

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 121 OF 2019

STATE

V

PAULIASI BALEIWAKAYA

**Counsel: Ms. K. Semisi for State
Ms. M. Ratidara for Defence**

**Dates of Trial: 21, 22, 23 November 2020
Date of Summing Up: 24 January 2020**

(Name of the complainant is suppressed. She is referred to as LC. Reporting restrictions prohibits the publication of the applicable information to the public or any section of the public in writing, in a broadcast or by means of the internet, including social media)

SUMMING UP

Madam Assessor and Gentlemen Assessors:

1. We have now reached the final phase of this case. The law requires me, as the judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my Summing- Up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.
2. I will direct you on matters of law which you must accept and act upon.

3. Matters of facts however, are a matter entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions. In other words you are the judges of fact. All matters of fact are for you to decide.
4. The counsel for Prosecution and Defence made submissions to you about the facts of this case. That is their duty as counsel. You are not bound to accept their submissions. You may properly take their submissions into account when evaluating evidence.
5. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I deliver my judgment.
6. On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proven guilty. The burden of proving his guilt rests on the prosecution and never shifts.
7. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty. Remember if you have any doubt, it must be reasonable. You cannot speculate. These doubts must be based solely on the evidence or lack of evidence that you have seen and heard in this court room.
8. Your opinions must be solely and exclusively based upon the evidence which you have heard in this court and upon nothing else. You must disregard anything you might have heard or read about this case outside of this court room. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial. Approach the evidence with detachment and objectivity.
9. Your duty is to find the facts based on the evidence and apply the law to those facts. You are free to draw reasonable inferences from facts proved by evidence. However, the inferences should not be based on mere speculation.
10. An incidence of rape would certainly shock the conscience and feelings of our hearts. It is quite natural given the inherent compassion and sympathy with which human-beings are

blessed. You may, perhaps, have your own personal, cultural, spiritual and moral thoughts about such an incident. You may perhaps have your personal experience of such a thing, which undoubtedly would be bitter. You must not, however, be swayed away by such emotions and emotive thinking. That is because you act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law to which every one of us is subject to.

11. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. The agreed facts of this case are that:

1. The complainant is LC, 21 year old security officer.
2. Pauliasi Baleiwakaya is a 43 year old, operations supervisor of Muslim League, Nabua.
3. The complainant and Pauliasi Baleiwakaya worked for the same security company that is Matrix Security Services.
4. On the 21st March 2019, at about 7 pm, the complainant started work at one Naga Fashion Shop at Raojibhai Patel Street in Suva.
5. At around 8 pm, Eremodo and Pau came to the building to make their checks.
6. While sleeping, the complainant felt someone waking her up.
7. Pau asked her why she was sleeping.

12. I have given you a copy of the Information which contains three counts. At the end of the Prosecution's case, the Court decided that there is no case for the accused to answer in respect of the second count thus the accused was acquitted of the 2nd count. In view of this acquittal, you are supposed to express your opinions only in respect of the 1st and the 3rd Counts. The relevant part of the information reads as follows:

COUNT 1

Statement of Offence

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

Particulars of Offence

PAULIASI BALEIWAKAYA on the 22nd day of March 2019 at Suva in the Central Division penetrated the vagina of **LC**, with his tongue without her consent.

COUNT 3

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

PAULIASI BALEIWAKAYA on the 22nd day of March 2019 at Suva in the Central Division unlawfully and indecently assaulted **LC** by touching her vagina, kissing her mouth and touching her breasts.

13. In order to prove the 1st count, the Prosecution must establish beyond reasonable doubt that the accused penetrated complainant's vagina with his tongue without her consent. Insertion of tongue fully into vagina is not necessary. A slightest penetration is sufficient to satisfy this element.
14. On the issue of consent, it must be proved that the accused either knew that the complainant did not consent or was reckless as to whether she consented. The accused was reckless as to whether the complainant consented to penetration if you are sure that he realised that there was a risk that she was not consenting and carried on anyway when in the circumstances known to him it was unreasonable to do so.
15. Consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Simply put, if somebody does not resist physically it does not necessarily mean that she or he had given consent. Different people react differently to situations. You don't necessarily need violence, kicking, and shouting etc. to show that one is not consenting.
16. I will now deal with the elements of the offence of Sexual Assault. A person commits the offence of Sexual Assault if he,
 - (a) Unlawfully and indecently,
 - (b) Assaults another person.
17. For the assault to be indecent it must be accompanied by a circumstance of indecency. A

conduct is unlawful when it is done without a lawful excuse. A conduct is indecent when it is as such that ordinary people would so describe it, in light of prevailing standards of morality and, more specifically, in light of whether the victim has consented to the conduct in question. However, Prosecution is under no burden to prove that the particular assault took place without the consent of the victim so long as it constitutes an unlawful and indecent act.

18. Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-person that connects him to the offence that he is alleged to have committed.
19. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a complainant who saw, heard and felt the offence being committed. In this case, for example, the complainant was a witness who offered direct evidence as to what she saw, heard or felt.
20. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether witness is consistent in his or her own evidence and with his or her previous statements or with other witnesses who have gave evidence in court. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same test to evaluate evidence.
21. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in court. You have seen how the witness's demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers or were they evasive? But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.
22. In testing the credibility of a witness, you may consider whether there is delay in making a complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation for such delay.

23. You may also consider whether there is a motive on the part of the complainant to make up such an allegation against the accused. If she had such a motive, then you may think that this allegation has been fabricated.
24. Please remember, there is no rule in Fiji for you to look for corroboration of complainant's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of complainant, depending on how you are going to look at her evidence.
25. I will now remind you the evidence led in the trial. It is a short trial and things should be fresh in your memory. I will only summarize the salient features. If I do not mention a particular piece of evidence that does not mean it is unimportant.

Case for Prosecution

LC (PW-1)

26. LC said that in March 2019, she was living in Chadwick Rd, Nakasi with her elder sister. She was working for Matrix Security Company as a security officer. On the 21st March 2019, she was assigned to Naqa Fashion Shop at Raojibhai Street for the shift starting at 7.00 p.m.
27. Her reliever Nunia, after her shift, was waiting for her at the site to briefly explain about the levels as she was new to that building. She changed into the company shirt and trousers. She started the shift when Nunia had left the Naqa Fashion Building. As she was recording the log book, her Supervisors Eremodo and Pauliasi entered the building from the main gate to check if she was there or not. They explained to her the different levels and the security arrangements. When they had left, she checked the all four levels at around 8.00 pm and again at 11.00 pm that night.
28. At around 12.00 midnight, a security man Johnny came inside the building to take his pillow. She forgot to close the gate firmly when Johnny left. When she was going through the report at 2.00 am, she felt sleepy and laid down on the tiles to sleep for a few minutes. She was shocked when she was suddenly awoken by Pauliasi. Pauliasi told her to go and check around the building. Both of them went by lift to check all the four levels. As they were still on the lift, Pauliasi started touching her breast, on top of her company shirt. She was shocked. She told

him not to do it and also told him that she was there to work and not to like each other. He did not listen to what she was telling him. He told her that no one will know this.

29. As they reached Level 2, Pauliasi told her to go and check the Chinese shop. When she returned after checking, Pauliasi pushed her to the passage towards the toilet beside the Chinese shop and seized her. She told him not to do it because he is a married man. He pulled her into the toilet and made her lie down forcefully in the passage of the toilet. He forced her to remove her clothes. She was scared and in a state of shock. She told him not to do it because he is a married man. He did not listen. He took his hand and started playing with her vagina. He put his tongue inside her vagina and started licking inside of her vagina. She was scared because that was the first time such a thing happened to her. She tried to flee away but she couldn't because he was holding her tightly. She did not agree to this. She told him of her disagreement. She could not do anything. She was in a state of shock. While he was still licking her vagina, her phone started ringing. The base controller Vilimone was calling at 2 am to check on the site. She could not answer the phone as he was holding her hands tightly. The phone was not with her. It was charging. Pauliasi knew that the controller was calling so he left her and went down. She said that there were bright tube lights so she was able to see Pauliasi's face clearly.
30. When Pauliasi went down, LC received a second call from Vilimone. This time she answered the call. She told Vilimone that Pauliasi forced her into the toilet and did something to her; she wanted to report what Pauliasi did to her to police. She was asked to wait at the site until the reliever comes and then go to the police station. When the reliever came at 7 am, she changed her clothes and went to Totogo Police Station and lodged a report. She said she did not report for work after the incident.
31. Under Cross-examination, LC admitted that it was a security lapse on her part in not closing the gate and sleeping during working hours, something to be reprimanded or to get into trouble. She denied that, when Pauliasi woke her up, he had told her off for sleeping and for not locking the gate. She also denied that Pauliasi picked out that she had done a false entry on the log book. LC denied that she had asked for assistance from Pauliasi to make the checks in the building. She denied that when Vilimone called the second time, Pauliasi was still with her. She denied that before Pauliasi left, she had asked him if he was going to report her for not locking the gate and for sleeping on the job. LC also denied the proposition that the only reason she reported Pauliasi was that she were going to lose her job if he had reported her first.

32. In March 2019, Vilimone was working as a security controller at Matrix Security Company. He said that LC was a newly recruited security officer and Pauliasi was the Operations Supervisor for the Suva area.
33. He said that on the 21st March 2019, LC was assigned for the stand-by night shift security job at Naqa Fashion Shop at Raojibhai Patel Street. Part of Vilimone's job was to check on all the guards on an hourly basis. Whenever he called LC on that day from 7.00 pm till 1.00 am she was answering the phone and her answer was "everything is okay". At around 2.00 am he went around on another check but LC was not answering the phone. As the security controller, he was concerned and had to send a supervisor to check on the security guard. Supervisor for the Suva area Eremodo was in the office at that time but Pauliasi, who was supposed to be the supervisor for the Tobacco Factory in Nabua that night, had taken the car.
34. He kept on calling LC on the phone because he was a bit worried. He took the car from the office and went down to Raojibhai Patel Street. He saw the company rental car that Pauliasi had taken parked outside the building. He knew that Pauliasi was there checking with the security guard at Naqa Fashion; so he didn't go inside the building to check on her. He went back to the office. Because LC was not answering the phone, he sent her a text message asking her to call back and report to the office in the morning. When he called again at 3 am, LC answered the phone. She sounded frightened and was crying. She said that Pauliasi did something to her and want it to be reported immediately to police. He asked her to wait until another security officer takes over. Vilimone said that he did not receive any complaint of LC's misconduct from Pauliasi.
35. Under cross-examination, Vilimone admitted that he did not inform the police that he heard from LC that Vilimone had done something to her. He admitted that he was not allowed to leave the office and drive the company vehicles. He admitted texting the message "I saw what you're doing and I will complain in the office".
36. That is the case for the Prosecution. At the close of the Prosecution's case, you heard me explain to the accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case he would be cross-examined.

37. The accused elected to give evidence under oath. That is his right. Now I must tell you that the fact that an accused gives evidence in his own defence does not relieve the Prosecution of the burden to prove their case to you beyond reasonable doubt. Burden of proof remains with the Prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

Case for Defence

DW1 Pauliasi Baleiwakaya (the Accused)

38. Pauliasi said that in 2019, he worked as a patrol supervisor for Matrix Security Ltd where LC also worked. Two days prior to the 21 March 2019, the General Manager told him that he received some reports from his clients that the guards were found sleeping in their premises and instructed him to do night shift to check their work. At around 8.00 pm on the 21st March 2019, he and Eremodo came to Naqa Fashion at Raajibhai Patel to make the checks. He found that LC was assigned as the stand-by security officer for that night. After checking the place they left to check some other sites and returned to the office at around 12.00 am. Eremodo wanted to take his 1 hour break thus he took over the Patrol duties. At around 12.30 pm, he reached Naqa Fashion Shop again and started calling LC. He found the gate open. He walked inside to the security desk and checked the log book to find that LC had already entered the 1.00 o'clock entry.
39. He went to check around the whole building and found LC sleeping at Level 1. He called her twice; when she didn't wake up, he started to tap her shoulder. She woke up and said 'sorry'. He told her to put all the blankets away and follow him down to the ground floor desk to show her gross misconducts; entrance was not secured, false entry in the log book and sleeping while on duty. He explained that they can lead to suspension or termination, because she was still on probation. She asked him not to report her to HR because she left Vanua Levu to come to Suva to look for a job to support her two (2) kids. He understood the situation so he gave her only a verbal warning and was leaving the building when LC called him again. She wanted him to accompany her to make a check around the building because she said there may be an intruder hiding inside the building. He agreed and came back to make the checks inside the building. They used the stairs for security reasons to check from the ground floor till Level 4. She was asked to follow him at a distance. They completed the checks at all four levels and came out.

40. Then again she asked him if he could make another round to check the building. He first refused but later agreed and made another round of quick check. On their way down, she asked if he used to have sex with one female guard. Her phone started ringing in her pocket for about two seconds, followed by a text message. He left the building after overhearing a rough conversation between Vilimone and LC and went straight to the office.
41. Pauliasi said that he did not make any report of what had happened at Naqa Fashion because he had already promised to LC that he won't report her to HR. He denied all the allegations made against him by LC.
42. Under cross-examination, Pauliasi denied that he was supposed to supervise the security officers at the Tobacco Company in Nabua on that day. He admitted that he didn't complain about LC and therefore there was no reason for her to go and complain about him. He denied that Vilimone had spoken to LC at 1.00 am. He admitted that, after the first round of checks, he was assured that the building was secure still he made the second round of checks upon LC's request. He admitted that there was no problem between him and LC at that time.
43. That is the case for Defence.

Analysis

44. Madam and Gentlemen Assessors, the accused is charged with one count of Rape and one count of Sexual Assault. There are two counts hence you are supposed to consider evidence against each count separately.
45. Prosecution called two witnesses and you heard what they said. The Prosecution says that the complainant is consistent and reliable. According to complainant's evidence, she had informed Vilimone soon after the alleged incident that the accused had done something to her in the toilet and that she wanted to go to the police station immediately. She had lodged a report with police after she knocked off early in the morning. Vilimone was called to support the version of the complainant.
46. The accused does not deny that he tapped and woke LC up at around 12. 30 am on 22 March 2019 but he denies touching her breast and vagina or licking or putting his tongue inside her vagina. The Defence says that LC lodged a report because she feared that the accused will

complain about her lapses in her security duties and lose her job. Accused says that LC made up this allegation after seeing the text message she received from Vilimone. It is up to you to decide where the truth lies.

47. You heard Accused's evidence and had the opportunity to observe the demeanour of the witnesses. You decide if the complainant was telling the truth in court. It is up to you to decide which version is to believe and whether you could accept the version of the Defence. If you accept the version of the Defence you must find the accused not guilty. Even if you reject the version of the Defence, still the Prosecution should prove their case beyond reasonable doubt. Remember, the burden to prove the accused's guilt on each count lies with the Prosecution throughout the trial, and never shifts to the Defence.
48. If you believe the complainant is telling you the truth that the accused penetrated her vagina with his tongue without her consent you may express an opinion that the accused is guilty of rape. If you believe that the accused touched complainant's vagina you may find the accused guilty of sexual Assault. But if you do not believe the complainant's evidence regarding the alleged offences, or if you have a reasonable doubt about the guilt of the accused, then you must find the accused not guilty.
49. Your possible opinion is either guilty or not guilty on each count.
50. You may now retire to deliberate on your opinions. Once you have reached your decisions, you may inform the clerks, so that we could reconvene, to receive the same.
51. Any re-directions?




Aruna Aluthge
Judge

At Suva

24 January 2020

Solicitors:

Office of the Director of Public Prosecution for State
Legal Aid Commission for Defence