

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

**Criminal Case No.: HAC 75 of 2016**

**STATE**

**V**

**AFZAL KHAN**

**Counsel** : Ms. L. Latu for the State.  
: Mr. D. S. Naidu for the Accused.

**Dates of Hearing** : 20, 21, 24, 25 June, 2019  
**Closing Speeches** : 26 June, 2019  
**Date of Summing Up** : 26 June, 2019  
**Date of Judgment** : 27 June, 2019

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**JUDGMENT**

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1. The Director of Public Prosecutions charged the accused by filing the following information:

*Statement of Offence*

**RAPE**: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.

*Particulars of Offence*

**AFZAL KHAN**, on the 26<sup>th</sup> day of March, 2016 at Nadi in the Western Division penetrated the vagina of **NAZIMUN NISHA KHIRL** with his penis without her consent.

2. The three assessors had returned with a unanimous opinion that the accused was not guilty of one count of rape as charged.
3. I adjourned overnight to consider my judgment. I direct myself in accordance with the summing up and the evidence adduced at trial.
4. The prosecution called three (3) witnesses and the defence called four (4) witnesses including the accused.
5. The complainant Nazimun Nisha Khirul informed the court, on 26<sup>th</sup> March, 2016 at about 3.30pm while she was alone at her home at Mulomulo, Nadi the accused also known as Munna her brother in law came and knocked on the door and asked her to open it.
6. The complainant refused saying he was not allowed into her house or her compound, upon hearing this, the accused started to forcefully kick the door. The accused told the complainant if she did not open the door he will break it, as the accused continued kicking, the tower bolt nuts came out and the door opened.
7. The accused went inside the house grabbed the complainant's right hand and pressed her neck with his hand and asked her why she did not open the door. The complainant was unable to talk properly because the accused was pressing her neck tightly as a result she urinated in her pants. The complainant was also unable to breathe properly she was dragged inside her bedroom and pushed onto her bed.

8. The complainant was struggling with the accused in the hope that he would leave her. The accused pulled her left hand to the side and then slapped her on her right cheek he then forcefully pulled down her pants together with her panty and forcefully inserted his penis into her vagina and had sexual intercourse with her. By this time she was half unconscious with saliva coming out from her mouth.
9. The accused then ejaculated inside the complainant's vagina she was struggling when the accused was forcefully having sexual intercourse with her. The complainant was not able to free herself she was helpless by this time, feeling weak, saliva was coming out of her mouth, and she thought she was dead. The accused kept on saying that he will kill her.
10. After this, the accused pulled his trousers up, and commented that she was not satisfied with sexual intercourse here that was the reason why she was going overseas. She was unable to talk properly, but she begged the accused not to kill her, she did not do anything since she was scared. The accused left her bedroom and went into the passage of the house at this time the complainant called her former husband Azad Khan for help.
11. The complainant was still on her bed when she started to vomit blood, a little later the accused came into her bedroom and told her not to worry a car was coming and he will take her with him. The accused then started to repair the door which he had broken when he saw Azad coming he ran out of the house.
12. The complainant came out of the bedroom into the passage of the house, from here she called out to her daughter Zaina after a while she was taken to the Mulomulo Police Post. Upon seeing her condition Police Constable Atish told the complainant's brother to take the complainant to the hospital immediately.

13. On the way to the Nadi Hospital the complainant told her daughter Zaina despite having difficulties in her speech that “Chachu” her uncle the accused had strangled her neck, tried to kill her and had forcefully raped her.
14. According to the complainant the accused had also punched the side of her head.
15. During cross examination the police statement of the complainant dated 29<sup>th</sup> March, 2016 was marked and tendered as defence exhibit no. 2. The complainant was referred to line 10 of her police statement which was read as follows:  
  
*“He then carried me inside my room, and I was struggling inside the room on top of my bed.”*
16. When the complainant was questioned by defence counsel that she had told the police that she was carried inside her room the complainant told the court she had informed the police officer writing her police statement that the accused had pressed her neck as a result her head was facing upwards and she was dragged inside her bedroom.
17. The complainant agreed she had told the court that from where the wash tub was she was pushed into her bedroom and she had urinated in her <sup>3</sup>/<sub>4</sub> pants because the accused was pressing her neck tightly. The complainant also agreed it was not mentioned in her police statement that she had urinated.
18. According to the complainant, the police officer did not mention that she had urinated in her pants in the police statement because she was told by the police officer to tell this in court. The complainant also agreed her police statement does not mention anything about her vomiting, however, she had told this to the police officer who had told her it was in her medical

report. The complainant maintained that she had told the police officer writing her police statement that she had vomited, urinated and the accused had pushed her into her bedroom that day and that the incident as she had narrated in court had happened.

19. The complainant clarified in re-examination that her police statement was recorded by a police officer and she had told the officer that the accused had held her neck, pushed her inside the bedroom and that she had also told the officer she had urinated and vomited when the alleged incident had happened. At that time, she was in shock but whatever was in her best of knowledge she told the police officer.
20. The complainant further stated that Azad had not assaulted her she had called him for help.
21. When the complainant was recalled in court in accordance with section 116 of the Criminal Procedure Act she stated that she was unable to recall whether she had lodged a report at the Mulomulo Police Post in respect of her complaint in the evening of 26<sup>th</sup> March, 2016 or the next morning. The complainant also stated she was told to go to the Nadi Police Station to lodge her report.
22. The second prosecution witness Zaina Nisha the daughter of the complainant informed the court on 26<sup>th</sup> March, 2016 she was at her aunt's house when she came to know that her mother was in some problem. Zaina and her uncle left for her mother's house at the gate of her mother's house, she met Azad who was rushing to the police station.
23. When Zaina entered the house she saw her mother lying on the floor in the passage inside the house and was vomiting blood, her mother's clothes were wet and smelt of urine her mother was unconscious like about to die. The witness observed the complainant was not able to talk, and was breathing slowly she helped her mother in changing her clothes, and with

the help of her uncle and cousin brother they lifted her mother into the car and took her to the Mulomulo Police Post.

24. At the police post the police officers told them to immediately take her mother to Nadi Hospital. In the car the complainant was lying on the lap of the witness at the back seat on their way to the Hospital from Mulomulo Police Post the complainant started to talk a bit, she told the witness that her uncle the accused had assaulted and raped her. The police statement of Zaina Nisha dated 30<sup>th</sup> March, 2019 was marked and tendered as defence exhibit no. 3.
25. Dr. Vincent Wong Kitmung on 29<sup>th</sup> March, 2016 had examined the complainant at Nadi Hospital. The Fiji Police Medical Examination Form of the complainant dated 29<sup>th</sup> March, 2016 was marked and tendered as prosecution exhibit No. 1.
26. According to the doctor, 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.
27. The accused informed the court that the complainant was his sister-in-law who used to stay about 10 meters away from his house. He denied the allegation raised against him by the complainant.
28. On 26<sup>th</sup> March, 2016 the complainant had called the accused into her house since he had told her to remove the black electricity wire which was going over his house. The accused was not welcome at the house of the complainant since Azad his brother had reported against him.
29. The accused denied he had forced himself into the house of the complainant by breaking the front door of the house. When the accused went inside the complainant's house for the second time, Azad the

accused's brother saw him so he ran out of the house. The accused saw Azad go inside the house, drag the complainant outside into the compound and started assaulting her by holding her neck. The accused did not do anything because his brother Azad was really angry by this time the complainant was close to the gate but inside her compound. At this time the accused saw a white car come into the compound he did not see who was in the car.

30. The complainant lived in a house which had two other flats with tenants. The tenants were in their flats at the time and there were other houses nearby. The accused was very angry with the complainant because he knew his relationship with the complainant had ended because she was now married in Australia the complainant was his first love and he would not hurt her because she had supported him.
31. The accused denied raping or assaulting the complainant. He does not know the reason why the complainant had made this allegation against him.
32. The second defence witness Vadivell Mudaliar informed the court that he knows both the complainant and the accused very well since they were neighbours. The witness helps the accused as a labourer since the accused was a carpenter.
33. On the 26<sup>th</sup> of March, 2016 at about 3.30pm the accused came from town and told the witness to sit and wait for him at his house and he will be back after meeting the complainant. The witness waited for about 10 minutes after a while, the witness heard the complainant shouting for help saying 'save me Azad is hitting me'. The witness saw this since he was standing in the compound.

34. After Azad had assaulted the complainant, the complainant sat beside the gate in her compound. Azad had dragged the complainant from her house to the gate. After assaulting the complainant Azad walked towards the Mulomulo Police Post. The witness did not see the accused at this time. Shortly after, a car came and the complainant's brother took the complainant in his car, the witness then left for his house.
35. The third defence witness Edward Bibi informed the court on 29<sup>th</sup> March, 2016 he had recorded the statement of the complainant Nazimun Nisha Khirul. The witness confirmed it was defence exhibit no. 2, he recorded what the complainant had told him.
36. The final defence witness Police Constable Poasa Lagicakarawa informed the court that he was doing afternoon shift at Mulomulo Community Post on 26<sup>th</sup> March, 2016. In the evening of the 26<sup>th</sup> the witness recalled taking a report from the complainant which he had recorded in the station diary. The complainant had told him the accused had threatened her, opened her house door without her permission and tried to rape her. The four highlighted diary entries of the Mulomulo Police Post dated 26<sup>th</sup> March, 2016 was marked and tendered as defence exhibit no. 4. This witness also told the court that the complainant had refused to give her police statement at the time.
37. 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 her demeanour was consistent with her honesty.
38. 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 she was able to withstand cross



examination and was not discredited. The complainant was also forthright and not evasive in her answers.

39. The complainant had promptly told her daughter Zaina what the accused had done to her. I accept the complainant was scared of the accused and not in a position to scream or shout since the accused had pressed her neck tightly. The circumstance of the complainant was such that she could not do anything but struggle to free herself from the accused which she was unable to.
40. The daughter of the complainant also told the truth when she narrated what her mother had told her a short while after the alleged incident when the complainant was taken in the car from Mulomulo Police Post to Nadi Hospital. The police statement of the complainant exhibited by the defence also gives credence to the evidence of the complainant that the accused had raped her without her consent.
41. Detective Constable Edward Bibi (defence witness 3) in his evidence stated that he wrote what the complainant had told him when he was recording her police statement. Constable Bibi made it clear that he did not have any interest in the outcome of the case and that he recorded what he was told by the complainant.
42. During the cross examination of the complainant and her daughter Zaina they were referred to some inconsistencies between their evidence in court and their police statements. 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.

43. The inconsistencies were not significant to adversely affect the reliability of the complainant's evidence.
44. The Supreme Court of India in a judgment arising from a conviction for rape in *Bharwada Bhoginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280* made the following pertinent observations:
- “Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when all the important “probabilities factor” echoes in favour of the version narrated by the witnesses...”*
45. 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 times the accused was not forthright in his answers as well.
46. This court rejects the evidence of the accused that he was not aware that the complainant had been raped and/or that he did not rape the complainant as untruthful. The evidence of the accused was unreliable and unworthy of belief.
47. The second defence witness Vadivell Mudaliar also did not tell the truth in court. Vadivell's evidence was irrelevant to the charge of rape it appeared to me that the defence was systematically shifting the focus of the trial away from the charge. This court rejects the evidence of this witness completely.
48. 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.

49. The defence has not been able to create a reasonable doubt in the prosecution case.
50. I accept the evidence of all the prosecution witnesses as truthful and reliable including the evidence of DC Edward Bibi.
51. This court is satisfied beyond reasonable doubt that the accused on 26 March, 2016 had penetrated the vagina of Nazimun Nisha Khirul with his penis without her consent.
52. This court also accepts that the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
53. For the above reasons, this court overturns the unanimous opinion of the assessors that the accused is not guilty of one count of rape as charged.
54. In view of the above, I find the accused guilty as charged and I convict him accordingly.
55. This is the judgment of the court.

  
**Sunil Sharma**  
Judge



**At Lautoka**  
27 June, 2019

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**  
**Messrs. Pillai, Naidu and Associates, Nadi for the Accused.**