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

CRIMINAL APPEAL NO.AAU 007 of 2015
[In the High Court at Suva Case No. HAC 56 of 2013]

BETWEEN	:	**ERONI TAVATAVANAWAI**	
			Appellant
AND	:	**THE STATE**	
			Respondent
Coram	:	**Chandana Prematilaka, JA** **Wasantha Bandara, JA** **Riyaz Hamza, JA**	
Counsel	:	Mr. S. Waqainabete for the Appellant	
	:	Mr. Y. Prasad for the Respondent	
Date of Hearing	:	13 April 2021	
Date of Judgment	:	29 April 2021	

JUDGMENT

Prematilaka, JA

[1] I have read in draft the judgment of Bandara, JA and agree with the proposed order thereof.

Bandara, JA

[2] The Appellant was charged with two counts of Rape contrary to Section 207 (1) and (2) (b) of the Crimes Act 2009.

The Information read as follows:

FIRST COUNT

Statement of Offence

RAPE: Contrary to section **207 (1) and (2) (b) and (3)** of the **Crimes Decree No. 44 of 2009**.

Particulars of Offence

ERONI TAVATAVANAWAI between the 1st day of October 2012 and the 31st day of October 2012 at Nadaro Village, Tailevu, in the Central Division, penetrated the vulva of LF, a child under the age of 13 years, with his tongue.

SECOND COUNT

Statement of Offence

RAPE: Contrary to section **207 (1) and (2) (b) and (3)** of the **Crimes Decree No. 44 of 2009**.

Particulars of Offence

ERONI TAVATAVANAWAI between the 1st day of October 2012 and the 31st day of October 2012, at Nadaro Village, Tailevu, in the Central Division, penetrated the vagina of LF, a child under the age of 13 years, with his finger.

Brief summary of the facts of the case:

[3] The Appellant is the victim's grandfather. At the time of the incident the Appellant was 47 years old and the victim was 7 years old. On the day of the incident the victim had gone to the "*canteen*" run by the Appellant to buy beans and chewing gum when the latter had got her to sit on a chair. Thereafter the Appellant had proceeded to put the victim's legs on his shoulders, pull her underwear to a side, lick her vagina and poke her vagina with a finger.

In her own words, the victim had told Court **"He then licked my vagina**. ***He also poked my vagina. He poked the inside of my vagina. He also licked inside my vagina. It was painful when he poked my vagina".***

Further the victim had refused an act of oral sex which the Appellant asked her to do. After the incident the Appellant had asked her not to tell anyone of the incident.

[4] After about two weeks, the victim's father had observed the victim showing a reluctance to go to the Appellant's house. The victim was in the habit of going there to spend time with the Appellant's daughter Kelera, but after the incident she had not gone there. When the father questioned about the reluctance the victim divulged the whole incident to him.

The Appellant who gave evidence at the trial had admitted that, at the material time the victim came to his canteen, but denied the allegation, stating that he only punished the victim by smacking her buttocks ***"to discipline her,"*** since she threw the cat out of the canteen.

Outcome of the trial before the High Court

[5] At the conclusion of the prosecution case the assessors unanimously expressed the opinion that, the Appellant was guilty in the charges in the Information. The learned trial judge concurred with their opinion and convicted the Appellant on both counts on the 7th November 2014 and sentenced him on the 21 November 2014 to 12 years imprisonment, with a non-parole period of 10 years on each count, ordering the sentences to run concurrently.

Initiation of the Appeal Process

[6] Being aggrieved by the above said conviction, the Appellant filed a timely "application for leave to appeal" before this Court, advancing three grounds of Appeal (against conviction only), which was heard by a single Judge of Appeal. At the leave to Appeal hearing, leave was granted only in respect of ground three.

[7] No renewal application had been filed by the Appellant, in respect of the grounds of appeal where leave was refused, to hear and determine the same, in terms of Section 35 (3) of the Court of Appeal Act.

Consideration of the ground of Appeal

[8] The ground on which leave to appeal was granted is to the effect that:

"The Learned Trial Judge erred in law and in fact when he did not properly consider the evidence led through the complainant where she stated that the appellant "touched" and "licked" her vagina thus there was no penetration"

The main issue that revolves around the impugned ground of Appeal is, whether the appellant's touching and licking the vagina of the victim resulted in a penetration, which forms a necessary ingredient to constitute the offence with which he was charged.

[9] In the present case, in relation to count 1, the prosecution has the burden of proving the element that the Appellant "Penetrated the vulva of the victim with his tongue," beyond reasonable doubt. In relation to count 2, the prosecution has the burden of proving the element that the Appellant "penetrated the vagina of the victim with his finger," beyond reasonable doubt Accordingly, in either case, whether *"a penetration"* was constituted is a fact in issue.

[10] Penetration could be proved by:

(i) the oral evidence of the victim;

(ii) through the opinion of a medical expert or;

(iii) by a combination of both oral evidence of the victim and the opinion of a medical expert.

[11] In the instant case the medical evidence established that the hymen of the victim was intact at the time of the examination. The medical expert explicitly states that, *"The hymen was intact. I don't see any evidence of penetration to be found, there must be forceful penetration. I won't expect any injuries"*.

[12] Relying on the above medical expert's opinion the defence attempts to show that a penetration had not taken place, or a reasonable doubt exists about it.

[13] The issue whether the penetration could be established when the hymen of the victim is intact, and no other injuries are visible on her private parts, should be viewed in the light of the ruling in the landmark case, **Radhakrishna Nagesh v State** of A.P (on 13 December 2012), where the Indian Supreme Court succinctly held that ***"The mere fact that the hymen was intact and there was no actual wound on her private parts, is not conclusive of the fact that she was not subjected to rape."***

[14] The Indian Supreme Court further held that, *"Penetration may not always result in tearing of the hymen and the same will always depend upon the facts and circumstance of a given case. The Court must examine the prosecution in its entirety and then see its*

cumulative effect to determine whether the offence of rape has been committed or it is a case of criminal sexual assault outraging the modesty of a girl".

[15] *"In* ***Guddu Santosh v State of Madya Pradesh [2006] Supp. 1 SCR 414)*** **the Indian Supreme Court observed that** *"The High Court failed to notice that even* ***slight penetration*** *was sufficient to constitute an offence of rape. The redness of hymen would not have been possible but for penetration to some extent."*

[16] Section 206 (4) of the Crimes Act, 2009 makes it clear that penetration to any extent is sufficient to constitute carnal knowledge.

Section 206 (4) reads as follows; *"If "carnal knowledge" is used in defining an offence, the offence, so far as regards that element of it, is complete on penetration to any extent."*

[17] Totally agreeing with the above judicially expressed views by the Indian Supreme Court, I hold that in the instant case, the fact that the hymen of the victim was intact or that there were no actual wound on the victiin's private parts, is not conclusive of the fact that she was not subjected to rape.

[18] Moreover, referring to the acts committed by the Appellant, the victim had testified that *"He also poked my vagina", he poked the inside of my vagina."* "*He also licked inside my vagina*", and *"It was painful when he poked my vagina."* Accordingly, in the course of the said acts committed by the Appellant, if there had not been a slight penetration caused to the victim's vagina, she would not have felt pain. The victim had felt the appellant licking inside her vagina which action too would have constituted the element of the "penetration".

[19] Having regard to the above consideration I hold that the present appeal is devoid of merit, and dismiss the same.

[20] **Hamza, JA**

I have read in draft form the judgment of Bandara JA and agree that the appeal against conviction should be dismissed.

Order of the Court

1. Appeal is dismissed.
2. Conviction is affirmed.

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Hon. Chandana. Prematilaka
JUSTICE OF APPEAL

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Hon. Wasantha. Bandara
JUSTICE OF APPEAL

COURT OF APPEAL
FIJI

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Hon. Riyaz. Hamza
JUSTICE OF APPEAL