

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

**CRIMINAL APPEAL NO. AAU 0061 OF 2014**  
**[High Court Criminal Case No. HAC 25 of 2013]**

**BETWEEN** : TOMASI TAVAKATOGA TUIWAILEVU MATENI  
*Appellant*

**AND** : THE STATE  
*Respondent*

**Coram** : Goundar JA

**Counsel** : Ms S. Vaniqi for the Appellant  
Mr. L. J. Burney for the Respondent

**Date of Hearing** : 3 December 2014

**Date of Judgment** : 12 June 2015

**RULING**

- [1] This is a timely application for leave to appeal against conviction and sentence. The appellant was convicted on one count of indecent assault and one count of rape after trial in the High Court at Labasa. He was sentenced to a total term of 13 years' imprisonment with a non-parole period of 10 years.
- [2] The appeal is advanced on the following grounds:

**Appeal Against Conviction**

- (i) That the Learned Judge erred in law and fact when he failed to direct the assessors properly in regards to the inherent weaknesses of the prosecution case.
- (ii) That the Learned Judge erred in law and fact when he failed to direct the assessors on the credibility of the two key witnesses MERE MATAI and KELERAYANI WATI who under cross examination admitted they did not see the Appellant by the light of a solar light but that of a kerosene lamp.

- (iii) That the Learned Judge erred in law and fact when he failed to direct the assessors on the credibility of the two key witnesses MERE MATAI and KELERAYANI WATI who under cross examination differed as to if the Appellant was wearing a wig or mask, which goes to identification evidence.
- (iv) That the Learned Judge erred in law and fact when he failed to direct the assessors adequately on the weight to be given to the alibi witness evidence of SANITA DILIONI RATUSAKI when contrasted with that of the two key witnesses MERE MATAI AND KELERAYANI WATI, which resulted in a miscarriage of justice.

**Appeal Against Sentence**

- (v) That the sentence is manifestly harsh and excessive.

[3] Unfortunately, counsel for the appellant has failed to properly articulate the alleged errors in the grounds of appeal. However, there are two issues arising from the appellant's written submissions that are of some concern.

[4] The convictions are based upon identification evidence of the victim and her sister. Although the witnesses said that they recognized the appellant, the circumstances surrounding the recognizance arguably called for **R v Turnbull** directions. The **Turnbull** directions were not given in the summing up.

[5] The appellant relied upon alibi as his defence. Apart from summarising the alibi evidence the trial judge gave no legal directions as to how the assessors were to assess the evidence. The trial judge did not direct the assessors that it was the prosecution who carried the burden to disprove the alibi.

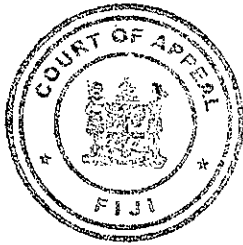
**Sentence Appeal**

[6] A sentence of 13 years' imprisonment for rape of a 9-year old girl in a contested case is within the tariff for child rape. The final term reflects the criminality involved and there is no arguable error in the sentencing discretion of the trial judge.

**Result**

Leave to appeal against conviction is granted.

Leave to appeal against sentence is refused.



A handwritten signature in black ink, appearing to read "D. Goundar", is written above a dotted line.

Hon. Mr. Justice D. Goundar  
**JUSTICE OF APPEAL**

**Solicitors:**

Office of Vaniqi Lawyers for the Appellant

Office of the Director of Public Prosecution for the State