sudden and rapid assault on him, may not clearly recall who assaulted him and how they assaulted him. The Court must consider whether, irrespective of those inconsistencies, witnesses of the Prosecution are, in substance, telling the same story. (**vide; Lord Pearson in Mohan and Another v Regina (1967) 2 All ER 58,**)

56. Considering my observation of the CCTV footage tendered in evidence and the above inconsistencies of the evidence of the Prosecution's witnesses, there is a reasonable doubt about the reliability of the evidence of Laisenia and Maika, alleging that the first Accused punched Laisenia before he entered into the vehicle.

57. I accordingly find the Prosecution failed to prove that the first Accused punched Laisenia, causing him actual bodily harm as charged.

58. The first, second and third Accused merely denied any wrongdoing and said in unison that they did not assault or wrongfully confine Laisenia but only questioned him to obtain necessary intelligence for their police investigation. Considering the above conclusion I reached with respect to the first, third, and fourth counts, I find the evidence of the three Accused persons is not true and also failed to make any reasonable doubt about the Prosecution case in respect of those three counts.

Conclusion

59. To recapitulate, I am satisfied that the Prosecution has proven beyond reasonable doubt that the first Accused committed the first, third and fourth counts as charged, and the second and the third Accused committed the third and fourth counts as charged. Moreover, the Prosecution failed to prove beyond reasonable doubt that the first Accused committed the second count as charged, the second Accused committed the first count as charged, and the fourth Accused committed the fourth count as charged.

60. In conclusion, I find the first Accused guilty of the first count of Criminal Intimidation, contrary to Section 375 (1) (a) (i) (iv) (2) (a) of the Crimes Act, third count of Acts Intended to Cause Grievous Harm, contrary to Section 255 (a) of the Crimes Act and fourth count of Wrongful Confinement, contrary to Section 286 read with section 46 of the Crime Act and convict of the same accordingly.

61. Furthermore, I find the first Accused not guilty of the second count of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act, and acquit him of the same accordingly.

62. I find the second Accused guilty of the third count of Acts Intended to Cause Grievous Harm, contrary to Section 255 (a) of the Crimes Act and the fourth count of Wrongful

Confinement, contrary to Section 286 read with section 46 of the Crime Act and convict of the same accordingly.

63. Moreover, I find the second Accused not guilty of the first count of Criminal Intimidation, contrary to Section 375 (1) (a) (i) (iv) (2) (a) of the Crimes Act and acquit him of the same accordingly.

64. I find the third Accused guilty of the third count of Acts Intended to Cause Grievous Harm, contrary to Section 255 (a) of the Crimes Act and fourth count of Wrongful Confinement, contrary to Section 286 read with section 46 of the Crime Act and convict of the same accordingly.

65. I find the fourth Accused not guilty of the fourth count of Wrongful Confinement, contrary to Section 286 read with Section 46 of the Crime Act, and acquit him of the same accordingly.

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Hon. Mr. Justice R. D. R. T. Rajasinghe

At Suva

07th June 2024

Solicitors

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Office of the Legal Aid Commission for the 4th Accused.