THE COURT OF APPEAL, FIJI

[ON APPEAL FROM THE HIGH COURT]

Criminal Appeal No. AAU 0075 of 2018

(Criminal Case No. HAC 58 of 2017)

BETWEEN : **MIZRA HAROON BUKSH**

APPELLANT

AND : **THE STATE**

RESPONDENT

Coram : **Mataitoga, JA**
Qetaki, JA
Dr. Kumarage JA

Counsel : **Mr. Davinesh Sharma for the Appellant**
: **Ms. Shameem S for the Respondent**

Date of Hearing : **02 May, 2023**

Date of Judgment : **14 June, 2023**

JUDGMENT

Mataitoga JA

[1] I have read in draft the judgment proposed by Kumarage JA. I agree with reasons and conclusions reached.

Qetaki JA

[2] I agree having considered the judgment in draft.

Dr. Kumarage, JA

[3] The Appellant in this matter was charged by the Prosecution on three counts of Rape, where two counts of Rape were under Section 207 (1) and 2 (b) and (3) of the Crimes Act of 2009 and one count of Rape was under Section 207 (1) (b) and (3) of the Crimes Act of 2009. As the fourth count, the Appellant was also charged under Section 210 (1) (a) of the Crimes Act of 2009 for Sexual Assault.

[4] Since the Appellant pleaded not guilty for these counts, the matter had proceeded for trial. After the Prosecution case. Since the Prosecution conceded that there was no evidence against the Appellant for the third count of Rape under Section 207 (1) and 2 (b) and (3) of the Crimes Act of 2009, the Appellant had been found not guilty for this 3rd count.

[5] Thereafter, the trial had proceeded against the Appellant for counts 1, 2 and 4 and after the Prosecution case the Defense had been called by the trial Judge. After trial, two of the three assessors had found the Appellant guilty for counts 1, 2 and 4 as charged. The High Court Judge on 16th July 2018 had concurred with the opinion of the majority of the assessors and convicted the Appellant by his judgement. On 18th of July 2018 the High Court Judge had imposed a sentence of 13 years and 10 months imprisonment against Appellant with a non-prole period of 10 years and 10 months.

[6] Being dissatisfied with this decision, the Appellant had filed a timely application to appeal against the said conviction and sentence in this Court. The single judge of the Court of Appeal, **Hon. Justice Prematilaka**, had delivered the leave to appeal ruling on 06th May 2020, where His Lordship has refused the leave to appeal application against the conviction and sentence of the Appellant.

[7] Thereafter, the counsel for the Appellant had filed Notice of Renewal and renewed the Appellant's appeal against conviction and sentence.

[8] **Summary of Evidence at the Trial**

- In this matter, the Complainant, aged 08, had gone to the Appellant's house on the day of the incident with her parents, her brother and sister around 8.00-8.30 p.m. for a get together with other relatives. The Complainant had played with other kids present and

all of them had started running back and forth from the Appellant's house to the adjoining house. They have had dinner next door and come back to the Appellant's house.

- After that the other children had once again gone to the adjoining house to play, where the Appellant and the Complainant had been seated on the long couch next to each other while the television was on in the sitting room. There was no evidence of other lights on in the sitting room. At one point of time, the Appellant is alleged to have put his hand underneath the Complainant's tights and panty putting his finger in her *'hole in the private part'* while watching to see if anyone was coming. The Appellant had moved his finger in a circular motion in her *'hole'*, causing pain to her at this point.

- Amidst her words of resistance, having withdrawn his finger from the private part of the Complainant, the Appellant had then put his hand inside the Complainant's top and the bra touching her breast and squeezed it which had been painful to her. The Appellant had thereafter once again put his finger inside her private part but not inside the *'hole'* but touched the top of her private part from outside. According to her, *"it was painful and I was like 'ouch'"* and asked the Appellant to stop. This episode had drawn to its close upon the arrival of the Complainant's mother into the sitting room. On returning home, when her mother intensively questioned the Complainant on suspicion, she had narrated what the Appellant did to her the same night.

- Dr. Elvira Ongbit who had examined the complainant on 13 February had observed the complainant's hymen to be intact and no bruises or injuries in the vagina but seen bruises on the inner side of the complainant's *labia minora* suggesting an attempted penetration or penetration on the vaginal opening (external female genitalia or vulva) that could have been caused by a finger. The doctor had also noted a light bruise on the left breast of the complainant that could have been the result of the breast having been squeezed. The age of the injuries had been estimated to be two days.

- The Appellant testifying at the trial had completely denied the allegation and called three witnesses on his behalf. The Defense of the Appellant at trial had been that there were several people in the house during the time he is alleged to have committed the sexual offences upon the Complainant. He had further alluded that the complainant's mother had framed him falsely because he had told her that he had seen her with someone at Pacific Harbor which made her angry. She is said to have responded by stating that he

had no business to interfere in her personal matters and told him *'before I leave Fiji, see what I will do to you.'*

- Dr. Neil Prakash Sharma summoned on behalf of the Appellant had testified that the bruise on the Complainant's breast could have been caused also by a fall or an infection. He had further said that the injuries reported around the vagina of the Complainant could have been caused by blunt force, falls, infections etc. but not due to the Complainant bouncing (on a couch) while legs were folded and sitting on heels. According to him, the fact that the hymen was intact meant that it was highly unlikely that there would have been any penetration of the vagina.

- The gist of the evidence of the other two witnesses who were the Appellant's daughter and son-in-law had been that they did not see the Appellant and the Complainant alone in the sitting room and if anything as alleged had occurred someone would have noticed.

Grounds of Appeal

[9] As per the Appellants renewed application tendered to this Court for leave to appeal against conviction, the counsel for the Appellant has informed this Court that the Appellant only intends to contest appeal grounds 1 to 4 and 8, 9 and 10 at this appeal hearing. This position was clearly indicated during the submissions of the Appellant's counsel in this Court. Therefore, now I will proceed to analyze the merits and acceptability of the above highlighted grounds.

[10] In this renewed application of appeal, Ground 1 and Ground 10 stems from the same background in relation to the involvement of the mother of the 8 year old Complainant, **Doreen Sing**, in initiating a conversation with her daughter and insisting her to divulge the occurrences at the party they attended on the night in issue and thereby the possibility of fabricating the allegation against the Appellant. Therefore, now I will consider appeal grounds 1 and 10 together.

Ground 1

1. That the Learned Judge erred in fact and in law when in his Summing Up he did not provide a Warning to the Assessors and analysing the following factors:

i. It was the complainant's mother who without any complaint from the Complainant said that she initiated everything and asked the Complainant whether the Appellant had done something to her on the night of 11th February 2017.

ii. ***The Complainant's mother did not provide any adequate reasons why she asked that specific question to the Complainant when the Complainant did not raise this issue at all.***

iii. ***Initially the Complainant had said nothing happened.***

iv. ***The issue of rape could have been fabricated by the Complainant's mother because of her personal grievance with the Appellant.***

v. ***The Complainant and her mother had sufficient time and opportunity to fabricate the story before the complaint was made to the Police.***

Ground 10

1. **That the learned Judge erred in fact and in law in failing to uphold the Defense Counsel's argument that the complainant and her mother had fabricated the allegations against the Appellant in view of the personal grievance that the complainant's mother had against the Appellant.**

[11] Considering the evolvement of our society over the years, I find that it is normal for mothers in todays' society to be extra cautious about their daughters and to be the best friend of a daughter in discussing sensitive issues with daughters from a very young age of the child unlike the Victorian era. Therefore, I find nothing extraordinary in the conduct of the mother in this matter in instigating a conversation with the daughter on her observations of her child, which could have the strength to indicate a total fabrication of the allegation against the Appellant.

[12] In referring to the Summing-Up of the trial Judge, it appears that he had instructed the assessors of the Defense contention that the mother of the Complainant had played a predominant role in the victim making a complaint against the Appellant and the Defense position that **Doreen Sing** had a motive to fabricate. In **paras 54 and 55** of the summing-up the Judge had reminded the assessors of the disputation of the Defense, as below:

> *"54. The accused denies the allegation that he penetrated the complainant's vulva or vagina with his finger and that he squeezed the complainant's breast. The Defense says that the complainant is lying and her mother is responsible in bringing these allegations against the accused which are false. Defense points out that the account given by the complainant is not probable and the incidents could not have taken place given the number of people who were present in that house at the material time.*
>
> *55. The Defense says there are inconsistencies in the evidence given by the Complainant. You should deal with the inconsistencies according to the directions I have already given you. It was also highlighted that the Complainant's mother had a motive to fabricate the allegations. The*

Defense also says that the injuries noted in PE1 could occur due to various reasons."

[13] It needs to be highlighted that when trials were conducted before assessors, what the assessors needed to know is that they are the final adjudicators of the facts of the case brought before them in Court. More than indicating this requirement, I don't find the necessity to provide any further specific directions about individual witnesses by the Judge at the trial. At the trial the Judge had indicated to the assessors that they are the final adjudicators of facts in his Summing-Up, in **para 6,** as follows:

"You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experience and our common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part of none of any witness' evidence."

[14] In considering the above analyzed circumstances, I find that ground 1 and ground 10 of appeal in this application has no merit.

Ground 2

That the learned Judge erred in fact and in law in not considering the fact that the Appellant called witnesses who were present on the night and who testified that the complainant's behavior was normal and happy when they said their goodbyes that night.

[15] In the Summing-Up of the trial Judge he had reminded the assessors of the evidence given by the civilian witnesses who have claimed to have been present at that party that night in **paras 52 and 53.** In addition to that, I don't find any further necessity for the trial Judge to impress upon the assessors of the desirability of these witnesses, since at the end of the day the assessors were the final adjudicators of the factual value of the evidence led in Court. However, in his judgement at **para 09** the trial Judge has stipulated his analysis of the Defense witnesses, as below:

"In my view, the accused was not a credible and a reliable witness. The third and the fourth defense witnesses gave evidence about what they saw and heard that night. On the night in question, their attention was obviously focused on enjoying with the family members and not on what the complainant and the accused were doing. Their evidence does not suggest that there could not have been a possibility for the accused and the complainant to be alone in the sitting room that night."

[16] In relation to the physical injuries the conduct of the Appellant claimed to have caused to the Complainant, it needs to be noted that according to medical evidence of **Dr. Ongbit** they had been in the nature of i) *a bruise on the left breast; ii) bruises on the inner sides of both labia minora, fossa navizolaois extending to posterior fourchette.* According to this doctor, a bruise is an injury applied on the skin or any surface which they cause damage to the underlining tiny blood vessels. In analyzing this evidence we have to remember that these injuries have been caused on an 8 year old child who had not even attained puberty at this time. Therefore, it is common sense that a female would comprehend and understand the seriousness of a close relative meddling with or touching her body and alarm others, contingent on her maturity and the physical harm and pain such action causes to her.

[17] In this light, it is natural for a very young girl of 8 years of age to act quotidian in the indestructible spirit of childhood when saying goodbyes to the known attendees of a family gathering when leaving, though she had sustained bruises, i.e. damage to the tiny blood vessels under her skin without any bleeding. Therefore, I find this ground of appeal to be devoid of any merit.

Ground 3

That the learned Judge erred in fact and in law in not considering and giving due weight to the fact that the complainant's evidence of rape and indecent assault it was highly improbable in light of the evidence that there were a large number of people in the house on the night in question who were frequently moving around the house and in and out of the sitting room on the night in question.

[18] The trial Judge had highlighted the presence of several people at this locality attending this family get together on the night this incident took place in **para 50 (i)** of his Summing-Up referring to the testimony of the Appellant, as below:

> *"50. (i) He said, that night there were 15 people in his house and he was never alone with the complainant at any point in time. He said if something happened, other family members would have known. He said he had a very good relationship with the complainant's family before the incident."*

[19] In addition, in **para 54** of the Summing-Up of the trial Judge he had categorically mentioned the Defense position of the presence of many people at the function to the assessors by stating, "*Defense points out that the account given by the complainant is not probable and the incidents could not have taken place given the number of people who were present in that house at the material time".* However, the Appellant had admitted in his cross-examination at trial that most of the people who were present at his house on that

night were concentrated in the kitchen of the house. In this background, there had been no special attraction for the adults in the sitting room, where the Appellant had been seated with the Complainant watching television. Further, it has not transpired from evidence of the availability of any other lights than the light emanating from the television in this sitting room.

[20] Therefore, it appears that though many adults had attended this function, they have proceeded with their own business without concentrating on the kids or others at this function. This position is also evident from the testimony of the forth Defense witness **Parma Nand** who had mentioned that the house was very busy that night and people were walking around and he didn't pay particular attention to anyone. In toto, it can be concluded that though adults attending this function had walked passed this sitting room at times, there had been no special attention on the individuals who occupied this sitting room that night. As Complainant had stated in her evidence, when the Accused was putting his finger in her hole, he had been looking around to see if anyone was coming.

[21] On the above analyzed material, I find that ground 3 of this appeal is conjectural.

Ground 4

That the learned Judge erred in fact and law in not considering and giving due weight to the fact that the complainant and her mother were not credible witnesses.

[22] In the Summing-Up of the trial Judge after initially emphasizing to the assessors that they would be the adjudicators of the facts laid out at this trial, in **paras 11 and 12** the trial Judge had succinctly explained to the assessors how the credibility of witnesses could be evaluated by them, as below:

> *"11. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by witnesses on the same issue. This is how you should deal with inconsistences. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.*

12. However, there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness if for you to decide."

[23] After this pronouncement by the trial Judge, it was up to the assessor to determine the credibility of the Prosecution witnesses in line with their own assessment. However, after the assessors had informed their verdict, in **para 5 and 6** of the judgement the trial Judge had spelt out his evaluation of the Complainant and her mother in the following terms:

"*5. In my assessment, the complainant was a credible and reliable witness. The account she give on what the accused did to her was consistent. I found her answers to be genuine and there was no attempt by her to make up answers.*
6. I accept the second prosecution witness evidence that she found the complainant sitting beside the accused, alone in the sitting room on 11/.02/17 when they were at the accused's house. I also accept her evidence that the complainant informed her about what the accused did to her after they returned home. Her taking time to take the complainant to the police station to lodge a complaint is justifiable given the circumstance of the case where the alleged perpetrator was a close family member. Any parent would be in a dilemma in deciding what to do with that type of information knowing that making a complaint would have serious implications in the relationship among the family members. I accept her explanation for the delay where she said that she and the husband were in a state of shock."

[24] In disagreeing with the Appellant's contention of the trial Judge not giving due weight to the facts, I need to reiterate that it was the assessors who had given appropriate weight and returned their verdict. On the part of the trial Judge, on stipulating the evidence of the Complainant and her mother, he had pronounced his evaluation and finding in the judgement.

[25] Therefore, I find that the 4th ground of appeal of the Appellant lacks a cogent plausible argument.

Ground 8 and 9

That the learned Judge erred in fact and law in failing to consider and direct the Assessors and failed to analyze the issue that Dr. Neil Sharma gave a reasonable explanation about the various injuries alleged to have been suffered by the Complainant, that Dr. Sharma had also explained the timing of such bruises.

That the learned Judge erred in fact and in law in failing to consider and analyze the fact that there was a credible medical report and evidence from Dr. Sharma that created doubt about the complainant's injuries and without any proper reasoning or analysis the learned trial Judge accepted the State doctor/s report in total and ignored Dr. Sharma's report.

[26] Since ground 8 and 9 of appeal tendered by the Appellant are in relation to evidence given by **Dr. Sharma** and acceptance of this evidence by the trial Judge, these two grounds will be considered together. At the very onset, I need to emphasize that there was no medical report tendered by the doctor summoned by the Defense and **Dr. Sharma** only provided another opinion of the report prepared and observations made by the Prosecution witness **Dr. Ongbit**. Therefore, I find that the Appellant had been misinformed about the availability of a medical report prepared by Dr. Sharma.

[27] In considering the Summing-Up of the trial Judge, it appears that from **para 43 to 46** the trial Judge had detailed the testimony of **Dr. Ongbit** and in **para 44** he had specifically instructed the assessors that they are not bound to accept the evidence of this doctor and they need to evaluate and be satisfied, as below:

> *"The third prosecution witness gave the medical opinion based on what she observed and her experience. You are not bound to accept that evidence. You will need to evaluate that evidence for it strengths and weaknesses, if any, just as you would with the evidence of any other witnesses. It is a matter for you to give whatever weight you consider appropriate with regard to the observation made and the opinion given by the third prosecution witness. Evaluating her evidence will therefore include a consideration of her expertise, her findings and the equality of the analysis which supports her opinion."*

[28] Thereafter, in **para 51** of his Summing-Up the trial Judge had enunciated the evidence of **Dr. Sharma** in detailed to the assessors in the following terms:

> *"The second witness for the defense was Dr. Neil Prakash Sharma. He said that:*
>
> *(a) Date of the injury can only be estimated by inspecting a bruise based on the change in colour of the bruises. Commenting about the bruise noted on the left breast of the complainant, he said, apart from squeezing a fall, blunt injury while playing or an infection can cause such injury.*
>
> *(b) With regard to the injuries noted during the vaginal examination, he said those injuries can be caused by blunt injury, falls, various types of infection and blood conditions. He said unless there is a large fall, bouncing while legs folded and sitting on heels would not cause bruising. He said if the hymen*

is intact it is highly unlikely that penetration into the vagina would have taken place. He also said if the child falls and hits a solid surface and straddles one limb either side on the solid object, there could be bruises on the external genitalia.

(c) In his opinion a bruise would appear within 24 hours after the injury and it would take 5 to 7 days to disappear. He said it would depend on the degree of bruising.

(d) He said a light bruise suggests that the wound is healing and that it was there a few days earlier. He also said that if it was a light squeeze or blunt injury then it may have taken place within 48 hours."

[29] In considering the above directions given by the trial Judge, it is perceptible that he had let the assessors to reach their decision after informing what was available in Court. Considering the testimonies of the doctor who conducted the examination and the doctor brought on behalf of the Defense, it is noticeable that both doctors are in agreement in relation to the manner that these injuries could have been caused, but Dr. Sharma for the Defense had opined of other possibilities in referring to the medical report of Dr. Ongbit. When the matters were such, the assessors have had the freedom to choose the most appropriate explanation on their individual assessment.

[30] When the material that had been available at the trial were such, I find that these two grounds of appeal are without substantiation.

Grounds of Appeal urged by the Appellant at the hearing on 12/05/2023.

[31] When this matter was taken up for hearing on 12/05/2023, the Appellant's counsel brought up a new ground of appeal, as follows:

"The area to concentrate on is, if you look at the offence, that offence clearly stated that on the 11th of February, Mizra Haroon Buksh penetrated the vagina of 'AS' an eight year old girl with his fingers. That is where my focus will be as why there was a miscarriage of justice and the Judge got it wrong in this particular instance."

[32] The counsel for the Appellant further went on to state in his submissions:

"The Complainant in her evidence has stated that the Appellant has inserted his finger into her vagina." I stand corrected, I went back and had a look at the record again and I'll take you to the relevant parts of the evidence which will show that the only part that the Complainant said was he had put one finger for one second in the urethra not the vagina. Just where she says that where she urinates from…….. ***And I would say My Lord that there was absolutely no evidence at all in Court when the evidence came up that there was any penetration of the vagina."***

[33] In perusing the charges filed by the Prosecution, I perceive that the Appellant had been charged for penetrating the vagina of the Complainant. The contention of the counsel for the Appellant is that there was no evidence at the trial to establish the penetration of the vagina, thus there had been a miscarriage of justice. However, this ground of appeal had not been raised by the Appellant at the stage of leave to appeal hearing or the renewed application filed for this full bench hearing by this Court. In that light, this is the first time the counsel for the Appellant has brought up this ground in this appeal hearing. Therefore, this ground needs to be viewed as a fresh ground of appeal.

[34] In considering to accept this ground of appeal at this juncture, I am bound to refer to the pronouncement made by this Court in the case of ***Sairusi Nasila v The State [2019]***[1]**,** where the possibility of accepting new grounds was analysed, as below:

> *"Therefore, in my view, the most reasonable and fair way to address this issue is to act on the premise that the new grounds of appeal against conviction submitted by the LAC should be considered subject to the guidelines applicable to an application for enlargement of time to file an application for leave to appeal, for they come up for consideration of this court for the first time after the appellant's conviction. This should be the test when the full court has to consider fresh grounds of appeal after the leave stage. In other words, the appellant has to get through the threshold of extension of time (leave to appeal would automatically be granted if enlargement of time is granted) before this court could consider his appeal proper as far as the two fresh grounds are concerned. Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in* ***Rasaku v State*** *CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and* ***Kumar v State; Sinu v State*** *CAV0001 of 2009: 21 August 2012 [2012] FJSC 17."*

[35] However, on perusing the full trial Court record, I notice that though the Appellant has not raise this position as a ground of appeal in this Court, at the trial it has been raised by the Defense counsel, as below:

> *"My Lord, in light of the evidence the Defense submits, looking at the evidence of the Doctor and she has said in her evidence there is no injury to the inner genitalia of the patient. My Lord, the Defense submits that one of the elements has not being fulfilled by the Prosecution, My Lord."*

[36] However, this position had been rejected by the trial Judge. Therefore, in the interest or justice, I will now consider the justifiability of this claim raised on behalf of the Appellant.

[1] [2019] FJCA 84: AAU 0004 of 2011

[37] At the very onset, I need to highlight that our Legislator in its wisdom under **Section 207 (2) (b)** of the **Crimes Act of 2009** has brought the penetration by a person of the vulva, vagina or anus of the other person to any extent with a thing or part of the person's body without that person's consent as rape, as follows:

> ***"207***
> ***(2)*** *A person rapes another person if-*
> ***(b)*** *The person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent;"*

[38] Therefore, referring to this matter, our law encompasses the slightest penetration of either the vulva or the vagina of the Complaint by the figure of the Appellant as rape. But the question that arises in this matter is, if the Appellant was charged for the penetration of the vagina, there need to be evidence to establish the element of penetration of the vagina to convict the Appellant. The contention of the Appellant's counsel is that there was only evidence of bruises on the vulva of the Complainant in this matter. In this light, though I need to analyze the evidence led at the trial to ascertain vaginal penetration, in view of our law recognizing the penetration of either the vulva or the vagina as rape, the absence of vaginal penetration could not have prejudiced the Appellant as to the act committed by him, but would demonstrate the failure of the Prosecution to establish a required element to take home a conviction against the Appellant for penetration of the vagina.

[39] In giving evidence at the trial Dr.Ongbit had stated, ***"during my vaginal examination, I noticed that hymen was intact but I noticed bruises on the inner sides of both labia minora, fossa navizolaois extending to posterior fourchette."*** Doctor had further stated, ***"the bruises on the external female genitalia can be caused by an erected penis and also can be caused by a finger***."

[40] At the end of the evidence of this doctor, she had answered two questions, as below:

> *"Ms. Semisi: Doctor, is this part that you told us about, the labia minora where you had seen the bruises is that part of the vagina or can you just explain to us where is that located?*
>
> *Dr. Ongbit: it is part of the vulva.*
>
> *Ms. Semisi: Now Doctor, in terms of the medical examination and your findings, can you tell the court what were your summary and conclusions?*

Dr. Ongbit: Definitely the last on attempt penetration or hand penetration over vaginal opening."

[41] Therefore, when considering the above evidence, Dr. Ongbit had referred to the vulva as the vaginal opening.

[42] The **Black's Medical Dictionary (42nd Edition)**[2] defines the female genital area referred to as Vulva, as below:

> *"The external genitalia of the female. The Labia majora and minora-comprising folds of flesh, the latter inside the former-surround the openings of the vagina and urethra. The folds extend upwards as an arch over the clitoris. The vulva also contains vestibular glands which provide profuse muscoid secretion during sexual activity".*

Therefore, this definition also recognizes the vulva as the openings to the vagina and urethra.

[43] In search of further clarification to the word vulva, I referred to the decision of **New Zealand Court of Appeal** in the case of **Shane Gregory Koroheke v R**[3]**.** In this matter the **Court of Appeal** had assented to the following direction given by the trial judge to the jury:

> *"The complainant said in evidence that she felt something slippery on the outside of her vagina, and sliding up and down her vagina, everywhere. She confirmed in cross-examination that the deodorant was on the outside of her vagina. Now, the vagina is part of the genitalia or genitals of a woman. The genitalia comprise the reproduction organs, interior and exterior.* ***They include the vulva, the external genitals or the mouth of the vagina****, including the lips, called the labia, both interior and exterior, at the opening of the vagina."*

[44] In considering the evidence given at the trial by **Dr. Ongbit**, the definition given to the vulva by the **Black's Medical Dictionary** and the decision in the above highlighted **New Zealand Court of Appeal** judgement, I find that there is nothing fallible in referring to the Vulva as the opening to the Vagina or the mouth of the Vagina. In this background, since it is evident from the bruises noticed on the mouth of the vagina of the Complainant by Dr. Ongbit, Prosecution had been successful in establishing that the Appellant had penetrated the mouth of the vagina of the Complainant with his figure. However, the charges filed

[2] Edited by Dr. Harvey Marcovitch (A & C Black Publishers 2010)
[3] BC200161901 (189/2001) (28 November 2001)

against the Appellant would have been more appropriate if they mentioned that the Appellant penetrated the vulva or the mouth of the vagina of the Complainant.

[45] Since under our law any level of penetration of the vulva or the vagina constitutes Rape, I am satisfied that the Prosecution had proved the case as needed at the trial and there had been no miscarriage of justice. For this end, the Appellant had not been prejudiced by the use of the word vagina instead of vulva or mouth of the vagina in the information filed by the Prosecution.

[46] On the above detailed analysis, I find that this new ground of appeal raised by the counsel for the Appellant is without merit.

Orders of Court

1) *Leave to appeal on the conviction is refused;*
2) *Appeal against the conviction is refused*

.....
Hon. Mr. Justice I. Mataitoga
RESIDENT JUSTICE OF APPEAL

.....
Hon. Mr. Justice A. Qetaki
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice Dr. T. Kumarage
JUSTICE OF APPEAL

Solicitors:

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Office for the Director of Public Prosecutions for the Respondent