

**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  
**Date of Sentence** : 09 July, 2019

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**SENTENCE**

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1. In a judgment delivered on 27<sup>th</sup> June, 2019 this court found the accused guilty and convicted him for one count of rape as per 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 brief facts were as follows:

On 26<sup>th</sup> March, 2016 at about 3.30pm the victim Nazimun Nisha Khirul was alone at her home at Mulomulo, Nadi when the accused also known as Munna the brother in law of the victim forcefully entered her house by kicking the front door open.

3. When inside the house the accused grabbed the victim's right hand and pressed her neck with his hand and asked her why she did not open the door. The victim was unable to talk properly because the accused was pressing her neck tightly as a result she urinated in her pants.
4. The victim was also unable to breathe properly she was dragged inside her bedroom and pushed onto her bed. She struggled 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.
5. The victim was unable to free herself, by this time she was helpless, feeling weak, and saliva was coming out of her mouth, she thought she was going to die. The accused also punched the side of her head, the victim was still on her bed when she started to vomit blood.

6. The victim did not consent to what the accused had done to her, the matter was reported to the police and the victim was later medically examined.
7. Both counsel filed sentence and mitigation submissions for which this court is grateful.
8. The following personal details and mitigation have been presented by the counsel for the accused:
  - (a) The accused is 32 years of age;
  - (b) First offender;
  - (c) He is a joiner by profession;
  - (d) He is the sole bread winner of the family;
  - (e) Takes care of his elderly father who is 83 years of age;
  - (f) Also looks after his widowed sister and her mentally ill son;
  - (g) Seeks a lenient sentence.
9. I accept in accordance with the Supreme Court decision in *Anand Abhay Raj vs. the State, CAV 0003 of 2014* that the personal circumstances and family background of an accused person has little mitigatory value in cases of sexual nature.

#### **AGGRAVATING FACTORS**

10. The aggravating factors are:
  - a) Breach of Trust

The victim was the sister in law of the accused and they were living about 10 meters away from each other. The accused breached the trust of the victim by what he had done to her.

b) Victim was alone and vulnerable

The accused was bold and undeterred that he entered the house of the victim by breaking the front door. He knew the victim was alone and vulnerable in her house, the victim was raped in her house a place where she was supposed to be safe.

c) Injuries caused to the victim

The accused caused injuries to the victim the medical report exhibited shows the victim had suffered lacerations inside her mouth, scratch marks on the neck, bruise about 3 cm long from the chin and tenderness at the back of the head. I also accept that the victim had urinated and vomited as the result of the accused actions.

d) Victim Impact Statement

The victim in her victim impact statement states that after the incident, she is not able to lead a normal life. She is constantly in fear of her life, having flashbacks of what the accused had done to her, with sleepless nights and nightmares. Her mind has not been at ease, although she left Fiji for Australia in June, 2016 the fear still continues. The defence did not raise any issues on the victim impact statement filed by the prosecution in their mitigation.

11. Although there is no expert evidence to support what the victim had mentioned in her victim impact statement, in my judgment there is no need for an expert to be called as long as the views expressed in the victim impact statement are a consequence of the accused conduct resulting in a harm suffered by the victim. Considering the facts and circumstances of this case, this court agrees that the contents of the victim impact statement are credible and therefore, it can be relied upon.

12. The English and Wales Court of Appeal in Regina v Joginder Chall and others [2019] EWCA Crim 865 made the following pertinent observations at paragraph 17:

*“The judicial assessment may in some cases be assisted by expert evidence from a psychologist or psychiatrist. However, we reject the submission that it is always essential for the sentencer to consider expert evidence before deciding whether a victim has suffered severe psychological harm. On the contrary, the judge may make such an assessment, and will usually be able to make such an assessment, without needing to obtain expert evidence.”*

At paragraph 19:

*The cases of R v Dalton [2016] EWCA Crim 2060, R v Egboujor [2018] EWCA Crim 159 and R v Boyle [2018] EWCA Crim 2567 provide recent examples of the application in practice of the principle that expert evidence is not a necessary precondition of a finding of severe psychological harm. We note that counsel for the defendants have not cited any authority to the contrary effect. In Dalton the point was made that the judge had presided over the trial, heard the victim give evidence and seen the effect of the sexual abuse upon her. It was held on appeal that he was entitled to make a finding of severe psychological harm, even without a psychiatric report upon the victim. In Egboujor it was held on appeal that a judge's assessment of whether severe psychological harm has been caused may be based upon expert evidence, but may be reached without an expert's opinion. In that case also the point was made that the judge had been able to observe the victim when she gave evidence during the trial. In Boyle the judge had, on the basis of the VPS\*, made a finding of severe psychological harm caused by the offence, notwithstanding that there was evidence that the victim had suffered from at least minor mental health issues before the offence. On appeal, it was held that the judge was entitled to reach the conclusion that she did. The VPS was*

*not contradicted by any of the other evidence and showed that the offence had resulted in a general deterioration in the victim's psychological and psychiatric condition.*

\*VPS means Victim Personal Statement.

Again at paragraph 22:

*“Save where there is an obvious inference to be drawn from the nature and circumstances of the offence, a judge should not make assumptions as to the effect of the offence on the victim. The judge must act on evidence. But a judge will usually be able to make a proper assessment of the extent of psychological harm on the basis of factual evidence as to the actual effect of the crime on the victim. Such evidence may be given during the course of the trial, and the demeanor of the victim when giving evidence may be an important factor in the judge’s assessment. The relevant evidence will, however, often come, and may exclusively come, from the VPS. The court is not prevented from acting on it merely because it comes from a VPS”.*

And at paragraph 30, the court raised an important point that:

*“We should add that where there is no VPS, the sentencer must not assume that the absence of a VPS indicates an absence of harm. Whether there is evidence of psychological harm and, if so, of its degree, will depend on the facts and circumstances of the case.”*

13. The maximum penalty for the offence of rape is life imprisonment the accepted tariff for the rape of an adult is a sentence between 7 years to 15 years imprisonment.

14. In *Mohammed Kasim v The State (unreported) Cr. Case No. 14 of 1993; 27 May 1994*, the Court of Appeal had stated:

*“We consider that at any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years. It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage. We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than the starting point.”*

15. Bearing in mind the objective seriousness of the offence committed I take 8 years imprisonment (lower end of the tariff) as the starting point of the sentence. I add 5 years for the aggravating factors, bringing an interim total of 13 years imprisonment. Although the personal circumstances and family background of the accused has little mitigatory value, however, I accept his good character has substantive mitigating value. I further reduce the sentence by 1 year for mitigation. The sentence is now 12 years imprisonment.
16. I note the accused has been in remand for about 41 days. I exercise my discretion to further reduce the sentence for the remand period by one month and 15 days in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served. The final sentence of imprisonment is 11 years 10 months and 15 days.
17. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offence committed on the victim compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter

offenders and other persons from committing offences of the same or similar nature.

18. Under section 18 (1) of the Sentencing and Penalties Act, I impose 10 years as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused which is just in the circumstances of this case.
19. Rape not only affects the physical integrity of a victim, but violates the human dignity, leaving lifelong scars of psychological devastation bringing about a sense of self blame and hopelessness which does not heal easily even long after the physical injuries have healed.
20. Mr. Khan you have committed a serious offence against the victim who was your sister in law. I am sure it will be difficult for her to forget what you had done to her. You have not only brought shame to yourself, but also to your family, your actions can best be described as selfish and lustful, for your sexual gratification you had no regard for the safety, pain and sufferings of the victim. You cannot be forgiven for what you had done to the victim.
21. This court will be failing in its duty if a long term deterrent custodial sentence was not imposed. The victim was in her home, alone and vulnerable and you took advantage of this. According to the victim impact statement the victim continues to be emotionally and psychologically affected by the incident.
22. In summary, I pass a sentence of 11 years 10 months and 15 days imprisonment for one count of rape the accused has been convicted, with a non-parole period of 10 years to be served before he is eligible for parole.



23. 30 days to appeal to the Court of Appeal.

  


**Sunil Sharma**  
**Judge**

**At Lautoka**

09 July, 2019

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Messrs. Pillai, Naidu and Associates, Nadi for the Accused.**