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

CRIMINAL APPEAL NO.AAU 157 of 2017
[In the High Court at Suva Case No. HAC 281 of 2016]

BETWEEN	:	**GEORGE VUCAGO**	***Appellant***
AND	:	**STATE**	***Respondent***
Coram	:	**Prematilaka, ARJA**	
Counsel	:	**Ms. S. Ratu for the Appellant**	
	:	**Ms. S. Madanavosa for the Respondent**	
Date of Hearing	:	**13 July 2021**	
Date of Ruling	:	**16 July 2021**	

RULING

[1] The appellant, 42 years old, had been indicted in the High Court at Suva with one count of rape of 11 year old girl (daughter of his wife's sister) contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009 and an alternative count of sexual assault contrary to section 210 (1) (a) and (2) of the Crimes Act, 2009 committed at Nasinu in the Central Division on 10 July 2016.

[2] 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

***GV** on the 10th day of July 2016 at Nasinu in the Central Division penetrated the vagina of **AV**, an eleven year old girl, with his tongue.*

SECOND COUNT

ALTERNATIVE COUNT

Statement of Offence

***SEXUL ASSAULT**: Contrary to Section 210 (1) (a) and (2) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

***GV** on the 10th day of July 2016 at Nasinu in the Central Division unlawfully and indecently assaulted **AV**, an eleven year old girl, by licking her vagina.*

[3] At the end of the summing-up the majority of assessors had opined that the appellant was guilty of rape whereas the minority opinion had found the appellant not guilty of rape but guilty of 'attempt to commit rape'. The learned trial judge had agreed with the majority opinion, convicted the appellant of rape and sentenced him on 30 August 2017 to a sentence of 12 years and 10 months imprisonment with a non-parole period of 11 years and 10 months.

[4] The appellant had appealed against conviction and sentence 03 weeks out of time but the state had not objected to the delay and the court had treated the appeal as timely. However, the appellant had applied to abandon the sentence appeal on 04 April 2019 in Form 3 under Rule 39 which can only be considered by the full court. Thereafter, the Legal Aid Commission had tendered amended grounds of appeal against conviction and written submission on 05 January 2021. The state had tendered its written submissions on 30 March 2021. Both parties had consented in writing to this court delivering a ruling at the leave to appeal stage on the written submissions alone without an oral hearing in open court.

[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. The test for leave to appeal against conviction and sentence 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) in order to 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] Grounds of appeal urged on behalf of the appellant are as follows.

Ground 1

THAT the Learned Trial Judge may have fallen into an error in fact and law to convict the Appellant when the conviction was unreasonable or cannot be supported having regard to the evidence adduced so as to relieve the State of the burden of proving the element of penetration beyond a reasonable doubt.

Ground 2

THAT the Learned Trial Judge may have fallen into an error in fact and law to convict the Appellant after having 'safely accepted the contents in the caution interview as true and credible evidence' without considering the totality of evidence to prove beyond a reasonable doubt the element of penetration.

[7] The trial judge had summarized the prosecution and defense evidence as follows in the judgment.

> *5. **The Prosecution** alleges that the accused came to the bathroom while the victim was washing her uniform in it. He then pulled her shorts down and licked her vagina. While licking the vagina, he penetrated into the vagina of the victim with his tongue.*
>
> *6. **The accused** denies the allegation that he penetrated the vagina of the victim with his tongue, though he admitted that he licked the vagina of the victim.*
>
> *7. Accordingly the main issue in this matter is whether the accused penetrated the vagina of the victim with his tongue.*
>
> *8. In order to prove the case, the Prosecution mainly relied on the evidence of the victim and her mother. The victim in her evidence said that the accused licked the place where menstruation blood is coming out. The Doctor,*

who was called to give evidence for the defence, in her evidence, said that menstruation blood comes out from the vaginal opening. The vaginal opening is covered by labia minora and labia majora. The Doctor further said that it is required to open the labia majora in order to approach the vaginal opening. According to the evidence given by the doctor I find that the accused has to open the labia majora in order to lick the vaginal opening with his tongue. According to the evidence given by the victim, she felt pain, coming from inside the vagina when he licked her vagina.

*9. **The accused** in his evidence admitted that the mother of the victim spoke to her when she came to the bathroom. He then heard that the victim was telling her mother that the accused licked her vagina. The accused in his caution interview has made an admission that he licked the "clito" of the vagina. Moreover, the accused during the cross examination admitted that he licked the vagina of the victim. The mother of the victim said that the meaning of the words of piam and kim in Rabi Language is "my vagina".*

01st ground of appeal.

[8] The counsel for the appellant argues that the prosecution had not proved beyond reasonable doubt the element of penetration to constitute rape. According to the summing-up and the judgment the victim had testified to the appellant having licked the vagina or the place where blood during her menstruation comes out and she had felt pain. The doctor had confirmed that blood comes out during menstruation from the vaginal opening covered by labia minora and labia majora. The doctor had further stated that the appellant had to open the labia majora with his tongue in order to access the vaginal opening.

[9] The appellant had admitted in evidence that he licked the top part of the vagina. In his cautioned interview, which is not being challenged, he had admitted that he licked the *'clito'* of the vagina but taken up the position in his evidence that the word *'clito'* was suggested by the interviewing officer and he did not know the meaning of it but simply accepted it. Under cross-examination, the appellant had however admitted that he understood and answered question 45 in the cautioned interview in the affirmative. He also had heard the victim complaining to her mother that the appellant had licked her vagina soon after the incident.

[10] The counsel submits that medical evidence is inconclusive as to whether the appellant had to open labia majora with his tongue in order to access the vaginal opening. It is immaterial whether the appellant had opened the victim's labia majora with his tongue or otherwise as long as he had penetrated her vagina or even vulva with his tongue.

[11] The appellant's challenge to his admission that he licked the *'clito'* of the vagina had been rejected by the majority of assessors and the trial judge.

[12] In any event, there appears to be ample evidence of penetration of the vulva, if not vagina, arising from the prosecution case itself which is sufficient to establish the charge of rape. The trial judge had carefully analysed the question whether there had been penetration of the victim's vagina.

[13] The Court of Appeal recently addressed its mind one again to a similar complaint in **Naduva v State** [2021]; AAU 125.2015 (27 May 2021) where it reaffirmed that penetration of vagina or vulva is sufficient to constitute the offence of rape.

> *'[22] The Court of Appeal dealt with a situation where there was a doubt whether the penetration complained of by the victim was of vagina or vulva, in **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017) where it was stated:*
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> > *'[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(2)(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.

[14] The Court further said

*'[23] It appears that helpful and explanatory remarks in **Volau** could equally apply to the evidence of the complainant in this appeal as well. It does not surprise me if the touching inside the victim's pussy or pinching inside of it by the appellant had gone only so far or deep as the vulva and therefore no injuries were caused in the vaginal area. Nevertheless, such touching and pinching inside her vulva, if not vagina is sufficient to constitute penetration (of any extent) under section 207(2)(b) of the Crimes Act 2009 as the information alleges.*

[24] Though the information had mentioned only vaginal penetration it would not be a bar for a conviction for rape had the penetration of vulva occurred. From the evidence of the victim it is clear that if not penetration of vagina, the appellant had penetrated at least her vulva as she had felt pain. Medical distinction between vulva and vagina is immaterial in terms of section 207(2)(b) of the Crimes Act 2009 as far as the offence of rape is concerned.

[15] In **Randall** (1991) 53 ACrimR 380 Cox J of the South Australian Court of Criminal Appeal commented at page 382:

'[I]t would appear that, at least for the last 150 years, the common law, for obvious practical reasons, has made no attempt to distinguish for [the purpose

of proving "sexual intercourse" ...] between penetration of the vulva, as denoted by the labia majora, or other lips, and penetration of the vagina itself. What little explicit authority on the point may be found in the books supports the wider notion of sexual intercourse. In Lines (1844) 1 Car & K 393; [1844] EngR 333; 174 ER 861, Parke B was trying a man for carnal knowledge of a female child under 10. There was evidence that the hymen of the child was not ruptured and counsel for the prisoner submitted that all the physical appearances were consistent with a failure to penetrate the vagina so that his client could not be convicted of the completed offence. The learned judge's ruling was:

"I shall leave it to the jury to say, whether, at any time, any part of the virile member of the prisoner was within the labia of the pudendum of the prosecutrix; for it ever it was (no matter how little), that will be sufficient to constitute a penetration, and the jury ought to convict the prisoner of the complete offence."

Lines has always been cited in textbooks and judgements dealing with the physical requirements of rape without, so far I am aware, ever attracting adverse comment [...].'

[16] Therefore, there is no reasonable prospect of success in the first ground of appeal.

02nd ground of appeal

[17] The complaint here is that the trial judge should not have taken the appellant's answer to question 45 of the cautioned interview as true and credible on the basis that the word *'clito'* was part of the question.

[18] The appellant in his cautioned interview had admitted that he licked the *'clito'* of the vagina but taken up the position in his evidence that the word *'clito'* was suggested by the interviewing officer and he did not know the meaning of it but simply accepted it. Under cross-examination, the appellant had admitted that he understood and answered question 45 in the cautioned interview in the affirmative.

[19] Thus, given his answers under cross-examination, even if the word *'clito'* was part of question No.45 the appellant seems to have understood and admitted it. He had not come out with his alleged lack of understanding of the word *'clito'* at the stage of

recording the interview. It does not appear to have been suggested to the interviewing officer that he introduced it and the appellant merely accepted it. Therefore, the trial judge cannot be faulted in rejecting his position that he did not understand the meaning of the word *'clito'* and accepting his answer as true and credible.

[20] In any event, as I have pointed out even if the appellant's admission to question No.45 is left out there is still enough evidence to sustain the charge of rape coming from the other witnesses.

[21] Therefore, there is no reasonable prospect of success in the second ground of appeal.

Order

1. Leave to appeal against conviction is refused.

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