

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

CRIMINAL APPEAL NO. AAU 0115 of 2019
[In the High Court at Lautoka Case No. HAC 075 of 2016]

BETWEEN : **AFZAL KHAN**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, RJA**
Qetaki, JA
Andrée Wiltens, JA

Counsel : **Mr M. Degei for the Appellant**
Ms L. Latu for the Respondent

Date of Hearing : **09 September 2024**

Date of Judgment : **27 September 2024**

JUDGMENT

Mataitoga, RJA

1. I concur.

Qetaki, JA

2. I have considered the judgment of Honourable Justice Andrée Wiltens, JA in draft and I agree with it, the reasons and orders.

Andrée Wiltens, JA

A. Introduction

3. Following trial by Judge and 3 Assessors, Mr Afzal Khan was convicted in the High Court at Lautoka on 27 June 2019 of one count of rape, perpetrated at Nadi on 26 March 2016. The conviction followed unanimous opinions by the Assessors at the conclusion of the trial that in their view Mr Khan was not guilty; but those opinions were not accepted by the learned trial judge for reasons set out in his judgment of 27 June 2019.
4. Mr Khan was sentenced on 9 July 2019 to a term of 11 years 10 months and 15 days imprisonment, with a minimum non-parole period of 10 years.
5. On 30 July 2019, Mr Khan, without the assistance of counsel, appealed the conviction in a timely manner. He filed additional amended grounds on 5 July 2020, which challenge his conviction. Subsequently, on his behalf, counsel filed amended grounds of appeal against conviction and sentence on 12 October 2020.
6. Justice Prematilaka, in his decision of 21 December 2021 as to whether leave to appeal should be granted, considered the appeal did not have a reasonable prospect of success on any of the 15 grounds then being advanced. Accordingly, he refused leave to appeal the conviction. Further, in relation to the appeal against sentence, which had been filed 14 months out of time, Justice Prematilaka refused to enlarge time to seek leave in the absence of (i) an appropriate application and (ii) an explanation for the delay.
7. Mr Khan is pursuing his appeal in reliance of section 35(3) of the Court of Appeal Act 1949, as is his right. By application of 23 January 2023, he also applied for leave to adduce further evidence, with a supporting affidavit.
8. On 2 September 2024, newly appointed counsel has filed what are termed “Consolidated Grounds of Appeal” incorporating 9 grounds of appeal against conviction and 2 grounds of

appeal against sentence. The document comes with supporting submissions, the preponderance of which were obviously prepared by Mr Khan himself.

B. Background

9. At approximately 3.30pm on 26 March 2016, Ms Nazimun Khirul was alone at her home in Mulomulo, Nadi. Mr Khan was her brother-in-law and he came calling, but was denied access. In response he broke open the front door and confronted Ms Khirul about not letting him enter. He took hold of her right hand and squeezed her neck making breathing difficult, which caused her urinate in her pants. He then dragged her into her bedroom and pushed her down onto the bed. Mr Khan slapped Mr Khirul and punched her to the side of her head – he also repeatedly said that he would kill her. He then pulled down her pants and underpants before forcefully inserting his penis into her vagina and eventually ejaculating. Ms Khirul struggled and attempted to stop him, but she was weakened by his squeezing of her neck, as well as her bodily response to vomit blood. She related that she had cried out for help, but no one came until her husband arrived later on.
10. Ms Khirul's daughter, Ms Zaina Nisha, arrived subsequently at the home and found her mother in distress and vomiting. She found her mother had urinated in her pants and was unable to speak. Ms Zaina helped her mother to change her clothes, before she, and others, escorted her mother to the Mulomulo Police Post, where Ms Khirul remained in the car and a police officer advised Ms Nisha to take Ms Khirul straight to Nadi Hospital. Ms Khirul was advised the police would come and see her at a later time.
11. On the way to hospital, Ms Khirul told Ms Nisha that her uncle, Mr Khan, had strangled her neck, punched her to the head, tried to kill her and forcefully raped her. Ms Nisha was called as a "recent complaint" witness at trial.
12. At the hospital, Ms Khirul was seen by a doctor regarding bruising to her neck and the fact that she had vomited blood. She was advised to take painkillers and permitted to leave. Two

police officers asked her to go to Nadi police station, but on arrival, Ms Khirul found she was unable to talk properly and so she was sent home.

13. Three days later, on 29 March 2016, police officers came and brought Ms Khirul to the Nadi police station from where she was to be medically examined in relation to the rape allegation. The result of the examination was neutral in that the allegation was neither able to be confirmed nor excluded on the basis of the medical findings. Later that same day the police took a statement from her as to what had transpired.
14. Mr Khan was arrested on 31 March 2016. At interview, he denied the allegation and put forward a different account for why he was at the house; and he repeated that account at trial. In his evidence, he said that Ms Khirul had invited him there to discuss the removal of a wire cable. He said the only dispute between them at that time related to a mobile phone he had previously given her which he wanted back. He maintained that he did not break in, assault Ms Khirul in any way, or have sexual intercourse with her. He alleged that his brother had come to the house, seen him there with Ms Khirul and had taken exception to his presence. He stated that his brother, Ms Khirul's husband, in real anger had then proceeded to beat Ms Khirul and hold her neck – she had cried out for help while being assaulted.
15. Mr Khan agreed that he was very angry with Ms Khirul as she was the love of his life and he had realized that the relationship was over due to her moving to Australia.
16. In cross-examination, Ms Khirul did not accept that she had invited Mr Khan to come to her home to discuss the removal of a wire cable. She did not accept that Mr Khan had also sought to repossess a mobile phone that he had previously given to her while he was there. She did not accept that she and Mr Khan had been in a sexual relationship for some 5 years, while she was married to Mr Khan's brother. She also did not accept that her husband had assaulted her that day – she maintained that he had helped her instead.
17. It was put to her that she had initially alleged attempted rape at the Mulomulo police post, but she maintained that she had remained in the car and made no allegations at that time. She

did not accept her account was false, and insisted she had been assaulted and raped. She maintained also that she had wet her pants and vomited.

18. It was put to her that in her statement she had alleged Mr Khan had carried her to the bed, yet in her evidence she had said alternatively that he had both pulled her to the bed and pushed her to the bed. Ms Khirul explained that the officer taking her statement had not recorded everything as she would be able to tell the Court about those matters herself. Further, she claimed to still be in shock when she signed the statement. She explained that although she had mentioned to the officer about vomiting, he did not record that as he said it was already recorded in the medical report.
19. Ms Nisha confirmed that on the way to the police post and Nadi Hospital her mother had difficulty in speaking, but that she did allege her brother-in-law had raped her, assaulted her and strangled her. Ms Nisha confirmed on her arrival she could see her mother had vomited and she smelt urine. She helped her mother to put on other clothes. She stated that her mother did not leave the car at the police post and confirmed the advice received there was to take her mother to hospital. Ms Nisha told the Court that after the hospital, her mother was taken to Nadi police station, where officers went to her in the car and interviewed her, taking some notes. She denied giving evidence as instructed by her mother.
20. She was cross-examined about her police statement not recording the fact that she had met Mr Khan at the gate before she entered her mother's house, nor that she had assisted her mother to change her clothes. She explained the police officer was speaking with her in Hindi, but recorded the statement in English. Even though Ms Nisha cannot write in English, she stated she was able to read some English. She agreed the officer had read back her statement to her before she signed it.
21. Dr Vincent Wong performed the medical examination of Ms Khirul on 29 March 2016. He confirmed that she had complained to him that her brother-in-law had raped her, punched her, grabbed her neck and engaged in sexual intercourse. He found a 1cm laceration on her inner right lip, a 0.5cm laceration on the tip of her tongue, 2 scratch marks on her neck, and

a 3cm bruise mark on her chin. There was also tenderness on the back of her hand. He considered the injuries to be “a couple of days old”. He was unable to determine if sexual penetration had occurred. In cross-examination the doctor agreed that had he been told Ms Khirul had vomited blood he would have recorded that.

22. Mr Khan called Mr Vediwel Mudaliar, a gardener as a witness. He recalled a dispute between Mr Khan’s brother and Ms Khirul on 26 March 2016, while he was waiting to meet Mr Khan. He heard Ms Khirul shouting for help – he saw Mr Khan’s brother beating Ms Khirul. In cross-examination he agreed he had not provided a statement to the police regarding what he had seen; and that only recently prior to trial Mr Khan had reminded him what had occurred at the time. He denied giving evidence to assist his friend Mr Khan.
23. Mr Khan next called Mr Edward Bibi, an investigator at the Nadi police station. He took the statement from Ms Khirul on 29 March 2016. He testified that he recorded what the witness had told him, and that he was not distracted at the time by other duties.
24. The final witness called was Police Constable Poasa Karawa, who was on duty at the Mulomulo police post on the afternoon of 26 March 2016. He made 3 entries in the station diary relating to his matter, as a result of Ms Khirul and her daughter entering the post and filing an allegation. At 8.08pm the diary records that Ms Khirul’s brother-in-law, Mr Khan, had tried to threaten her. At 8.07pm the diary records that he also went to Ms Khirul’s house and opened the door without her permission. At 8.10pm the diary records that her brother-in-law had tried to rape Ms Khirul in her room. He further stated that Ms Khirul refused to give a statement at that time, although there was no entry to that effect.
25. It is evident that the diary came to the notice of Mr Kahn’s counsel very late, indeed so late that he was not able to put the diary entries to Ms Khirul. Accordingly, out of fairness, she was recalled prior to Constable Karawa giving evidence. She agreed that she had attended the Mulomulo police post at around 3.30pm on 26 March 2016. She confirmed that a police officer had told her brother, then driving, to take her to Nadi Hospital. She had not alighted.

She could not recall returning to the post at 8pm. She denied lodging any allegation that day at the police post. She denied causing the specific diary entries.

26. The above recitation of the relevant evidence demonstrates that the outcome of this case depended on the credibility and reliability of the witnesses.

C. Appeal against conviction

27. At the commencement of the appeal hearing Mr Degei, recently assigned counsel for Mr Khan, advised he would not advance the appeal against conviction based on competence of counsel. We note that the requirements for advancing such ground, as set out in *Nilesh Chand v The State* [2019] FJCA 254 have not been adhered to, and accordingly this ground was unlikely to be entertained in any event. The concession by Mr Degei necessarily also made redundant Mr Khan's application for leave to adduce further evidence.

28. Mr Degei also abandoned grounds in relation to alleged deficiencies in the summing up regarding the absence of directions dealing with "dock identification" and "alibi evidence". These grounds had no prospect of success in any event – Mr Khan had admitted, at interview and again at trial, being present at the time of the alleged offending, and there is no evidence from him or anyone else that he was elsewhere.

29. Mr Degei pointed to a number of matters which he submitted amounted to unfairness in the trial and which were prejudicial to his client:

- the primary judge, in his opening remarks to the assessors, made mention of two accused and used the plural tense when explaining how criminal trials operate in practice – no such complaint is made of the primary judge's summing up. Accordingly, even if there was an error initially, it was rectified in the summing up. There is no prejudice arising from this;
- the primary judge, in his judgment, recorded:

"The evidence of Poasa Lagicakarawa also does not affect the credibility of the complainant in light of her evidence and police statement. The report of attempted

rape was succeeded by the police statement of the complainant which suggests otherwise.”

This was submitted to be both unjust and incorrect. In reality, the primary judge did not accept the evidence of the named witness given that the complainant had in her statement to the police and in her evidence made it clear that her allegation was rape, not attempted rape. The credibility and reliability of the witnesses is the sole province of the trial judge, and he was best placed to make such assessment. We see nothing in this point;

- it was submitted that the primary judge “totally relied” on witness demeanour rather than inconsistency of account – however, the judgment makes it plain the primary judge took into account all the evidence of the prosecution and the defence, and considered the inconsistencies in the evidence, which he not only itemised but found did not go the root of the matter or undermine the credibility of the complainant or her recent-complaint witness, her daughter. He took witness demeanour into account as well, as he was entitled to do, but it was not the sole or even the principal consideration. We do not accept this submission;
- the primary judge was submitted to have erred by considering the evidence of Detective Edward Bibi, as his statement had been “struck out” during the trial – however, Mr Degei was unable to show this Court evidence of the statement being excluded from consideration by the assessors. Indeed, we cannot understand how the primary judge’s acceptance of the evidence given by this witness in favour of the defence can be prejudicial to Mr Khan. We do not consider this point carries any weight; and
- the primary judge was submitted to have wrongly relied on the medical evidence. In the judgment the primary judge records that Dr Wong had examined the complainant 3 days after the alleged incident had occurred. The primary judge went on to record the doctor’s evidence as follows:

“...his conclusion was that he was unable to determine if sexual penetration had occurred since there were no obvious signs noted except for vaginal discharge. However, the doctor could not rule out vaginal penetration since it was a delayed examination.”

We conclude that there is no substance to the submission that the primary judge relied on medical evidence to convict.

30. Mr Degei's most compelling point related to Ms Khirul's evidence. In chief, she explained for the first time, that Mr Khan had penetrated her vagina with his fingers, prior to inserting his penis. At that point Ms Latu, who was prosecuting, asked for the assessors to be excused, which they were. Ms Latu pointed out to the primary judge that no charge had been laid in respect of this allegation, in response to which the primary judge indicated he would instruct the assessors to ignore this piece of evidence, as it was not relevant or admissible in relation to the charge. However, Mr Naidu, then acting for Mr Khan, sought to be permitted to cross-examine on the point as being an inconsistency going to the credibility of the witness. The primary judge did not allow that. Mr Naidu is recorded in the Court record as reluctantly abiding by this decision.
31. This was the only aspect of the appeal that we required a response from Ms Latu, appearing for the Respondent. She quite properly did not rely on Mr Naidu's abiding by the primary judge's decision to not allow cross-examination. She conceded that the primary judge may have erred in this regard. However, she sought to maintain the conviction relying on the proviso of "no substantial injustice" having occurred pursuant to section 23(1) of the Court of Appeal Act 1949.
32. As earlier stated, the outcome of the trial rested on credibility and reliability assessments. We consider to not permit Mr Naidu to cross-examine Ma Khirul about an inconsistency in her evidence revealed for the first time in her oral evidence at trial may have been an error, which was prejudicial to Mr Khan.
33. In our view, the primary judge summed up the case to his assessors in an unimpeachable manner. He summarized the evidence given by the prosecution witnesses, pointing out in detail the inconsistencies raised in the evidence. He similarly dealt with the defence witnesses, again in some detail, and set out for the assessors the differences they needed to consider in order to make the appropriate findings of fact. He invited them to consider the

differences between what the witnesses had said in evidence, and the differences between what they had previously stated in their statements to the police. He also pointed to the exhibits produced and what use the assessors were able to make of them. He made it clear their factual findings had to dictate their opinions, but reminded them it was for the prosecution to prove the case.

34. In his judgment the primary judge directed himself in accordance with the summing up. He recorded, after concisely setting out the evidence of the witnesses called, which again dealt with the inconsistencies in and between the various accounts:

“After carefully considering the evidence of the prosecution and the defence I accept the evidence of the complainant as truthful and reliable. I have no doubt in my mind that she told the truth in court and her demeanour was consistent with her honesty. The complainant gave a coherent account of what the accused had done to her some three years ago. The complainant was vigorously cross examined at great length by defence counsel and she was able to withstand cross examination and was not discredited. The complainant was also forthright and not evasive in her answers.”

He similarly accepted as truthful the evidence of recent complaint, and found support in the allegation of rape in Ms Khirul’s statement to the police confirming such allegation.

35. The primary judge specifically dealt with inconsistencies between what Ms Khirul and Ms Nisha had said in evidence and what was recorded in their police statements. He stated:

“In my judgment the inconsistencies and discrepancies did not go to the root of the matter and shake the basic version of their evidence. Considering the time lapse, inconsistencies and discrepancies are bound to arise. I would have been surprised if both the witnesses had given evidence word to word in accordance with their police statements. The inconsistencies were not significant to adversely affect the reliability of the complainant’s evidence.”

He referred to the case of *Bharwada Bhoginbhai Hirjibhai v State of Gujarat* [1983] AIR 733 as authority supporting such conclusion.

36. The primary judge went on:

“On the other hand, this court does not believe the accused told the truth in court. His evidence was untenable and unreliable the demeanour of the accused was not

consistent with his honesty. It was obvious to me that he was very cautious in choosing his words when under cross-examination and at time the accused was not forthright in his answers as well. This court rejects the evidence of the accused that he was not aware and/or that he did not rape the complainant as untruthful. The evidence of the accused was unreliable and unworthy of belief.”

The primary judge also recorded that he not believe the evidence of Mr Mudaliar and that the evidence of Constable Karawa did not affect the evidence of Ms Khirul.

37. The assessors had been directed to ignore Ms Khirul’s revelation at trial that Mr Khan had also inserted his fingers into her vagina in making their factual findings. The primary judge also did not have the advantage of cross-examination as to why this information had not previously been made known. However, there were, as previously set out, other matters which Ms Khirul told the Court about in her evidence which were not recorded in her earlier statement to the police – this was in reality, just another. The primary judge accepted Ms Khirul’s evidence to the effect that she was still in shock on 29 March 2016 when she gave her statement, but that she had done her best to recount what had occurred. What was not recorded in her statement did not affect either her credibility or her reliability in the primary judge’s view.
38. In the circumstances, we consider that despite the error, the conviction should stand, as other findings make it plain there has been no substantial miscarriage of justice in this case. Accordingly, we dismiss this ground of appeal against conviction.

D. Appeal against sentence

39. Mr Khan submitted the sentence imposed was manifestly harsh and excessive as well as wrong in principle. He further submitted that the primary judge had taken irrelevant matters into account.
40. Mr Degei relied on the submissions obviously prepared by Mr Khan himself, who pointed out the lack of weapons and premeditation. Mr Khan pointed to only one charge being involved and that the complainant was a mature woman; and he pointed to other cases where more lenient sentences had been imposed. Mr Khan did not accept that Ms Khirul was home

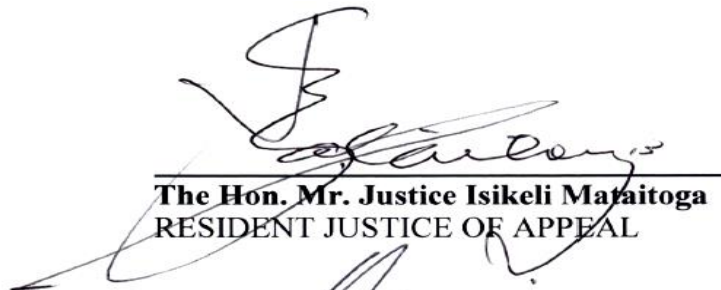
alone, as there were other neighbours about; nor did he accept that she was vulnerable in her own home. Further, he submitted the evidence that Ms Khirul had wet her pants and vomited should not have been accepted and taken into account at sentence. He attributed Ms Khirul's injuries to her having been assaulted by her husband.

41. Mr Degei left the matter in the hands of the Court.
42. We do not consider the primary judge erred in sentencing Mr Khan as he did. He did not take irrelevant matters into account. The sentence imposed is well within the range for offending of this type, taking into account the particular circumstances of this case. Accordingly, we decline leave to appeal against sentence.


Orders of the Court:

1. The appeal against conviction is dismissed.
2. Leave to appeal against sentence is declined.




The Hon. Mr. Justice Isikeli Maitoga
RESIDENT JUSTICE OF APPEAL


The Hon. Mr. Justice Alipate Qetaki
JUSTICE OF APPEAL


The Hon. Mr. Justice Gus Andrée Wiltens
JUSTICE OF APPEAL

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