

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**

**Crim. Case No: HAC 206 of 2021**

**STATE**

vs.

**VICTOR HARRY**

**Counsel:** Ms. W. Elo for the State  
Ms. N. Ali for Accused

**Date of Hearing:** 01<sup>st</sup> May 2023

**Date of Closing Submission:** 02<sup>nd</sup> May 2023

**Date of Judgment:** 03<sup>rd</sup> May 2023

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**JUDGMENT**

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*(The name of the victim is suppressed she will be referred to as "MW")*

**Introduction**

1. The Director of Public Prosecutions charged the accused for the following offences as per the Information dated 18<sup>th</sup> December 2022;

**COUNT ONE**

*Statement of Offence*

**CRIMINAL TRESAPASS:** contrary to Section 387 (1) (a) of the Crimes Act, 2009.

*Particulars of Offence*

**VICTOR HARRY** on the 22<sup>nd</sup> day of March 2021 at Suva, in the Central Division, unlawfully entered the dwelling house in possession of **JOSEFATA WARA** with intent to commit an offence.

**COUNT TWO**

*Statement of Offence*

**RAPE:** contrary to Section 207 (1) and (2) (b) of the Crimes Act, 2009.

*Particulars of Offence*

**VICTOR HARRY** on the 22<sup>nd</sup> day of March 2021 at Suva, in the Central Division, penetrated the vulva of **MW** with his fingers without her consent.

2. When this matter was mentioned on the 13<sup>th</sup> of May 2022 the Accused has pleaded guilty to Count No. 1 that of Criminal Trespass and not guilty to count No. 2, that of rape. The summary of facts were presented and upon the Accused admitting the same he had been was convicted of Count No. 1. However, sentencing awaits; which will be considered at the end of these proceedings. The trial in respect of the Rape Count commenced on 01/05/2023.
3. For the Accused to be found guilty of the count of Rape in the present case based on sub sections 1 and 2 (b) of Section 207 that in addition to the date stated in the count the prosecution must prove beyond reasonable doubt, the following elements, that;
  - i) The identity of the Accused,
  - ii) The Accused penetrated the vulva of the Complainant with his with his fingers,
  - iii) The Complainant did not consent to the Accused to penetrate her vulva with the with his fingers,
  - iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his finger in that manner.

The slightest penetration of the complainant's vulva by the Accused's finger is sufficient to satisfy penetration.

4. If I may elaborate count No. 2 that of rape is based on sub sections 2 (b) of Section 207 of the Crimes Act. Under this section, the offence of Rape is constituted when a person penetrates the finger in to the vulva without that other person's consent. The slightest penetration is sufficient to prove the element of penetration. According to Section 206 of the Crimes Act, the term '*consent*' means consent freely and voluntarily given by a person with the necessary mental capacity to give such consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given.
5. The accused is presumed to be innocent until he is proved guilty. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation or burden on the accused to prove his innocence. The prosecution must prove the accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the court was not sure of the accused's guilt, or if there be any hesitation in my mind on any of the ingredients or on the evidence of the prosecution the Accused must be found not guilty of the charge and accordingly acquitted.

#### Admitted Facts

6. The following are admitted and not in dispute;
  - (a) *The name of the person charged is Victor Harry ["Victor"].*
  - (b) *Victor was born on 12 January 2000 and was 20 years old in March 2021.*
  - (c) *On or before the alleged offending, Victor resided at Balabala Crescent, Newtown.*
  - (d) *The name of the complainant is MW ["M"].*
  - (e) *MW was born on 15 March 2005 and was 16 years old in March 2021.*
  - (f) *Victor and MW are known to each other namely they are neighbours and their homes are closely located beside each other at Balabala Crescent, Newtown.*
  - (g) *On 22<sup>nd</sup> March 2021, Victor entered into MW's home through a window by removing three louvre blades without her knowledge or permission.*
  - (h) *It is agreed that the admissibility of the following documents are not in dispute and the same as tendered by consent and annexed as follows:-*
    - (1) *The Photographic booklet dated 23/03/21.*
7. The trial commenced on 1<sup>st</sup> May, 2021 and the Prosecution summoned the victim MW and

her father Josefata Wara and closed its case. Upon the conclusion of the prosecution case the defence was called for and rights were explained. However, the Accused opted remain silent and did not call any witnesses. Upon considering the closing submissions of both parties and the evidence I will now endeavor to pronounce my judgement.

#### Prosecution Case

8. A great part of the incident is admitted by the Accused. The fact that he entered the house and came, into her room are admitted. It was suggested that he only touched her buttocks over the blanket. Therefore, what is in dispute is the issue of penetration by his fingers as alleged in Count No. 2.
9. According to PW1 MW she was sleeping alone in her room and her parents and siblings were in the sitting area around 4am of the 22<sup>nd</sup> March, 2021. She had gone to the toilet and returned to her bed and was falling asleep. She had suddenly felt pain in her private part and awakened and seen the Accused beside her bed with his hand inside her pants. She had seen the Accused and when she moved back Accused too had moved closer and then pulled his hand out. She had then screamed to alert her parents and run out of the room when her father too woke up and came up to her.
10. The Accused has just then come out of the room in a “bending position” and gone towards the rear door and was trying to open it. Her father has then attempted to get hold off the Accused and there was a brief struggle but the Accused managed to escape.
11. MW stated that she was wearing a baggy basketball shorts and also was wearing a panty beneath that. Initially in her evidence she said that two fingers of the Accused went into her vagina. This was when she felt pain. However, MW when questioned further stated that the Accused hand was inserted into the shorts which was baggy however it was above the panty. She also said that the Accused poked his finger with the panty. From her evidence it was apparent that the Accused had not put his hand into or under the panty but it was between the shorts and the panty.
12. The Defence suggested that the Accused did not put his hand in to her shorts but he only

touched her buttocks over the blanket she was covering at that time. It was also suggested that if the Accused inserted his hand she ought to have felt and realized that he was pushing his hand in. the defence further suggested that she was sleeping on her stomach at that time. The victim denied this and said that when she was awakened due to pain the Accused's hand was in her shorts. She said that she was sleeping with her face up and was having one leg raised from the knee and other lying flat on the bed. [She demonstrated in Court the manner in which she was at that time]. The Defence suggested that the Accused did not penetrate her vagina. This was denied.

13. PW2 Josefata Wara the father of MW confirmed that he heard the daughter scream and saw her near the room door. Then the Accused had rushed out and made his way to the rear door and his attempt to apprehend the Accused was not successful and the Accused escaped. Accused had been a known person and a long standing neighbor. Josefata has then gone to the Accused's house but only the Accused's parents were there and he had told them what happened. In the meantime his mother has informed the police and the police has then arrived.

#### Evaluation

14. MW has promptly informed her father and also within a few hours made a statement to the police. There were no contradictions or omissions elicited. The demeanour of the witness was extremely consistent with that of a truthful witness. There was no suggestion that she was making a false allegation either. Her evidence to my mind is credible and truthful. The Defence did not challenge her evidence except as regards the act of putting his hand into her trousers. The Defence suggestion was that he merely touched her buttocks over the blanket.
15. The rape charge depends on the testimonial evidence of the victim MW. Testimonial evidence given by a witness can raise concerns of both veracity and accuracy. Veracity relates to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. Accuracy relates to the witness's ability to accurately observe, recall and recount the events in issue. When a court is concerned with a witness's veracity, they speak of the witness's **credibility**. When concerned with the accuracy of a witness's testimony, they speak of the **reliability** of that testimony. As such, reliability and credibility are distinct and different from one another and I must consider both these

aspects in considering the testimonial trustworthiness of the evidence of the Complainant, MW.

16. MW clearly has identified and seen the Accused with his hand in her shorts. She had not seen him or felt him when he was putting his hand into her trousers. She suddenly is awakened due to the pain in her private part. Is it possible for her not to have felt the hand being inserted? This was suggested by the defence too. According to MW this incident takes place about 10 minutes after she returned from the toilet. She admittedly had not fallen into a deep sleep but was just falling asleep and her eyes were closed. In these circumstances as she was wearing a baggy shorts it is probable and possible that the Accused could have inserted his hand without alerting the victim who was on the verge of falling asleep. Further, she demonstrated the position she had her legs, which further confirms the possibility of the Accused being able to gain access to her private part as explained.
17. MW then said that the Accused poked two fingers into her “vagina”. What does she mean when she refers to the vagina? What vagina means in medical parlance was explained in the case of **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017) as follows;

*[13] ..... 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.*

18. According to the said description the female genitalia at the outer most is the mons pubis which in general usage is also sometimes referred to as the private part. From the labia majora to the vaginal orifice it is referred to as the vulva. Then the vagina. The victim in her evidence did say that she felt pain in her vagina and also said that he inserted the two fingers into her vagina. Then she also said that the poking of the fingers was over the panty. In the normal course it is not possible to have pushed the two fingers into the vagina with the panty.

However, when MW used the term *vagina* it was certainly not a reference to the medical concept of being beyond the vaginal orifice. In the common usage the word *vagina* is used to describe the inner female private part in general and it is not a specific reference to a particular area of the female organ. When MW said that he 'poked' her vagina, it meant no more than an intrusion to her sexual organ.

19. Accordingly, when the victim MW used the word *vagina* she merely made reference and meant the inner genitalia. This was obvious. As such considering her evidence in its totality and its context what the victim said was that she felt 2 fingers of the Accused entering beyond the labia majora. This evidence if accepted will prove penetration to the vulva as alleged in the charge.

#### Was Penetration Proved?

20. MW certainly did say that the Accused poked into her female organ. However, this happens whilst she was wearing her panty. She suddenly is awakened due to a pain in her female private part and the Accused instantly takes his hand out. This happens in a flash and at a moment when MW herself was half a sleep. Thus, she was not in the best of circumstances or alertness to precisely feel and comprehend the exact nature of the act; and if the fingers did penetrate or if the pain was from the pressure exerted to the outer aspect of the female organ.
21. It is not that the victim is being untruthful when she says that she “felt the pain in her vagina and his fingers were poking inside”. She sincerely and truly says what she believed and felt at that moment. However, in view of the circumstances and the extremely brief moment she had, there is a possibility she may not have been able to precisely comprehend where the pain was exactly emanating from. She certainly did not see the fingers been inserted. To elaborate further, no doubt the poking of the fingers to her female genital area has certainly caused pain. She believed the pain to be with *in the genitalia*, which may have caused her to believe that the fingers were in her female genitalia (vulva).
22. The poking takes place over the clothing (panty). Thus, there is the possibility that the finger may not, have penetrated the genitalia between the labia majora but caused pressure on the external aspect of the labia majora or on the pubic mound causing pain. MW in a state of semi

slumber may well have believed the pain was from within. There was no oral or medical evidence of any corresponding injury (contusion/laceration) either. In these circumstances there is an uncertainty as to penetration. This creates a reasonable doubt as to the ingredient of penetration. Therefore, the prosecution is not able to prove the charge of Rape beyond reasonable doubt on this evidence.

#### Consideration of the lesser or alternative offence

23. On the evaluation of MW's evidence, I observe that her demeanour was consistent with that of a truthful witness and she was certainly a truthful and a credible witness. Her evidence is also reliable except as regards penetration. In her mind she may have believed that the finger went into the "vagina" (valva). The doubt, if the finger actually penetrated has arisen not due to the reason of her being disbelieved but due to the limited opportunity she had to perceive the act. As stated above her evidence is consistent reliable as regards the hand being put onto the pubic area and touching her mons pubis over the clothing (panty). Thus, when she says that she felt two fingers going into her vagina she was not being untruthful. As such I will now act under Section 162 (1) (f) of the Criminal Procedure Act and consider the lesser or alternative offence of sexual assault punishable under Section 210 of the Crimes Act.

#### Sexual Assault

24. For the accused to be found guilty of the alternate offence of "sexual assault" under section 210 (1) (a) of the Crimes Act, there should be proof beyond reasonable doubt, that the accused himself did, unlawfully and indecently assault MW. In the current context it will be putting his hand into the shorts and poking the genital area with his fingers.
25. Sexual assault is an aggravated form of indecent assault. The prosecution must prove the above elements against the accused beyond reasonable doubt. "Assault" is to apply unlawful force to the person of another without his or her consent. The "assault" must be considered "indecent" by right thinking members of society. The test is basically objective.
26. The ingredients of Sexual assault under the 1<sup>st</sup> limb of section 210 and indecent assault as defined under section 212 of the crimes Act are the same except for the distinction in the



titles of the respective sections. It appears that sexual assault is an aggravated form of indecent assault as it carries a higher sentence. Thus, considering the use of the word 'sexual' in the title of section 210, I am of the view that, sexual assault should necessarily be involuntary contact of a 'sexual' nature that occurs through the Accused's use of force, coercion or the victim's incapacitation.

27. According to the victim the Accused had put his hand into her baggy trousers. His fingers have poked against her private part and touched her genital area. This is not an accidental touch but a deliberate poking when she was sleeping. She was a girl of just 16 years of age and a neighbor. She had certainly not agreed or consented such touching or poking. A person approaching a girl whilst half a sleep and surreptitiously putting his hand into her shorts in this manner is certainly indecent by any standard of a decent society. Therefore, it is indecent. A person putting his hand in this manner and touching and coming into contact with the female genital area in these circumstances would be an act of a sexual nature to derive some form of sexual pressure. The only suggestion was that he touched her buttock and not the vagina which was denied by MW. Considering the totality of the evidence with the suggestions I am of the view that the defence had not been able to create any doubt on the prosecution evidence on this issue. Accordingly, I hold that the ingredients to prove the offence of sexual assault are all satisfied and proved beyond reasonable doubt.

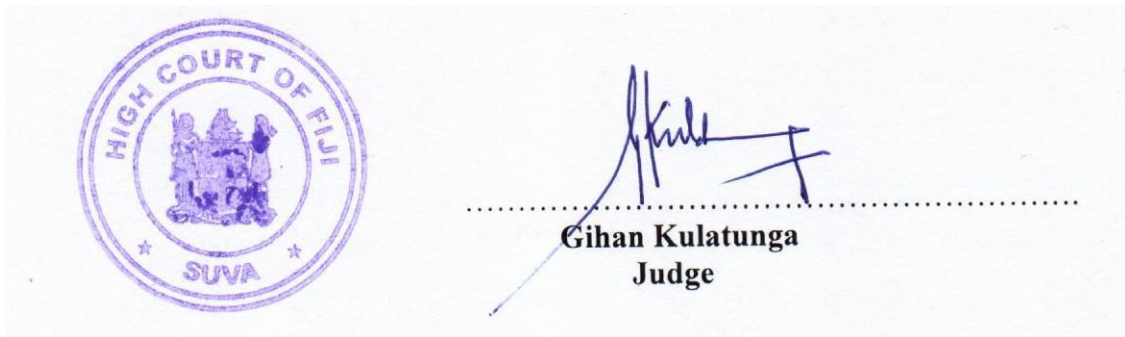
28. As for count No. 1 of Criminal Trespass, the Accused had pleaded guilty and was convicted. However, in considering the 2<sup>nd</sup> Count I have not in any way considered or taken into account the fact of so pleading. However, the evidence and the admissions have independently proved that the Accused entered the dwelling house of MW with the intention to commit an offence *inter alia* of sexual assault. The Accused did not give evidence and remained silent. It was his right. This cannot and was not in any way considered against the Accused nor was any adverse inference drawn against the Accused.

### Conclusion

29. In the above circumstances I hold that the prosecution failed to prove the charge of rape beyond reasonable doubt. However, I hold that the prosecution had proved beyond reasonable doubt the alternative offence of sexual assault punishable under section 210 of

the Crimes Act. Accordingly, I hold that the Accused cannot be found guilty of charge of rape, but find him guilty of the alternative offence of sexual assault committed on the 22<sup>nd</sup> of March 2021 punishable under section 210 of the Crimes Act.

30. Accordingly, the Accused is hereby convicted of the said alternative offence of Sexual Assault, punishable under section 210 (1) (a) of the Crimes Act and the Accused is acquitted of the charge of rape. As for count No.1 of Criminal Trespass the Accused remains convicted on his own plea of guilt.



**At Suva**

03<sup>rd</sup> May 2023

**Solicitors**

Office of the Director of Public Prosecutions for the State.  
Legal Aid Commission for the Accused