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

CRIMINAL APPEAL NO. AAU 61 of 2020
[In the High Court at Suva Case No. HAC 445 of 2018]

BETWEEN	:	**JOSUA DIGITAKI KOTOBALAVU**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Ms. U. Tamanikaiyaroi for the Respondent**
Date of Hearing	:	**12 December 2022**
Date of Ruling	:	**13 December 2022**

RULING

[1] The appellant had been indicted in the High Court at Suva and after trial found guilty of one count of digital rape [section 207(1) and (2)(b) and (3)] and one count of indecently annoying any person upon his plea of guilty [section 213 (1)(a)] of the Crimes Act, 2009. The offences were allegedly committed on a female child of 06 years on 11 October 2018 at Nasinu in the Central Division. The appellant was 20 years of age at the time of committing the offences.

[2] After trial, the assessors had expressed a unanimous opinion that the appellant was guilty of count 01. The learned High Court judge had agreed with their opinion and convicted the appellant. He had been sentenced on 12 March 2020 to 11 years with a non-parole period of 07 years and 04 months of imprisonment but the actual period to be served is 10 years and 11 months with a non-parole period of 07 years and 03 months.

[3] The appellant's appeal against conviction and sentence is untimely but the delay of 03 months and 29 days is not very substantial and could be excused as the appellant had in person tendered the appeal and his explanation for the delay is probably true. The respondent has not averred any prejudice likely to be caused by entertaining the late appeal. Therefore, I will treat this as a timely appeal.

[4] The appellant, however, had tendered a Form 3 under Rule 39 to abandon his sentence appeal on 11 July 2022 which was confirmed by the appellant on 12 December 2022. Having fully complied with **Masirewa v The State** [2010] FJSC 5; CAV 14 of 2008 (17 August 2020) his application to abandon sentence appeal was allowed and accordingly, the appeal against sentence is deemed dismissed in terms of Rule 39 of the Court of Appeal Rules.

[5] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] The main issue for determination was as to whether the appellant penetrated the vulva of the victim (LNK) with his finger. LNK had clearly testified as to how the appellant took off her skirt and penetrated her vulva with his finger. She had used the term *'pia'* to refer to this part. LNK had informed her 12 year old sister, LBL, about the incident as soon as the sister came home from school that day. Accordingly, LNK had made a prompt complaint about the incident to her sister enhancing the consistency and credibility of her evidence. The appellant had testified and totally denied that he

poked or penetrated the vulva of LNK. However, he had admitted that he asked her to remove her pants. When she did so, he says that he had touched her thighs.

[7] The appellant urged the following grounds of appeal against conviction:

Ground 1

THAT the Learned Judge erred in law and in fact when outlined the burden of proof at the latter rather than at the beginning of the Summing Up causing the same to be unbalanced, unfair and biased.

Ground 2

THAT the Learned Judge erred in law and in fact when he misdirected the assessors on the prosecution's case at paragraph 17 of the Summing Up when there was no standard of proof explained to the assessors of how they should treat the defence case.

Ground 3

THAT the Learned Judge erred in law and in fact when he failed to direct the assessors on the issue of inconsistency of the complainant and her sister's evidence with respect to their police statement and the evidence they adduced in court.

i. *"in her evidence the complainant said she was sleeping in her cousins room however in her police statement she stated she was sleeping inside her grandmothers room."*

ii. *"in her evidence the complainant said the appellant was already in the room and was pressing his phone however in her police statement she stated that she was sleeping inside her grandmothers bedroom when the appellant came inside."*

iii. *"in her evidence the complainant referred to her private part as 'Pia' however in her police statement she stated 'after he used his two fingers inside my private part.'*

Ground 4

THAT the Learned Judge erred in law and in fact when he failed to direct the assessors regarding the inconsistences of the complainant between her police statement and the evidence adduced in court.

Ground 5

THAT the Learned Judge erred in law and in fact when he did not make an independent analysis of the evidence causing a substantial miscarriage of justice.

Ground 6

THAT the Learned Judge erred in law and in fact when he convicted the appellant for the offence of Rape when the evidence regarding hymen penetration only satisfied the offence of Sexual Assault causing a substantial miscarriage of justice.

Ground 7

THAT the Learned Judge erred in law and in fact when he did not consider section 231 of the Criminal Procedure Act 2009 but proceeded to call for defence to present their case.

Ground 01

[8] There is no rigid rule of procedure or practice (or for that matter any rule or practice) that a trial judge should deal with the burden and standard of proof at the beginning of the summing-up and not in the middle or at the end as long as the burden and standard of proof are explained clearly in a manner that can be understood by assessors. The judge had dealt with these concepts at paragraphs 30, 31, 33, 34 and 78 of the summing-up.

Ground 02

[9] The trial judge had explained the prosecution case at paragraphs 68-72 and highlighted the defence case at paragraphs 73 & 74. Paragraph 17 summarises LNK's recent complaint to her sister and paragraphs 18 & 19 on how to treat recent complaint evidence.

[10] As for the appellant's complaint that the trial judge had not guided assessors how to treat defence evidence, I find that the judge had in fact given impeccable directions on the appellant's evidence at paragraphs 87-89 and 90 in keeping with modified ***Liberato*** directions as approved at paragraph [30] in **Naidu v State** AAU 0158 of 2016 (24 November 2022) namely:

> *'**(i)** if you believe the accused's evidence (if you believe the accused's account in his or her interview with the police) you must acquit; **(ii)** if you do not accept that evidence (account) but you consider that it might be true, you must acquit; and **(iii)** if you do not believe*

> *the accused's evidence (if you do not believe the accused's account in his or her interview with the police) you should put that evidence (account) to one side. The question will remain: has the prosecution, on the basis of evidence that you do accept, proved the guilt of the accused beyond reasonable doubt?*

Grounds 03 and 04

[11] When it comes to alleged inconsistencies in the testimony of LNK and her sister with their police statements, the trial judge had indeed drawn the attention of assessors to those in the course of explaining prosecution evidence. Then at paragraphs 20, 21, 84 and 85 the trial judge had guided them as to how they should consider the same in their deliberations.

[12] I do not think that those inconsistencies are such that they shake the foundation of the evidence of LNK and her sister. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance [vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) & **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016)].

Ground 05

[13] The only matter of real contention was whether the appellant had penetrated LNK' vulva with his fingers. The trial judge had analysed that issue in detail in the judgment.

[14] In **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021), the Court of Appeal said of a trial judge's duty when agreeing with assessors:

> *'[23] What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts*

to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter….'

[15] Thus, though technically not required, the trial judge indeed gave his attention to the most crucial issue with an analytical mind and concluded that there had been penetration.

Ground 06

[16] The allegation in the information against the appellant was that he penetrated LNK's vulva and not the vagina. Thus, the fact that medical evidence had revealed that LNK's hymen was intact does not mean that there was no penetration of her vulva, for penetration of vulva (or for that matter even vagina) can take place without rupturing the hymen. For the offence of rape to complete even slightest penetration is sufficient. LNK's evidence was unequivocal on penetration and it was accepted by the assessors and the trial judge.

[17] The remarks and observations in **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017) are sufficient to dispel the appellant's doubt arising from LNK's hymen being intact.

'[13] Before proceeding to consider the grounds of appeal, I feel constrained to make some observations on a matter relevant to this appeal which drew the attention of Court though not specifically taken up at the hearing. There is no medical evidence to confirm that the Appellant's finger had in fact entered the vagina or not. It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.

[14] Therefore, it is clear one has to necessarily enter the vulva before penetrating the vagina. Now the question is whether in the light of inconclusive medical evidence that the Appellant may or may not have penetrated the vagina, the count set out in the Information could be sustained. It is a fact that the particulars of the offence state that the Appellant had penetrated the vagina with his finger. The complainant stated in evidence that he 'porked' her vagina which, being a slang word, could possibly mean any kind of intrusive violation of her sexual organ. It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of rape is concerned.

[15] Section 207(b) of the Crimes Act 2009 as stated in the Information includes both the vulva and the vagina. Any penetration of the vulva, vagina or anus is sufficient to constitute the actus reus of the offence of rape. Therefore, in the light of Medical Examination Form and the complainant's statement available in advance, the prosecution should have included vulva also in the particulars of the offence. Nevertheless, I have no doubt on the evidence of the complainant that the Appellant had in fact penetrated her vulva, if not the vagina. Therefore, the offence of rape is well established. It is very clear that given the fact that her body had still not fully developed at the age of 14, cries out of considerable pain of such penetration would have drawn the attention of the Appellant's wife to the scene of the offence.'

[18] Dr. Nikotimo Bakani had said that though LNK's hymen was intact he noted fresh superficial abrasion on inner sides of both labia minora. Labia minora is part of vulva. According to the doctor, some of the causes for an injury of this nature could be due to rubbing or friction from blunt objects, such as fingers, penis or any inanimate object and therefore, medical evidence in fact corroborated an act of penetration of LNK's vulva.

Ground 07

[19] The appellant complains that the trial judge had not complied with section 231 of the Criminal Procedure Act, 2009 by simply calling for the defence.

[20] Section 231 requires the trial judge to inform the accused his right under 231(2)(a), (b) and (c) and further act under section 231(3)-(5), if the judge considers that there is evidence that the accused committed the offence when the prosecution evidence has been concluded. This is what the trial judge had exactly done according to paragraph 72 of the summing-up.

[21] The defence had not made an application for no case to answer at the close of the prosecution case, neither had the judge thought that there was no evidence that the appellant had committed the offence at that stage. Therefore, there was no requirement for the judge to hear any of the parties under section 231(1).

[22] In my view, none of the grounds of appeal has a reasonable prospect of success in appeal.

Order of the Court:

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL