

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

**CRIMINAL APPEAL NO. AAU 55 OF 2016**  
**(High Court HAC 77 of 2014 at Labasa)**

**BETWEEN** : **TOMASI YABAKIONO** *Appellant*

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

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

**Counsel** : **Mr G O' Driscoll for the Appellant**  
**Mr M Korovou for the Respondent**

**Date of Hearing** : **23 January 2019**

**Date of Ruling** : **5 February 2019**

**RULING**

- [1] Following a trial in the High Court at Labasa the appellant was convicted on one count of rape and three counts of indecently annoying a person. On 9 May 2016 he was sentenced to a term of imprisonment of 12 years with a non-parole term of 10 years for the rape conviction and 6 months imprisonment for each of the three indecently annoying convictions with all sentences to be served concurrently.

- [2] This is his timely application for leave to appeal against conviction and sentence pursuant to section 21(1)(b) and (c) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives a single judge of the Court of Appeal power to grant leave. The test for granting leave to appeal against conviction is whether the appeal is arguable before the Court of Appeal and the test for granting leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion (Naisua -v- The State [2013] FJSC 14; CAV 10 of 2013, 30 November 2013).
- [3] There are seven grounds of appeal against conviction. They are all in one way or another concerned with the judgment delivered by the learned trial Judge. In that judgment the Judge had overturned the unanimous opinions of the assessors that the appellant was not guilty on all counts.
- [4] Although the trial Judge is permitted to disagree with the opinions of the assessors under section 237 of the Criminal Procedure Act 2009, he is required to deliver a written judgment with cogent reasons for doing so on those occasions when he disagrees with those opinions. Whether the reasoning in the judgment is sufficiently cogent will to some extent depend upon an examination of the transcript of the evidence. Whether the evidence was sufficiently analysed by the trial Judge necessarily involves an examination of the transcript of evidence. As a result leave should be granted to enable the Full Court to consider the evidence in order to determine the grounds of appeal against conviction.
- [5] The grounds of appeal against sentence involve a claim that the sentence was harsh and excessive. The judge selected a starting point of 7 years which is at the lowest end of tariff. He added 7 years for aggravating factors. It is quite apparent that there has been no double counting. The Judge regarded the difference in the status and rank between the appellant and the complainants as severe aggravation. In my judgment that does not represent an error in the exercise of the sentencing discretion.

[6] However it may be argued that at the age of 47 years old the appellant was entitled to a discount greater than 1 year for good character and greater than 1 year for other mitigation. The head sentence of 12 years for one count of rape in the present case is on the high side and it is arguable that there has been an error in the exercise of the sentencing discretion.

[7] As a result leave to appeal against conviction and sentence is granted.

Orders:

1. *Leave to appeal conviction is granted.*
2. *Leave to appeal sentence is granted.*



*W. Calanchini*

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