IN THE COURT OF APPEAL, FIJI
[ON APPEAL FROM THE HIGH COURT]

Criminal Appeal Nos. AAU 061 of 2014
(High Court Case No. HAC 25 of 2013)

BETWEEN	:	**TOMASI TAVAKATOGA TUIWAILEVU MATENI**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Gamalath, JA** **Prematilaka, JA** **Nawana, JA**
Counsel	:	**Mr. M. Fesaitu for the Appellant** **Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**11 February 2020**
Date of Ruling	:	**27 February 2020**

JUDGMENT

Gamalath, JA

[1] The Appellant faced trial in the High Court at Labasa on two counts; one count of Indecent Assault allegedly committed on 6 August 2012 and another count of Rape allegedly committed on 7 August 2012, offences committed against the complainant M.M., (name suppressed) a 9 year old girl. According to the particulars of the charge of rape, it was a case of digital rape.

[2] After trial, based on the unanimous opinion of the assessors, the learned trial Judge convicted the Appellant on both counts and on 28th April 2014, the Appellant was sentenced to imprisonment for 13 years with a non-parole period of 10 years.

[3] The appellant filed a timely application for leave to appeal against the conviction and the sentence. In it, there were four grounds against the conviction and one ground against the sentence. The learned single Judge while refusing leave on the ground against the sentence, granted leave to appeal against the conviction.

[4] Presently before this Court, distilling the essentials of the grounds for which leave was granted, the Appellant relies on the following two grounds;

(1) Non -directions on *Turnbull* guidelines;
(2) Non-direction on *alibi* evidence and how to assess alibi evidence.

[5] Having regard to the totality of the evidence at the trial, the issue of the identification of the Appellant has taken the center stage. The present grounds of appeal have been formulated to highlight that issue. Since the respondents raised no objection to the style of the present grounds of appeal, this appeal shall be considered accordingly.

The Facts:

[6] Prosecution relied mainly on the evidence of the complainant MM and her sister to establish the case against the appellant.

[7] MM was 9 years old and was living with her grandparents when the alleged incidents happened. According to MM, on two occasions the Appellant had intruded into her bedroom in the night while they were sleeping. On 6 August 2012 having sat on her bed, it was alleged that he ran his hand all over her body. The count of Indecent Assault is based on this incident. On the second occasion on the 7 August 2012, once again having had access into her bed room, he inserted his finger into her vagina. Evidence does not disclose how it had been possible for the appellant to find access into the complainant's bedroom. Both

incidents happened around 8 in the night, while the complainant and her siblings were asleep. The evidence shows that until MM was found bleeding in the school from her vagina and reported the matter to her teacher, no complaint had been made about the alleged incident to anyone.

[8] On the second occasion when the Appellant allegedly entered the bed room, the second witness, the sister of MM, one Kelerayani stated in her evidence that she felt the presence of someone in the room. The person was wearing a mask. The said person sat on the bed beside MM and removed the mask he was wearing. That was the moment in which she claimed to have seen the appellant who she had known before. Out of fear the witness had covered her face with the blanket and what followed thereafter was not known to the witness. She was an 8 years old child when this happened and as it could be gathered from her evidence it could be comfortably concluded that she has had a fleeting glance of the person sitting on the bed of the sister.

[9] On the issue of the mask that the Appellant alleged to have been wearing, the evidence of MM does not disclose any material to support her sister's evidence. On the other hand what MM said in her evidence was that she saw the Appellant wearing a black wig, when she first saw him on the 6 August, the first day, which he removed before he started touching her body.

[10] The Appellant giving evidence at the trial denied the charges and took up the position that he was attending a church service in the night, a crusade, at the material times to these charges. This, I find to be the consistent position he had been taking from the time of his arrest, a defence of *alibi*, and as the trite law dictates, in the event of the prosecution is unable to dispel the reasonable doubts that such evidence could cause on the case for the prosecution, it should entitle the accused to an acquittal.

[11] Clearly the case for the prosecution is based on the issues relating to the accuracy of the visual identification said to have been made by MM and her sister. In the circumstances it is important to examine the conditions under which the identification had been made.

[12] The evidence relating to the quality of light;

(a) Answering the evidence-in-chief MM Stated that at the time the appellant allegedly entered her bed room "an electricity light was on" (Answer Q13) and the light was beside her bed.

(b) Again in the evidence in chief she said that she identified the appellant from the "room light" and she knew him as they used to see each other during the day time. (Answer Q29).

(c) MM further said that after inserting his finger the appellant "remained there for a long time". (Answer Q30).

(d) Answering the cross-examination, MM said that there was no electricity available in that house. (Cross examination 3).

(e) The witness qualified the answer by saying that they used kerosene lantern in the night, (cross exam 6).She did not agree that they turned off the lights before going to sleep. (cross exam 7) There were no street lights available around the area where they were living. (Cross examination 12).

(f) When MM was further questioned about the quality of light she said the electricity light that she was referring to was the solar light that was installed in April 2012. (Cross examination 27). She further said that the solar light was just behind her back. (Cross exam 55).

(g) Further down in the cross- examination MM said "the solar light was enough light. Solar light was given from solar light. It was bright light". (Cross examination 63).

(h) Qualifying the answer MM further said that "our solar light was a small light with 5 bulbs" and the light covered the room. (Cross examination 68).

[13] The evidence of the sister of MM on the quality of light had been very brief in the sense she had merely said that she saw the appellant with "electricity light"; no further questions had been put to the witness to find details on that matter. She distinctly said the appellant was wearing a mask when she saw him and she knew the difference between a mask and a wig, which was not what the appellant was wearing. She could not remember how long she had the appellant under her observations. Her position was clear, that as she saw the appellant she has covered her face with the blanket as she was frightened (Answer 06).

[14] The grandfather of the complainant was a witness for the prosecution under whose care and protection the complainant lived. Prosecution made no attempts at the trial to verify from him about the issue relating to the quality of light in the house, in the relevant nights.

[15] The prosecution witness, Woman Police Constable 3184 Maca Baleinamoto, who was the Chief Investigating officer of this crime, said in evidence that "I did not watch the solar light at the victim's house". (pg132 –answer 5). One does not have to take pains to describe the significance of this answer *vis a vis* the quality of the visual identification the complainant and her sister said to have made of the appellant. Suffice it to state that whatever the witness may have meant by that answer, it would not augur well for furthering the interests of the prosecution case.

The Defence:

[16] From the time of his arrest the appellant denied the accusation. In his evidence at the trial he maintained that he was at a "crusade" a church event at the material times to this case and his evidence was supported by the defence witness Sanita Dilioni. Sanita's evidence was that the appellant was with the witness throughout the nights on both 6th and 7th and as such the witnesses for the prosecution have made a mistaken identification.

[17] The evidence of the witnesses had not been controverted in their material points.

[18] Dealing with the Grounds of Appeal:

As regards the prosecution case, there is no doubt that the case rests on the issue of the visual identification of the appellant, said to have been made by the complainant and her sister. The lighting conditions under which the witnesses recognized the appellant became a seriously disputed issue and further, I find that in the summing up, as contended by the counsel for the appellant, the learned Trial Judge overlooked the requirement to give directions in line with *Turnbull* directions, ([1977] Crim. Appeal R.132) a requirement that is seriously needed in a case of this nature, in my opinion. (See also **Savu v State** [2014] FJCA 208:AAU0090, 2012 (5 December 2014)).

[19] The State, on the other hand argues in its written submissions that the main thrust of the defence case had been not about the disputed identification of the appellant made by the witnesses under difficult circumstances, but about the veracity of the witnesses, for on many occasions in the High Court trial, the defence counsel had suggested to the complainant and her sister that they falsely implicated the appellant and therefore they were liars. Extending the argument further, it has been sought to be contended that the absence of a specific direction in line with the **Turnbull** dicta would not make the conviction unsafe. On this argument, I am unable to agree. In the preceding paragraphs [12] and [13] I have highlighted the relevant portions of the evidence for the prosecution in which it is easy to find the main line of the defence at the trial. In my understanding all along there had been an effort to demonstrate the unsatisfactory conditions under which the appellant had been identified. The defence had questioned the quality of the light that existed when they claimed to have identified the appellant. I find that the prosecution also had relied on the fact that this was more a recognition of the appellant than a mere identification of someone about whom they have had no prior knowledge. The prosecution had not seriously elicited from MM material such as the duration of time for which the Appellant was under her observation, a matter that is important for the purpose of establishing the correct identification of a perpetrator. I am mindful of the fact that there are two incidents that had

happened on two successive days, and despite the fact that there were no prompt complaints made, it was the same appellant that both MM and her sister had implicated as the offender. However, as far as the issue of identity is concerned that on the first day the appellant was said to have been wearing a wig and on the second day he was said to have been wearing a mask, about which the witness Kelerayani spoke about. Obviously, these are matters that have a bearing on the quality of the identification made under the circumstances that the witnesses described and since they have a direct bearing on the issue raised in the ground one, a direction in line with **Turnbull** would have been a requirement in this case.

[20] On a careful consideration of the summing up with a particular attention being paid to the aspect relating to the overall issue of the identification evidence I could not help thinking whether the learned trial Judge had lost the degree of objectivity that is expected of him. This perceivable error could have been averted had the **Turnbull** guidance been followed. In his analysis of evidence, which is far from being an analysis, but more a repetition of evidence, the learned Judge had left no room for any doubt that the complainant identified the appellant with the aid of the solar light, a matter on which there had been no investigation conducted by the investigating officer. Kelerayani's evidence that she saw the intruder wearing a mask, not a wig as described by the complainant and the fact that she covered her face with the blanket as she saw the intruder out of fear, matters which are directly referable to the quality of the identification evidence, had not been given any importance in the analysis of the evidence in the summing up.

[21] The relevant questions that should have been left with the assessors such as the risk involved in depending on the visual identification evidence of the kind in the case was not explained to the assessors. The possibility of an honest witness to make a mistaken identity under difficult circumstances was never explained to the assessors. The possibility of a convincing witness to be still wrong was never explained to the assessors. More than one witness may still be wrong was never explained to the assessors. Even in situations of recognition of the accused person, there is possibility for a mistaken identification was never explained to the assessors. The length of time the accused was observed by the witness with a special reference being attached to the nature of the evidence of each witness was never

explained to the assessors. On the whole the issues that are intrinsic to the issue of the identification of the appellant by the prosecution witnesses were not brought up for the consideration of the assessors. Instead what one finds is an emphatic repetition of the evidence of the complainant, in that the learned trial Judge summed up that "she saw the accused through bright solar light", referring to the evidence of MM. As regards the summing up it is unclear whether the learned trial Judge paid attention at all to the issue of the degree of visibility in the bedroom of the complainant, a disputed matter that has a direct bearing on the identification evidence. It is in that context the absence of **Turnbull** guidelines, causes a miscarriage.

[22] Citing the decision in **Savu v State** [2014] FJCA 208; AAU10090.2012 (5 December 2014), the counsel for the appellant submitted that "in the present case, the complainant and her sister claimed to have recognized the Appellant. Nonetheless , Turnbull guideline was required, as stated in **Savu v State** (*supra*) that it equally applies to a fleeting glance as well as disputed recognition" I am in agreement with the submission of the counsel for the appellant. State submitted the decision in the Privy Council in the case of **Beckford** (Appellant) **v Reginum** (Respondent) (1993)97 CR.APP.R. 409, in which it was held that "*since the failure to give a general warning about the dangers of mistaken identification* would nearly always by *itself* be *enough to* invalidate *a conviction which was substantially based on identification evidence, it followed that the judge's failure to give a general warning in the absence of other significant evidence against the appellants meant that the conviction must be quashed*".

In my view this decision is on all force with the issue raised in the first ground of appeal. In the circumstances the first ground of appeal should succeed.

Ground 2: "Non–direction on alibi evidence and how to assess alibi evidence";

[23] The evidence of the prosecution witness Detective Constable 3521 Saiyasi at the trial was that on 12 August 2012, she had conducted the caution interview of the appellant in custody. Accordingly the appellant denied the charges and took up the position that he was attending a crusade, a church ceremony, on both days at the relevant times. This had been the

appellant's consistent position and at the trial in his support the evidence of one Sanita Dilioni was called and according to her evidence she had been with the appellant throughout the nights of both days relevant to the incidents.

[24] The appellant relied on some documents at the trial to prove the fact that he had been attending the crusade organized by the church. The evidence had been admitted without any objection.

[25] Since the appellant had been maintaining his innocence coupled with the fact that there was an alibi taken up by him from the beginning of the investigation, the requirements to comply with the provisions of section 125 of the Criminal Procedure Act 2009, (Cap.21A) did not arise in this case. However, what is clearly absent in the prosecution case is the evidence to show as to what action had been taken by the police to verify the truth of the alibi the appellant had taken up in his defence.

[26] It is trite law that when an accused raises an alibi as an defence, in addition to a general direction on the burden of proof, assessors should be directed that prosecution must disprove an alibi, and even if they conclude an alibi is false that does not, of itself, entitle them to convict; **R. v Anderson** [1991] Crim. LR 361; **R. v Bailie** [1995]2 Crim. App. R. 31; **R. v Lesley** [1996] 1 Crim. App. R.39.

[27] In **Ram v State** [2015] FJCA 131; AAU0087.2010 2 October 2015) at [29], the aforementioned dicta had been reiterated.

[28] However, there had been absolutely no evidence adduced by the prosecution at the trial to demonstrate that in compliance with the statutory requirements referred to above and in terms of the *dictum* of the citations of the judgments, whether the Police have conducted an investigation to verify the truth or otherwise of the assertion made by the Appellant from the very inception of the case that he was attending a church crusade at the material times to this case, a defence of alibi. If the prosecution had failed to conduct an investigation into the defence, how would they be able to disapprove the defence taken up by the appellant in a

manner to satisfy the legal requirements referred to above? This I think is a fundamental issue that has a serious bearing on the entirety of the prosecution case and by necessary implication, it should have an impact on the final outcome of the appeal.

[29] In the summing up all what the learned trial Judge had stated in relation to the defence of alibi was that "you must also carefully consider the accused's position as stated above; "Please remember even if you reject the version of the accused that does not mean that the prosecution had established the case against the accused. You must be satisfied that the prosecution has established the case against the accused. You must be satisfied that the prosecution has established the case beyond reasonable doubt against the accused" see para 51. What could be the consequence of a situation where the Assessors neither believe the Appellant nor did they disbelieve him? This third proposition under which the Prosecution's case should have been evaluated had not been left with the assessors by the learned Trial Judge. In my view, these are matters that have an irreversible impact on the outcome of the appeal.

[30] In the summing up what one can find is a general direction which falls far short of the legal requirements to satisfy the burden upon the prosecution when an accused has taken up the specific position of an alibi. In particular, since the appellant's position from the time of his arrest had been that he was in the church during the crucial times to the prosecution case. There had been no evidence elicited through the prosecution witnesses to establish that that was a doubtful position. In the circumstances, it should cast a serious doubt about the ability of the prosecution to prove the case beyond reasonable doubt. Unfortunately, the learned trial Judge had lost sight of these crucial issues and never directed the assessors on these matters. Thus these matters had caused an irreparable miscarriage. Therefore, I hold that Ground 2 also has merits.

[31] In the circumstances, the conviction of the Appellant is bad in law and therefore it should be quashed and Appeal on both grounds should be allowed.

Prematilaka, JA

[32] I have read in draft the judgment of Gamalath JA and agree that the appeal should be allowed and convictions should be quashed as proposed by Gamalath, JA, and particularly due to the indefensible lapse on the part of the learned trial judge to direct the assessors and himself on the lines suggested in ***Turnbull*** on identification and also on the alibi taken up by the appellant. I agree that as a result a miscarriage of justice has taken place. Given what my brother Gamalath JA has stated in the judgment I am convinced that this is not a fit case to apply the proviso under section 23 (1) of the Court of Appeal Act and dismiss the appeal.

[33] However, in my view since the appeal is allowed primarily on account of lack of consideration or adequate consideration on two vital matters in the summing-up and the judgment which may affect the guilt or otherwise of the appellant and not on the ground that the verdict cannot be supported having regard to the evidence or it is unreasonable, the interests of justice requires that a new trial is ordered. In other words this is not a fit case to enter a verdict of acquittal.

[34] The victim, 09 years at the time of the incidents has stated that they happened in the nights on 06 and 07 August 2012. She has testified that on the first day she saw the appellant whom she called as Tomu (his name being Tomasi) seated on her bed wearing a wig which he removed later and then touched her face, shoulder and stomach. The other inmates of the house had been away. The following day he had come, removed the mosquito net and touched inside her vagina and inserted his finger into her vagina. She had identified him with aid of the solar powered lamp beside her bed though they normally have a kerosene lantern in the night at home. The appellant had been there for a considerable time. She had bled from her vagina on the following day.

[35] She had known the appellant before and used to see him during the day and even conduct church gathering at his place. In the agreed facts it is recorded that the victim and the accused knew each other by name in 2012 and that both reside in Nakama Heights Savusavu. Further, it has been agreed that both the victim and the accused were in Nakama

Heights Savusavu on the nights of 06 and 07 August 2012. In my view, this agreed fact may cut across the appellant's alibi defense.

[36] The younger sister of the victim Kelerayani Wati, aged 08 years at the time of the incident had seen the appellant on 07 August 2012 coming and sitting close to the victim on the bed and removing the mask he was wearing. Then she had got scared and covered herself with blanket. She too was positive that it was the appellant and confirmed that there was enough light inside the room.

[37] Thus, while the victim has spoken to what happened on both days, Kelerayani Wati's testimony only relates to what she saw on the 07th August. In the face of the suggestion that the appellant was elsewhere at the relevant times, both sisters had stood firm and were steadfast that it was the appellant who was present in their home on the two days. There is no reason to doubt the truthfulness of their evidence and no sinister motive had been suggested as to why they were falsely implicating the appellant. It is, in my mind very unlikely that both were mistaken as to the identity of the appellant in the circumstances of this case.

[38] Though the victim had showed blood stained clothes to the grandfather on the following day after the incident on 07th night he had thought that blood had come from a boil. According to the grandfather the victim had been scared and ashamed seeing blood on her skirt. On the 10th the victim had been crying in a toilet at school and a teacher, Vaseva Muaibeqa had visited her and been told that a guy had done something to her vagina. The teacher had taken the victim to the police station and from there to the hospital for medical examination.

[39] Medical examination on 10 August had confirmed that the victim's hymen was not intact though there were no injuries or blood stains in her vagina. According to the doctor, if an injury had happened two days back it was unlikely for blood to be seen on her vagina. He had said that if a finger had inserted an injury could be expected but any injury on the vagina is healed very fast due to high blood circulation and the incident had happened two

days prior to the examination. In fact when the victim was examined more than two days had lapsed.

[40] Appellant's position had been that the victim knew him as both of them were from the same village and her house was situated a few meters away from his house. His contention was that he had been at a crusade at Foreshore grounds with his cousin called Sanita both on 06 and 07 August 2012 from 7.00 p.m. and arrived home at 9.30 p.m. and did not go anywhere thereafter. Sanita had given evidence corroborating the appellant and admitted that she was trying to protect her cousin.

[41] For some inexplicable reason, the State had not called the witness whose name had been disclosed in the Notice of Alibi Disclosure dated 18 February 2014 whose statement had been to the effect that anyone could punch in the card at any time and even sneak out at any time from the evangelistic meeting. The card would only show the date and not the time.

[42] When all the circumstances are taken into account and also considering the fact that the appellant is alleged to have committed acts of sexual abuse including digital rape on a vulnerable child of 09 years who, according to the victim impact report, has been living in fear thereafter, I am of the view that interests of justice demand that there should be a new trial. In my view, there is enough evidence for properly directed assessors and a trial judge to arrive at a verdict of guilty on the charges against the appellant if they believe the victim. Therefore, I cannot agree that the appellant is entitled to an acquittal at this stage.

[43] I have also taken into account the comments in **State v Laojindamanee** [2013] FJHC 20; HAC323.2012 (25 January 2013) in ordering a new trial.

> *'[103] The power to order a retrial is granted by section 23 (2) of the Court of Appeal Act. A retrial should only be ordered if the interests of justice so require. In Au Pui-kuen v Attorney-General of Hong Kong [1980] AC 351, the Privy Council said that the interests of justice are not confined to the interests of either the prosecution or the accused in any particular case. They also include the interests of the public that people who are guilty of*

*serious crimes should be brought to justice. Other relevant considerations are the strength of evidence against an accused, the likelihood of a conviction being obtained on a new trial and any identifiable prejudice to an accused whilst awaiting a retrial. A retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (**Azamatula v State** unreported Cr App No AAU0060 of 2006S: 14 November 2008).*

[44] Therefore while agreeing with quashing the conviction and allowing the appeal, I would order a new trial against the Appellant.

Nawana, JA

[45] I have read in draft the judgment of Gamalath JA, the reasons and conclusions therein. I have also read the order and the reasons for a re-trial as proposed by Prematilaka JA, whilst agreeing to the facts of the case. Considering omissions by the prosecution and evidential deficiencies in the case, I am not inclined to hold that a re-trial should be ordered after a lapse of 7 ½ years. In the circumstances, I agree with the orders proposed by Gamalath JA.

The Orders of the Court (by majority) are:

1. Conviction quashed.
2. The Appeal on Grounds 1 and Ground 2 Allowed.
3. Appellant acquitted of all Counts.

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Hon. Justice S. Gamalath
JUSTICE OF APPEAL

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Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Justice P. Nawana
JUSTICE OF APPEAL