

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 106 of 2015

STATE

V

PAULIASI RAISELE

Counsel : Ms. S. Kiran for the State.
: Mr. K. Tunidau for the Accused.

Dates of Hearing : 23, 24, 31 July, 6, 7, 8, August, 2018
Closing Speeches : 09 August, 2018
Date of Summing Up : 10 August, 2018
Date of Judgment : 13 August, 2018

JUDGMENT

(The name of the complainant is suppressed she will be referred to as "PD").

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 No. 44 of 2009.

Particulars of Offence

PAULIASI RAISELE between the 1st day of January 2015 and 31st day of January 2015 at Nadi in the Western Division, penetrated the vagina of "PD" with his penis without the consent of the said "PD".

2. The three assessors had returned with a majority opinion that the accused was guilty by 2 is to 1.
3. I adjourned to consider my judgment. I direct myself in accordance with my summing up, redirections and the evidence adduced at trial.
4. The prosecution called four (4) witnesses and the defence called three (3) witnesses including the accused.
5. The complainant in January, 2015 was 17 years of age and a school student. She was living with the accused and his wife the complainant's cousin sister at Malawai, Nadi.
6. On Sunday 25 January, 2015 the complainant was alone at home since the other family members had gone to church. After cooking, she went to have a shower in the bathroom. Whilst having her shower the accused came and opened the bathroom door. The bathroom did not have a lock, when the accused opened the bathroom door she was wearing her bra and panty, she screamed and told the accused that he is not supposed to do this and he is not to come inside the bathroom.
7. The accused told the complainant that he wanted to have a relationship with her. The complainant replied that this cannot be because he was her brother in law. The accused wanted to have sexual intercourse with her and said that he was the boss of the house and he is the one who looks after everyone in the house.
8. The accused pushed the complainant on the floor removed her panty and inserted his penis into her vagina. After having sexual intercourse with the complainant he told her not to tell his wife about what had happened.

9. Furthermore, when the accused forcefully inserted his penis into her vagina she was scared and did not know what to do. She did not consent to what the accused had done to her. The complainant was scared and frightened she felt numbness from her hip downwards.
10. On Monday the complainant went to school and from there she went to her aunt Taina Ragatu and told her about the incident. Her aunt did not believe her so she reported the matter to the police.
11. During cross examination the police statement of the complainant dated 20 June, 2015 was marked and tendered as defence exhibit no. 3.
12. The second prosecution witness was Taina Ragatu the complainant's aunt she informed the court that the complainant was staying with the accused and his wife at Malawai.
13. In early 2015 after school, the complainant came to her home and told her that the accused was touching her and she did not like it, also when she visited the bathroom he used to push open the door and that the accused had been doing this for a long time. According to Taina upon her questioning the complainant told her that the accused did not have sexual intercourse with her.
14. After the witness informed the wife of the accused of what the complainant had told her, both the accused and his wife came to her house. During discussions the accused sought forgiveness. The accused said that he will not do that act again that is he will not touch the complainant again.
15. In cross examination the police statement of Taina Ragatu was marked and tendered as defence exhibit No.4.

16. The third prosecution witness was the mother of the complainant Mereisi Daulakeba who informed the court that the reason her daughter was sent to live with the accused and his wife was to look after their son in 2013. The wife of the accused had undertaken to get the complainant into a school in Nadi.
17. At no time the accused or his wife had made any complaints about her daughter to her. The accused was her sister's son in law.
18. The final prosecution witness was Raj Deo the Catering Supervisor employed by Air Terminal Services Ltd. He has been employed by ATS for the past 34 years. The witness explained to the court about the shift work and the workers entitlement to breaks within their shift. A shift worker was entitled to take 15 minutes for tea breaks and 30 minutes for lunch breaks. The breaks could be taken separately and also jointly depending upon the flight movement. The leading hand that is his assistant decides who takes the break. Furthermore, a shift worker was allowed to leave the work premises during the breaks as long as he or she comes back to work within time.
19. In January 2015 the accused was working under his supervision. The accused was on a day off on this day, however, due to lack of manpower the accused was asked to do overtime from 4am to 1pm. The time sheet was prepared by the witness who was the supervisor of the day, during the overtime the accused was entitled to 2 meal breaks and 1 tea break.
20. According to this witness it was upon an individual worker whether he or she wanted to take meal breaks within or outside the work premises. This movement of workers was not recorded anywhere it was upon the worker whether he wanted to leave the premises or to stay on the premises and utilize the breaks. The signing "on" and signing "off" in the timesheet did not reflect the going out of the work premises for breaks. The timesheet of

the accused dated 25 January, 2015 was marked and tendered as defence exhibit no.6.

21. The witness agreed that for the 12.45 pm flight by the time the workers would have gone on the aircraft the time would be 1pm. The witness could not say that the accused would have been working on this flight because he had knocked off at 1pm.
22. The witness further stated that 25 January, 2015 was a busy morning and in his estimation taking into account the flight movement summary the accused would have most likely taken his break between 11am and 12 midday. The accused had 2 meal breaks and 1 tea break due, so he was entitled to one hour break and it was possible the accused could have taken his break from 12 midday to 1pm.
23. The accused informed the court that he was employed by the Air Terminal Services Limited since 1997. At the present time he is employed as a Storeman in the cabin section. On 25 January, 2015 he started working overtime at 4 am in the morning till 1pm in the afternoon.
24. He was entitled to receive meal breaks and after every 2 hours he was given a 10 minutes meal break because he was doing overtime. On this day he received 2 meal vouchers and one tea voucher.
25. According to the accused the meal vouchers are to be used for 15 to 20 minutes which can be utilized for breakfast at 10am and the other for lunch from 12 to 1pm. Due to the busy schedule of 25 January it was not possible to have the meal times spent outside the work premises without the approval of the leading hand or the senior catering services attendant. On this day the accused had breakfast after 10 am after a flight departed at 9:45 am. The next flight was due to arrive at 12.25pm so he had his lunch around 12 midday.

26. From 4am to 1pm he did not leave the premises of the Air Terminal Services Ltd. He also denied the allegation that between 1st January, 2015 to 31st January, 2015 he had sexual intercourse with the complainant without her consent.
27. In 2014 at about 6pm the accused spoke loudly and harshly to the complainant for arriving late from school. The accused knows Taina Ragatu, he went to Taina's house for a discussion with Taina in respect of the complainant's complaint about him. At Taina's house he saw the complainant inside a room, during discussions with Taina he sought forgiveness for raising his voice and offending the complainant in any way since he was reminding the complainant of the household rules. He denied touching the complainant as mentioned by Taina.
28. The accused does not know why the complainant had made such serious allegation against him since he treated the complainant like his eldest daughter.
29. The accused agreed that meal breaks was for 30 minutes which was taken at the discretion of the supervisor which could be increased to 45 minutes by the supervisor. As for the tea breaks 10 minutes was allowed.
30. The accused agreed that he was able to take his 2 meal breaks and tea break all together but a worker can only leave the premises with the supervisor or the leading hand's permission.
31. The accused had attended to all the flights on 25 January, 2015 because he was driving the cabin cleaning truck during his shift.
32. Due to a busy schedule and bearing in mind the movement of aircrafts into and out of Nadi Airport the accused was able to have his breakfast for 30 minutes from 10am to 10.30am as for his lunch he took only 5 minutes lunch break around midday due to operational demand.

33. The accused denied he had committed the offence according to him it was a lie since he was at work. The reason why he had asked for forgiveness from Taina was because Taina had relayed the complainant's message.
34. I accept the evidence of the complainant as truthful and reliable she was able to recall and relate what had happened to her some three years ago. She was forthright and straight forward in her evidence moreover the complainant was able to withstand vigorous cross examination and was not shaken.
35. The inconsistencies between the evidence of the complainant under oath and her police statement were not significant to adversely affect the reliability of her evidence. I have no doubt in my mind that the complainant told the truth in court her demeanour was consistent with her honesty.
36. The complainant had promptly told her aunt about what the accused had done to her. I take note that this was the only opportunity the complainant had to go to her aunt's house from school since she was living with the accused. The complainant took advantage of this opportunity.
37. Although the complainant did not tell her aunt all the details of what the accused had done to her including the fact that the accused did not have sexual intercourse, however, she did disclose material and relevant information about the unlawful sexual conduct on the part of the accused which was, the accused used to touch the complainant which she did not like. This evidence of the complainant's aunt was relevant to the question of consistency or inconsistency of the complainant's conduct and as such was a matter going to the complainant's credibility and reliability as a witness see *Anand Abhay Raj v State, CAV 0003 of 2014 (20 August, 2014)*.

38. I accept the evidence of the complainant's aunty Taina Ragatu, she was also an honest witness who informed the court what the complainant had told her and that the accused had sought forgiveness for touching the complainant. The complainant's mother also told the truth that the accused or his wife never complained to her about the complainant.
39. I also accept the evidence of Raj Deo the supervisor of the accused, although he did not see the accused leaving the work premises before ending his shift at 1pm the only reasonable inference that can be drawn from the evidence of this witness points to the fact that firstly the accused was knocking off at 1pm he could not have attended to the flight that had arrived at 12.45pm. Secondly, the accused had accrued his meal breaks for one hour that day hence leaving before 1pm in lieu of his break of one hour cannot be ruled out. The evidence of Raj is supported by the complainant when she said the accused had come home when she was alone.
40. In this case much reliance was placed by the defence on the timing of the alleged rape. 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:

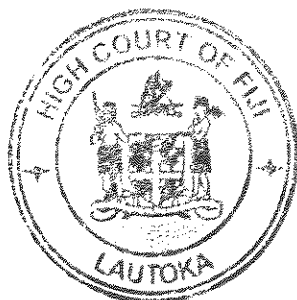
"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ... (3) The powers of observation differ from person to person. What one may notice, another may not... It is unrealistic to expect a witness to be a human tape recorder;... (5) In regard to exact time of an

incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends. On the 'timesense' of individuals which varies from person to person..."

41. This court does not believe the accused had told the truth in court that he was at work at the time of the alleged offending. He also did not tell the truth when he told the court that he did not have sexual intercourse with the complainant as alleged.
42. The demeanour of the accused was not consistent with his honesty he was not forthcoming under cross examination in a few instances he was not answering the questions put to him. I also observed the accused to be careful in choosing his words, on most occasions he was diverting attention from the issue at hand by explaining in detail his work related duties and responsibilities.
43. This court rejects the evidence of the accused as unreliable and unworthy of belief. The defence has not been able to create a reasonable doubt in the prosecution case.
44. I accept the evidence of all the prosecution witnesses as truthful and reliable.
45. I am satisfied beyond reasonable doubt that the accused between the 1st day of January, 2015 and 31st day of January, 2015 at Nadi penetrated the vagina of the complainant with his penis without her consent.
46. I also accept that the accused knew or believed that the complainant was not consenting or didn't care if she was not consenting at the time.

47. I agree with the majority opinion of the assessors that the accused was guilty of one count of rape as charged.

48. In view of the above, I find the accused guilty as charged and I convict him accordingly. This is the judgment of the court.



Sunil Sharma

Judge

At Lautoka

13 August, 2018

Solicitors

Office of the Director of Public Prosecutions for the State.

Kevueli Tunidau Lawyers, Lautoka for the Accused.