IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(CRIMINAL DIVISION)
IN THE STATE OF WILAYAH PERSEKUTUAN, MALAYSIA
[CRIMINAL APPEAL NO: WA - 41S(A) - 2 - 09/2020]

MUHAMMAD HANIF OTHMAN

VS.

PUBLIC PROSECUTOR

JUDGMENT

Introduction

[1] The appellant was charged in the Magistrates Court with assault or using criminal force with the intent to outrage the complainant's modesty under section 354 of the Penal Code. He stood trial and was subsequently found guilty. The appellant was sentenced to a year's imprisonment from the date of conviction. His appeal pertains to both the conviction and sentence meted out by the Magistrates Court.

Facts

[2] The charge against the appellant read as follows:

'Bahawa kamu pada 17/06/2018jam lebih kurang 8.00 maiam di dalam Pejabat Polis Bantuan HKL Jaian Pahang, 50586, Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur telah menggunakan kekerasan jenayah kepada Aida Suzanna binti Md Zain, No, K/P:840215115350 dengan cara memeluk dan meraba

seluruh badan dengan maksud hendak mencabul kehormatannya dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 354 Kanun Keseksaan. '

[3] In essence, the appellant was accused of using criminal force on the complainant (SP1), by hugging and fondling her with the intention of outraging her modesty. The alleged incident occurred at around 8.00 p.m. on the 17 June 2018, at the Auxiliary Police's headquarters at the Kuala Lumpur General Hospital ('the hospital').

[4] The appellant and the complainant were colleagues. They were members of the Auxiliary Police Force and stationed at the hospital. The appellant was the complainant's superior, holding the rank of Assistant Superintendent of Police.

[5] The alleged incident occurred on the third night of *"Hari Raya Aidilfitri"*. The personnel at the Auxiliary Police Station of the hospital had planned for a celebration for that night. The complainant was working the night shift on the day of the incident and was one of those entrusted to help with the preparations. She had some time that night went to the bank and grocery store. She received a call from her colleague, SP2, who told her that the appellant had noticed her absence from work and was looking for her. The complainant immediately went back to the station at the hospital and proceeded to join her colleagues in the pantry.

[6] The appellant was also at the pantry and had upon seeing the complainant instructed her to see him at his office, which was located not far from the pantry. The appellant was seated at the edge of his table when the complainant entered the office. He then asked the complainant to explain her absence. She attempted to justify her absence by explaining that she had gone

out to go to the bank and also to buy some groceries. She claimed that the appellant was not satisfied with her explanation, and proceeded to grab her hands and pulled her towards him. The complainant turned her body around and claimed that the appellant touched her breasts with one hand and groped her private parts with the other. She claimed to have pleaded with the appellant to stop what he was doing but to no avail. She managed to prise herself away from the appellant's grasp and left the room.

[7] The complainant then went to the changing room nearby but left after seeing that there were many people there. She then went to the back of the station to calm herself down, after which she then called her colleague, SP5, on her mobile phone and related the incident to him. SP5 had advised her to lodge a police report. The complainant returned to the pantry to help with the preparations. Later that night, the complainant confided on what had happened to SP2, who too advised her to lodge a police report.

[8] The complainant took leave from work from 19 June 2018 until 26 June 2018. She had during the leave also told another colleague, SP4, of the alleged incident. She had upon returning to work on 26 June 2018, together with SP4, reported the incident to her immediate superior officer, SP3. She had also related the incident to the hospital's management but was told not to lodge a police report pending internal investigations.

[9] She did not stop there, for she had on 28 June 2018, together with SP3, reported the incident to the Head of the hospital's Auxiliary Police, SD2. The latter seemed to disbelieve the complainant, as she had advised the complainant to forgive the appellant, believing that it was consensual. The complainant was

on the same day called to meet the hospital's head of management, where she was told that there were other similar cases and that they were resolved internally without needing to lodge police reports.

[10] Frustrated with the lackadaisical attitudes, the complainant decided to lodge a police report. She was not surprisingly uneasy, as she was still stationed at the hospital and the appellant was still her immediate superior.

[11] The complainant had during the course of cross-examination revealed that the incident was not the first time that the appellant had outraged her modesty. She claimed that he had done the same on 15 June 2018, when she was in the car with him and another colleague. She did not lodge a police report but claimed to have complained to another superior officer.

[12] The learned Magistrate had at the end of the prosecution's case concluded that a prima facie case had been established and called for the appellant to enter his defence.

[13] Four witnesses testified for the defence, including the appellant. The appellant denied the complainant's accusation and claimed that she had concocted the incident out of anger towards him. He claimed that the complainant had been upset with him as he had on the night of the incident requested another officer to give a bite of a cake to the complainant, and also requested everyone including the complainant to seek forgiveness from each other. The appellant claimed that the complainant was unhappy with the latter instructions as she had issues with one of the officers present.

[14] SD2, the head of the hospital's Auxiliary Police Force had disbelieved the complainant as she found it difficult to accept

that the incident had occurred due to the proximity of the appellant's office and the pantry. She concluded that as there were many other officers in proximity, they would have been able to hear the complainant screaming or struggling if the incident had indeed occurred. SD2 also stated that the fact that the complainant did not lodge a police report when the police station was just nearby meant that the incident was unlikely to have happened. SD2 also testified that the complainant's accusation could not be verified as there were no witnesses.

[15] The third defence witness, SD3, testified that the complainant seemed her usual self on that night during the celebration and did not detect any abnormalities. The last witness called for the defence was SD4. He was in the car together with the complainant and the appellant, where the complainant claimed to have been molested by the appellant. He denied the complainant's accusation and testified that nothing unsavoury had occurred in the car. Similar to SD3, he too claimed that everything seemed normal that night during the celebration.

[16] The learned Magistrate had at the end of the trial concluded that the defence had failed to raise any reasonable doubt. The appellant was found guilty and sentenced to a year's imprisonment from the date of the decision.

Findings

[17] I must admit that I had initially found no issues with the learned Magistrate's findings. Her judgment was impeccably written and demonstrated her thoroughness in analysing the facts and applying the relevant law. My initial views were not in favour of the appellant. My view changed after hearing the oral

submissions by counsel, in particular that of the learned counsel for the appellant.

[18] Learned counsel for the appellant highlighted an anomaly in the learned Magistrate's judgment. This was at paragraph 59 of the judgment, in particular the last sentence, which reads as follows:

'This Court had the advantage in witnessing the petrified demeanor of the complainant that trembled and sobbed while she gave her evidences under oath to this Court equally exposing her traumatic incident in the presence of her husband seated in the public gallery of this Court.'

[19] Learned counsel for the appellant pointed out that the learned Magistrate did not preside over the trial from the onset. She was the second Magistrate that presided. The first Magistrate had commenced the trial on 7 August 2019 and continued presiding on 8 August 2019 and 3 December 2019. Four of the prosecution's witnesses, SP1, SP2, SP3 and SP4 had testified before the first Magistrate. She however did not continue to preside over the trial after 3 December 2019, as she was subsequently replaced (presumably due to being transferred which is the norm in the civil service) by the second Magistrate. The second Magistrate continued with the trial on 13 January 2020, where SP5 gave evidence and went on to preside until the trial reached its conclusion.

[20] It is abundantly clear that the learned Magistrate was not the one presiding when the complainant (SP1) testified. She could not have observed SP1 's demeanour when the latter testified. Her description of SP1 's demeanour is, therefore, with respect fallacious.

[21] The learned Magistrate had two options when she was entrusted to preside over the trial. Under section 261 of the Criminal Procedure Code, she could have continued to preside and act on the evidence recorded by the preceding Magistrate, or summon the witnesses back and recommence the trial. Section 261 Criminal Procedure Code ('CPC') reads as follows:

Change of Magistrate during hearing

261 Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction in it and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may resummon the witnesses and recommence the inquiry or trial:

Provided as follows:

(a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be resummoned and reheard;

(b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was *had, if that Court is of the opinion that the accused has been materially prejudiced thereby, and may order a new trial.*

[22] Although section 261 CPC was meant to expedite the disposal of part-heard cases, the paramount consideration should be justice. The succeeding Magistrate must be satisfied that there was no serious need to recall any witnesses based on the evidence given

by them. This should only be done where the evidence given was merely formal or uncontroverted, or where the demeanour of the witness is not paramount. Ajaib Singh J (as he then was) in *Oh Keng Seng v. PP* [1993] 1 MLJ 133 (HC) held:

[7] The provision in s. 261 of the Criminal Procedure Code which empowers the succeeding magistrate or president to act on the evidence recorded by his predecessor is no doubt intended to save time and money and to expedite the disposal of part-heard criminal cases. This provision however should be exercised with caution. It must be appreciated that the succeeding magistrate or president who acts on the evidence of witnesses whom he has not heard and seen is obviously at some disadvantage particularly in respect of the demeanour and credibility of those witnesses. There is therefore a really risk that evidence not wholly recorded by a magistrate or president but which is acted on by him may materially prejudice an accused person where a decision involving the credibility of a witness is based on that evidence. The provision however may generally be exercised where the evidence to be acted on is more or less formal or is largely uncontroversial and where the credibility of any material witness is not involved.' [page 144]

[23] The learned Magistrate had obviously opted to continue presiding over the trial without calling back any of the witnesses to testify again. I take the view that this was an erroneous approach, as the demeanour of the complainant or victim in a sexual offence case particularly where there were no eyewitnesses is crucial. The learned Magistrate should have at the very least recall the complainant to testify so that she could make her observation on amongst others, the complainant's demeanour. The importance of the trial judge that will deliver the final decision observing the demeanour of the material

witnesses was highlighted in *Mohd Shukor bin Hassan & Anor v. Public Prosecutor* [2004] 2 MLJ 602 (HC). The High Court in that case set aside the conviction of the appellants charged with rape as the second Sessions Court Judge that gave the verdict did not preside over the trial from its commencement. The relevant part of the judgment is as follows:

[8] I agree with this proposition of the faw. Since this case relates to charges involving statutory rape, it is all the more important and relevant for the final arbiter to be in a position to weigh the evidence taken together with considerations of demeanour and the general conduct and management of the witnesses in court, especially the complainant. Deprived of the opportunity of availing himself of such considerations, it cannot be said that both the accused have had a fair hearing before the second judge who merely had the opportunity to see words in cold hard print. ' [page 606]

[24] Many sexual offences are committed without the presence of others. The victim is more often than not left with the difficult task of justifying the truth of the crime committed. It is the word of a victim against the perpetrator. There is however no need for a victim's version of events to be corroborated, for it is entirely permissible for the court to accept the victim's version alone. This however means that the victim's credibility is an extremely important factor for the court to consider. This tenet was laid down by the Federal Court in *Dato[1] Seri Anwar Ibrahim v. PP* [2015] 2 CLJ 145 (FC), where the apex court held:

'[81] A judge is entitled in law to convict even without corroboration if convinced of the truth of a complainant's evidence (Chiu Nang Hong v. Public Prosecutor [1965] 1 MLJ 40 (PC)). If the evidence of a complainant in a sexual offence

inspires confidence then it should be relied upon without the need for corroboration. It has been said that a refusal by the courts to convict based on the testimony of a victim of a sexual offence alone in the absence of corroboration, amounts to 'adding insult to injury' (Bharwada Bhoginbhai Hirjibhai v. State of Gujarat AIR [1983] SC 753).' [page 177]

[25] As the truth or falsity of such a charge would invariably depend on the version accepted by the court, the credibility of the complainant here is therefore paramount. The testimonies of the other prosecution's witnesses in my opinion were not sufficiently strong to give credence to the complainant's accusation. The complainant's evidence, particularly the narration of the incident must be convincing enough for the court to convict, even without corroboration. The complainant's demeanour is therefore of the utmost importance in this case, particularly as it is a sexual offence case.

Conclusion

[26] The credibility of a witness is the domain of the trial judge who had the audio-visual advantage that a judge or judges sitting in an appellate capacity do or does not have, and should therefore loath to disturb the findings; *Ahmad Shah bin Hashim v. PP* [1980] 1 MLJ 77 (FC). I am however compelled to do so as the learned Magistrate's findings are flawed, as she had in her judgment indicated that she was persuaded by the demeanour of the complainant when that could not have possibly been the case. I believe that it would be unsafe to find the appellant guilty based on this apparent discrepancy. Under the provisions of section 261(b) of the Criminal Procedure Code ('CPC'), the High Court may set aside any conviction recorded by a

succeeding Magistrate where the evidence had not been wholly recorded before him if it is of the opinion that the accused had been materially prejudiced.

[27] It is my view that the appellant had been materially prejudiced as the learned Magistrate had made a finding on the complainant's demeanour when the latter did not testify in her presence. The appellant's appeal is therefore allowed.

Dated: 30 SEPTEMBER 2021

(MOHAMED ZAINI MAZLAN)
Judge
High Court of Malaya
(Criminal Division)
Kuala Lumpur

COUNSEL:

For the appellant - Fahmi Adilah &Norman Mohd Nasir; M/s Fahmi Zhafri Ashraf & Co

For the deputy public prosecutor - Goh Ai Rene; Attorney General's Chambers

Case(s) referred to:

Oh Keng Seng v. PP [1993] 1 MLJ 133 (HC)

Mohd Shukor bin Hassan & Anor v. Public Prosecutor [2004] 2 MLJ 602 (HC)

Dato' Seri Anwar Ibrahim v. PP [2015] 2 CLJ 145 (FC)

Ahmad Shah bin Hashim v. PP [1980] 1 MLJ 77 (FC)

Legislation referred to:

Penal Code, s. 354

Criminal Procedure Code, s. 261(b)