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

CRIMINAL APPEAL NO.AAU 0099 of 2020
[In the High Court at Labasa Case No. HAC 28 of 2019]

BETWEEN	**:**	**ALIKI RITALAU PRASAD**
		Appellant
AND	**:**	**THE STATE**
		Respondent

Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Ms. S. Daunivesi for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	**:**	**02 June 2023**
Date of Ruling	**:**	**05 June 2023**

RULING

[1] The appellant had been charged and found guilty in the High Court at Labasa on a single count of digital rape of his 12 year ole step daughter contrary to section 207(1) and (2) (b) and (3) of the Crimes Act, 2009.

[2] The assessors had expressed a unanimous opinion that the appellant was guilty as charged. The learned High Court judge had agreed with the assessors' opinion, convicted him and sentenced the appellant on 07 July 2020 to a period of 12 years' imprisonment with a non-parole period of 08 years.

[3] The appellant's appeal filed in person against conviction is slightly out of time (by 11 days) but could be regarded as timely.

[4] 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)].

[5] The learned trial judge has summarized the evidence in the sentencing order as follows:

> *'[1] The victim is a 12-year girl and a school student. The offender is her stepfather. He is 35 years old and is a fisherman.*
>
> *[2] In February 2019, the offender took the victim and her two younger siblings to a river at Cawaira, Labasa for a swim. When they were at the river, the offender pulled the victim into the water and told her that he was going to touch her private parts. He fondled her genitals over her tights until she started crying when he stopped. He told her not to report the incident to her mother. Later, when the victim's mother came to know about the incident, she reported the matter to police and the offender was arrested and charged with digital rape.'*

[6] The complainant and her mother were the only witnesses summoned by the prosecution. The appellant had not given evidence; nor had he called any other witnesses on his behalf.

[7] The grounds of appeal against conviction are as follows:

> ***Ground 1***
>
> *That the Learned Trial Judge erred in law and in fact by lacking to provide an adequate and proper Summing Up, in particular to the following:*

a) The Learned Trial Judge's directions on penetration was inadequate and lacked fairness in law and;
b) The Learned Trial Judge erred in law and in fact by not directing the assessors on an alternative verdict or lesser charge of any sexual offence.

Ground 2

That the conviction was unreasonable and cannot be supported by having regard to the totality of the evidence at Trial, in particular to the following:

a) The Learned Judge's assessment of penetration was erroneous in law and fact;
b) The Learned Trial Judge failed to take into account that the complainant's clothes were not adduced as evidence to determine if penetration was possible on top of the clothes.

Ground 1

[8] The trial judge had directed the assessors as follows:

'[19] Firstly, the prosecution must prove that the Accused penetrated, that is, inserted his finger into the complainant's vagina. Slightest penetration is sufficient. The element of penetration is in dispute and it will be your task to determine whether this element has been proven.

[21] The real issue for you to consider is whether the Accused penetrated the complainant's vagina using his finger as alleged by the charge.

[26] The prosecution's case wholly rests on the complainant's evidence. If you believe the complainant is telling you the truth that the Accused penetrated her vagina with his finger and if you feel sure of the Accused's guilt, then you may express an opinion that the Accused is guilty. If you disbelieve the complainant or if you are not sure of guilt, then you must find the Accused not guilty. Remember the Accused does not have to prove anything. The prosecution must prove guilt beyond reasonable doubt.'

[9] The complainant had stated in her evidence that the appellant took her and her two other younger siblings for a swim in a river. A little later he had pulled the complainant into deeper water to give a swimming lesson. While he was taking her into the deeper water he had told her that he was going to touch her vagina. She was wearing tights on this day. According to her, the appellant had removed her floating tube using one hand while holding her with the other hand. Then the appellant had

poked her vagina with his finger through her tights. She started crying and he had told her not to let him go or she will drown. He also had told her not to complain to her mother when they returned home.

[10] The appellant argues that the trial judge's directions on penetration was inadequate and lacked in fairness. I do not agree. The above directions are sufficient on the facts of the case. The appellant also argues that the trial judge had erred in not directing the assessors on an alternative verdict or lesser charge such as sexual assault or indecent assault. He asserts that the assessors should have been directed to consider the probability of penetration when the complainant was clothed. The basis of this contention is that the complainant was wearing tights and therefore, penetration of her vagina may not have been possible over her cloths.

[11] It is nothing short of common sense that there is no impossibility for penetration to take place over a cloth as even slightest penetration is sufficient for the offence of rape. This is more so when it is digital penetration. Further, to sustain a charge of rape vaginal penetration is not essential. Penetration of the vulva is sufficient [vide **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017) & **Navunisaravi v State** AAU 0150 of 2017 (25 May 2023)]. Thus, digital penetration of vulva is enough to constitute rape.

[12] **Sunia v State** [2015] FJCA 87; AAU0017 of 2014 (15 June 2015) does not help the appellant as in that case there was evidence by the appellant that he only attempted to penetrate but was unsuccessful as opposed to the evidence of penetration by the complainant. It is in that context that the single judge ruling held that the trial judge should have directed the assessors on an alternative verdict or lesser charge of attempted rape.

[13] It is well-settled that the judge in a criminal trial is under a duty to place before the jury all possible alternatives open on the evidence even if they are not raised by the parties or inconsistent with the defence run by the accused (vide per Lord Clyde in **Von Starck** [2000] 1 WLR 1270 at 1275; [2000] UKPC 5 and per Lord Bingham in **Coutts** [2006] UKHL 39). However, placing alternative verdicts before the jury is not

unqualified. There must be an evidential basis, whether led by the state or by the defence, for a reasonable jury to have come to an alternative verdict [per Lord Rodger in ***Coutts*** paragraph [81] and **Pickering v State** [2021] FJCA 234; AAU158.2019 (30 July 2021)] and then only the judge is obliged to direct on an alternative verdict or lesser offence.

[14] In this case, there does not appear to have been any evidence from the complainant or even a suggestion to her by the appellant that no penetration could have taken place with her tights covering her genital area. Therefore, there was no duty on the trial judge to have directed the assessors or himself of any alternative verdict or lesser offence.

[15] The fact that the complainant started crying (most probably in pain) shows that there had been in fact penetration of at least her vulva, if not vagina. He seem to have prepared her for what was coming by telling her that he was going to touch her vagina and instilled fear of drowning in her to stop her cries and then given a warning to her not to tell her mother to cover up what he did.

Ground 2

[16] Submissions have been made on the non-production of the tights and medical report at the trial. The failure of the prosecution to summon the two siblings of the complainant has also been raised. These are pure trial issues that could and should have been canvassed at the trial. In any event, the prosecution had the discretion to decide on whom to call and what to produce. Upon being served with all the disclosures, the defence could have called any of the witnesses or documents so disclosed.

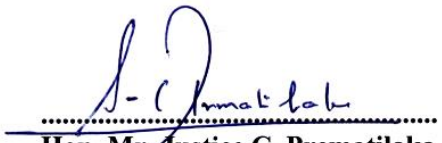
[17] Without doing so, it is futile to submit at this stage that the production of the tights would have revealed the thickness of its material and accordingly, it could have been ascertained whether penetration with finger was possible through the tights. The defence does not appear to have raised any of these concerns at the trial where these aspects could have been properly ventilated. It is possible that the defence at that

stage thought that these questions, if raised at the trial may have elicited unfavourable answers. Hence, the silence.

[18] I have no doubt that on the evidence available to them it was reasonably open to the assessors to be satisfied of guilt beyond reasonable doubt [vide **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)] and trial judge could have reasonably convicted on the evidence before him [vide **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014)]. Thus, the contention that the verdict is unreasonable or cannot be supported having regard to the evidence fails.

***Order* of the Court:**

1. Leave to appeal against conviction is refused.



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

Solicitors:

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