IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 0035 of 2023
Court of Appeal No. AAU 0125 of 2015

BETWEEN : **FABIANO DAKAI NADUVA**

Petitioner

AND : **THE STATE**

Respondent

Coram : **The Hon. Acting Chief Justice Salesi Temo**
Acting President of the Supreme Court

The Hon. Justice William Young
Judge of the Supreme Court

The Hon. Justice Alipate Qetaki
Judge of the Supreme Court

Counsel : **The Petitioner in person**
Mr J Nasa for the Respondent

Date of Hearing : **9 October, 2024**

Date of Judgment : **30 October, 2024**

JUDGMENT

Temo, AP

[1] I have read the judgment of Young, J and I agree entirely with the same.

Young, J

The petition

[2] The petitioner was tried in 2015 in the High Court before a Judge and assessors on an information alleging rape. The particulars alleged digital penetration of the victim's vagina. He was found guilty and later sentenced to imprisonment. His appeal against conviction having been dismissed by the Court of Appeal, he now seeks leave to appeal to this Court against both conviction and sentence.

The factual background

[3] The alleged offending occurred on 13 May 2014. At that time the petitioner was living in a house in Lami with members of his extended family, including his mother (to whom I will refer as V), his sister (to whom I will refer as A) and her daughter who was then four years of age. I will refer to the daughter as M.

[4] The prosecution alleged that the petitioner called M into a room and placed his finger "inside" what M referred to at trial as her "pussy" and that he had pinched it. In her evidence M spoke also of mucus winding up on her shorts, implying that the petitioner had masturbated and ejaculated over her clothing. For this reason, she changed her clothes after the incident. When her mother (A) asked her why she had done so, M told her what had happened. In the course of the disclosure process that followed, M told A that the petitioner had touched her pussy and that mucus from his "balls" had wound up on her clothes.

[5] In her evidence, A said that she told her father (who is also the petitioner's father) what had happened on 18 May 2014. She reported the incident to the Police on 26 May 2014.

[6] M was medically examined on 27 May 2014. This examination revealed an intact hymen with no sign of recent laceration. There was an abrasion between the vaginal opening and the labia minora. The doctor was of the view that if there has been digital penetration of M's vagina, it was "highly expected" that the hymen would not be intact. She considered that the abrasion was of more recent origin than 13 May 2014.

[7] In his evidence, the petitioner denied that he had sexually interfered with M. He said that on the morning of 13 May 2014 he had intervened in an argument between A and their mother and in doing so had punched A and that this had upset both A and M. His defence was advanced on the basis that the complaint against him had been fabricated to get back at him over this incident. His account of his argument with A was generally (although not precisely) supported by evidence of another member of the family who was living in the house.

[8] In his summing up, the Judge left it open to the assessors to find the petitioner guilty of sexual assault if not satisfied that there had been penetration of M's "vagina", a word which he did not define for them.

[9] At the conclusion of the trial the assessors expressed the unanimous opinion that the petitioner was guilty of rape, an opinion with which the Judge concurred. So he convicted the petitioner. He later sentenced the petitioner to 12 years and 11 months imprisonment, imposed a non-parole period of 11 years and directed that the sentence be served consecutively with a sentence he was serving for other and unrelated sexual offending against children.

The Court of Appeal

[10] The petitioner initially filed an appeal to the Court of Appeal against conviction only. He then filed an amended appeal in which he included a challenge to his sentence. Not long afterwards, on 3 May 2018, the petitioner applied to abandon his appeal against sentence. In a judgment delivered on 30 November 2018, his application was granted and the appeal against sentence was dismissed. That judgment records that the petitioner had confirmed that the abandonment of his sentence appeal was voluntary and that he appreciated the consequences.

[11] The Court of Appeal subsequently dismissed the petitioner's conviction appeal.

The proposed appeal against conviction

The points on which the petitioner relies in support of his challenge to his conviction

[12] The submissions in support of the propose conviction appeal, raise two issues: (a) whether the Judge dealt adequately with the medical evidence and (b) the significance of the delay in reporting the matter to the Police.

Did the Judge deal adequately with the medical evidence?

[13] The appellant was tried on charge of rape contrary to s 207(1) and (2)(b) of the Crimes Act 2009. Section 207 relevantly provides:

> (1) Any person who rapes another person commits an indictable offence.
>
> Penalty — Imprisonment for life
>
> (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; … .

[14] The particulars alleged that the petitioner had

> … penetrated the vagina of [M] with his finger.

[15] The petitioner contends that there was substantial inconsistency between, on the one hand, the charge and the evidence of M and, on the other, the medical evidence which made it unlikely that there had been penetration of the vagina.

[16] When giving evidence, the doctor used "vagina" in its medical sense – as meaning the muscular canal that leads from the uterus to the vulva. On her evidence, it is unlikely that the petitioner's finger penetrated M's vagina (in its medical sense). In the context of s 207(2)(b) and particularly its use in conjunction with "vulva", "vagina" is used in its medical sense. So, the petitioner's argument is that the case against him alleged digital penetration of the vagina in its medical sense, and it was not proved beyond reasonable doubt that there had been such digital penetration.

[17] In common speech, "vagina" is used to refer to external female genitalia. In her evidence, M used the word "pussy" to describe what the petitioner did. Unsurprisingly – she was five at the time – she made no attempt to distinguish between her vulva and vagina. Her reference to the petitioner putting his finger inside her pussy denoted the insertion of this finger into at least, and thus penetration of, her vulva. She cannot sensibly be taken to have been alleging digital penetration of the muscular canal that leads from the vulva to the uterus, or to put it another way, what the doctor would have regarded as her vagina.

[18] At trial, counsel and the Judge appear to have used the expressions "pussy" and "vagina" as meaning the same thing. As well, there was no discussion of the medical meanings of "vulva" and "vagina". The overall impression I have is that they were using "vagina" in its popular sense.

[19] A broadly similar situation arose in *Volau v State* in which rape by digital penetration of the vagina had been alleged but where the medical evidence left it uncertain whether there had been penetration of the vagina in its medical sense. In that case the Court said:[1]

> 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. ….
>
> Section 207(b) of the Crimes Act 2009 … 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.

[20] In his judgment in the Court of Appeal in this case (with which the other judges agreed) Prematilaka JA referred to *Volau* and then went on:

> 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

[1] *Volau v State* [2017] FJCA 51 at [14].

> 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.
>
> 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.

[21] If this issue had been squarely addressed at trial, the Judge could properly have amended the charge to substitute "vulva" for "vagina" under s 214 of the Criminal Procedure Act 2009. Likewise, it would have been open to the Court of Appeal, if it thought it necessary to do so, to amend the conviction so that it referred to penetration of the "vulva" rather than the vagina; this under s 23(5) of the Court of Appeal Act 1949. There was, however, no necessity to take either of these steps. This is for two reasons.

[22] For the purposes of the charge against the petitioner, the allegation of penetration of the vagina was a particular rather than an element of the offence. As the Court of Appeal of Western Australia in *Cotter v State of Western Australia* observed, in a case which, like *Volau*, has some similarities to this:[2]

> To understand what is meant by the indictment and specifically the particulars contained in it, it is important to consider it in the full context of the way in which the trial was conducted.

As I have indicated, in the High Court, the case against the petitioner was conducted generally on the basis that the word "vagina" was used in its popular rather than medical sense.[3] It is therefore sensible to treat the word "vagina" in the particulars as having the same meaning. On this basis, there was no variation between the particulars and the evidence.

[23] In any event, even if there was a material difference between the particulars and the evidence (which is not my view), I do not see this as affecting the safety of the verdict. As the Court in *Cotter* also said:[4]

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2 *Cotter v State of Western Australia* [2011] WASCA 202 at [28].

3 I say "generally" because this was obviously not the case with the doctor's evidence.

4 *Cotter*, at [30] – [31].

> Particulars serve the purpose of ensuring that an accused person is aware of the act and occasion which the prosecution relies upon as being the commission of the offence alleged. It is one of the components of a fair trial that an accused person be informed of precisely what it is that the prosecution alleges he or she has done that constitutes a crime: **…** .
>
> In assessing whether particulars have been adequate, the relevant question is whether the accused person has been able to identify the act, omission and circumstances which the prosecution alleged amounted to the offence charged. It is always a question of substance, not technicality. If the particulars are said to be wrong or misleading, the question remains whether they actually caused the accused to misunderstand or fail to appreciate the case brought against him such that he was prejudiced in his defence. A divergence between particulars and the evidence does not necessarily mean that a different offence is alleged, but it may mean that the fairness of the trial is drawn into question. Thus, whether or not the prosecution can properly depart from particulars depends on whether doing so will result in unfairness to the accused.

[24] So even if there was a shift from an allegation of penetration of the "vagina" (in its medical sense) to one of penetration of the "vagina" (in its popular sense), there was no unfairness to the petitioner. The fundamentals of time, place and conduct remained the same. And once there was penetration of the vulva, the offence was complete.

The significance of the delay in reporting the matter to the Police

[25] The incident occurred on 13 May 2014 and M made a prompt, same day, complaint to A, her mother. Had the Police been informed the same day, it is possible that there could have been scientific examination of M's shorts which may have revealed whether the petitioner had ejaculated on them.

[26] The petitioner's argument is that given the obviousness of the importance of a prompt referral to the Police, the fact that A did not formally complain to the Police until 26 May 2014 casts a shadow over her credibility.

[27] I disagree. There was no delay by M in reporting what happened to A on 13 May 2014, that is the day of the incident. And given the family dynamics, A's delay in reporting the incident to the Police is unremarkable.

The proposed appeal in relation to sentence

[28] In his petition, petitioner sought to challenge the abandonment of his appeal to the Court of Appeal against sentence. This was on the basis of his belief that the abandonment had not been dealt with by the Court of Appeal. As will be apparent from what I have already said, this belief is incorrect. The Court of Appeal dealt with his application for abandonment in a judgment delivered on 30 November 2018.

[29] In his submissions to us the petitioner sought to challenge directly the sentence imposed by the trial Judge. This Court does not have jurisdiction to entertain such an appeal.

[30] For the sake of completeness, I note that the proposed sentence appeal is based on a misunderstanding. The petitioner appears to think that the Judge declared him to be a "habitual offender" (a reference to ss 10 - 14 of the Sentencing and Penalties Act 2009). In this he is wrong. The Judge did not declare the petitioner to be a habitual offender. Instead, he directed that the sentence he imposed on the petitioner for the offending against M was to be consecutive on an earlier sentence imposed for prior sexual offending against other children. This order was warranted under s 22(6) of the Sentencing and Penalties Act as the petitioner had been on bail in relation to the earlier charges when he offended against M.

Outcome

[31] The case does not meet the leave criteria specified in s 7 of the Supreme Court Act 1998. I would therefore dismiss the petition.

<u>Qetaki, J</u>

[32] I have read in draft the judgment of Young, J and I agree with it, the reasoning and proposed order.

Orders of the Court

The petition is dismissed.

The Hon. Mr. Acting Chief Justice Salesi Temo
Acting President of the Supreme Court

SUPREME COURT FIJI

The Hon. Mr. Justice William Young
Judge of the Supreme Court

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Judge of the Supreme Court