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

CRIMINAL APPEAL NO: AAU0089 of 2013
[High Court Case No. HAC 311 of 2011S]

BETWEEN	:	**DHARMENDRA BAL RAM**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Calanchini P** **Goundar JA** **Hamza JA**
Counsel	:	**Mr M Fesaitu for the Appellant** **Mr Y Prasad for the Respondent**
Date of Hearing	:	**23 August 2017**
Date of Judgment	:	**14 September 2017**

JUDGMENT

Calanchini P:

[1] I have read in draft form the judgment of Goundar JA and agree with his reasoning and conclusions. The appeals against both conviction and sentence should be dismissed.

Goundar JA:

[2] This is an appeal against both conviction and sentence. The appellant was charged and tried in the High Court at Suva on one count of rape and two counts of sexual assault. He was acquitted of one count of sexual assault (count 2) at the no case to answer

stage. In the summing up, the learned trial judge directed the assessors to consider an alternative charge of attempted rape, although the appellant was not charged with an attempt to rape. The assessors gave mixed opinions. All three assessors found the appellant not guilty of rape (count 1) and sexual assault (count 3). Two assessors found the appellant not guilty of attempted rape while one assessor found him guilty.

[3] In a written judgment pronounced in open court, the learned trial judge accepted the victim's evidence as true and convicted the appellant of attempted rape (digital rape). The learned trial judge did not make any determination on the remaining count of sexual assault (count 3). It is not clear why the learned trial judge overlooked to render a verdict on count 3. The parties have not taken any issue regarding the lack of verdict on count 3 and for that reason it may not be appropriate to consider the issue.

[4] On 5 August 2013, the learned trial judge sentenced the appellant to 5 years' imprisonment with a non-parole period of 3 years for attempted rape contrary to section 208 of the Crimes Act 2009.

[5] On 24 July 2014, the appellant was granted leave to appeal under section 21(1) of the Court of Appeal Act 1949. The grounds of appeal are:

(i) The appellant was prejudiced in his defence when the learned trial Judge introduced the offence of attempted rape to the assessors as an alternative charge at summing up stage which the appellant was unable to challenge during trial stage.
(ii) The learned trial Judge unfairly adjudged at paragraph 5 of the appellant's sentence that family tension caused by the appellant was an aggravating feature of the offending.

[6] At the hearing of the appeal, the appellant abandoned his sentence appeal. The Court conducted an inquiry in accordance with the principles set out by the Supreme Court in *Masirewa v State* unreported Cr App No CAV0014 of 2008S; 17 August 2010. After hearing the appellant, the Court was satisfied that he made the decision to abandon the sentence appeal freely and voluntarily, after seeking legal advice. I would dismiss the appeal against sentence.

Facts

[7] The victim was a child. It was an agreed fact that she was born on 13 November 2003. When the allegation arose in 2011, she was 7 years old and in class two. The appellant was her uncle – stepfather's younger brother. He was 38 years old, not married but had a child from an earlier relationship. The appellant and his child lived with the victim's family in Valelevu.

[8] The victim's evidence was that the appellant touched her private parts (between the legs) with his hand. This act was subject of the charge alleged in count 1 (digital rape). She also said he used his lips and tongue between her legs, which was the act alleged in count 3 (sexual assault). The incident happened when she was asleep in her bedroom. She felt uncomfortable and pain. She yelled out to the appellant to go away.

[9] The following morning (19/09/11), the victim told her mother that the appellant entered her room naked when her mother questioned her why she had yelled out for the appellant to go away the previous night. The matter was reported to police. The victim was medically examined the same day. The examining doctor found a tear at 6 o'clock position at the vaginal opening. The hymen was intact. In his evidence, the doctor said that the injury was consistent with a penetration with a finger or rubbing with a penis.

[10] At the trial, the appellant gave evidence and called his brother (the victim's stepfather) and his niece (the victim's stepsister) as witnesses. The appellant said on the night in question he drank beer and watched television till 10.30 pm when he went to sleep in his bedroom with his son. He denied sexually assaulting the victim as alleged by her. The brother's evidence was that while he heard the victim yell for the appellant to get out, he did not respond because the victim had the tendency to talk in her sleep. The niece's evidence was that she was in the bedroom with the victim when she yelled for the appellant to get out but the appellant was not in the room. In cross-examination, she admitted that her father told her to say that in court.

Alternative charge of attempted rape

[11] The appellant was charged with rape contrary to section 207(1) (2) (b) of the Crimes Act 2009. The charge alleged that the appellant penetrated the vulva of the victim with his finger without her consent (underlining mine). Attempt to rape is an offence contrary to section 208 of the Crimes Decree. The physical and the fault elements of attempt to commit an offence are set out in section 44 of the Crimes Act 2009.

[12] Attempt requires proof of two essential elements. Firstly, it must be proved that the accused intended to commit the alleged offence and secondly, that, with that intention, the accused did something which was more than mere preparation for committing the alleged offence (*DPP v Stonehouse* [1978] AC 55; [1977] 2 ALL ER 909; 65 Cr App R 192 (HL) at 68; 917; 208, per Lord Diplock). The Court of Appeal adopted the principle in *Stonehouse* in *State v Rainima* unreported Cr App No AAU0002/94S; 12 August 1994 (Tikaram P, Thompson JA and Hillyer JA).

[13] At the trial, neither the prosecution nor the defence suggest that the appellant was not guilty of rape but guilty of attempted rape. The prosecution case was that the appellant committed rape. The appellant's case was that the victim was lying and that the sexual allegation was untrue. In the summing up, the learned trial judge told the assessors to consider attempted rape as an alternative should they find the appellant not guilty of rape. The reason the learned trial judge told the assessors to consider attempted rape was due to the uncertainty in the medical evidence on the issue of penetration. The learned trial judge took the view that the medical doctor was unsure whether there had been a penetration of the victim's vagina (although the charge alleged penetration of the vulva and neither the trial judge nor the parties tried to draw a distinction between a vagina and a vulva).

[14] The direction on the elements of attempted rape is correct. In paragraph [15] of the summing up, the learned trial judge told the assessors:

> ...if you find there was no penetration of the complainant's vagina by the accused's finger, you will have to consider the alternative charge of "attempted rape", although the accused was not formally charged with the same. For the accused to be found guilty of "attempted rape", you must

> consider our discussions on the offence of "rape" in paragraphs 9, 10, 11, 12 and 13 hereof. Furthermore, on the facts, you must find that the accused intended to penetrate the complainant's vagina with his finger, and he did some overt acts to manifest that intention, although he did not commit the offence of rape, as described in paragraph 9 hereof. In other words, he intended to rape the complainant, and did some overt acts to manifest that intention.

[15] The appellant was represented by counsel at the trial. After the summing up was delivered, the appellant's counsel sought redirections on other issues but he did not take any objection to the learned trial judge directing the assessors to consider the alternative charge of attempted rape.

[16] There is no suggestion by the appellant that the learned trial judge did not have power to consider a conviction for attempted rape when the charge was rape. The trial court's power to convict for offences other than those charged is provided by the Criminal Procedure Act 2009. Section 161 is relevant. It states that when a person is charged with an offence, the person may be convicted of having attempted to commit that offence, although he or she was not charged with attempt.

[17] Similarly, section 162(1) gives the trial court power to record a conviction for any lesser or alternative sexual offence where the accused is charged with rape. These provisions are clear. Since the appellant was charged with rape, the learned trial judge had power to convict him for attempted rape, although he was not charged with attempt. There is no obligation on the trial court to give advanced notice to convict for attempt when an accused is charged with a substantive offence. Provided the charge is rape and there was evidence adduced at the trial to support a conviction for attempted rape, the trial court has power to convict for attempted rape or a lesser or an alternative sexual offence without advanced notice to the accused.

[18] In the present case, the learned trial judge convicted the appellant for attempted rape because he entertained a reasonable doubt as to the element of penetration required for rape. However, he believed the victim's evidence and rejected the appellant's denial of the allegation. The victim gave unequivocal evidence that the appellant had touched her inappropriately between her legs. She said she felt pain. She yelled out

for the appellant to go away. Other members of the household heard her yelling for the appellant to go away. The following morning she told her mother about the incident. She implicated the appellant. On the same day she was medically examined. A fresh tear was found in the opening of her vagina. The prosecution evidence against the appellant was strong. The appellant is fortunate that he was not convicted of rape but of attempted rape.

[19] For these reasons, I would dismiss the appeal against conviction.

Hamza JA:

[20] I have read the judgment in draft of Goundar JA and I agree with his reasons and conclusions.

Orders of the Court are:

1. Leave granted to abandon the appeal against sentence.
2. Appeal against conviction and sentence dismissed.

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Hon. Mr Justice W Calanchini
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr Justice D Goundar
JUSTICE OF APPEAL

.....
Hon. Mr Justice R Hamza
JUSTICE OF APPEAL

Solicitors:
Office of the Legal Aid Commission for the Appellant
Office of the Director Public Prosecutions for the Respondent