PP
v.
SOPHIAAN SAHRUN

High Court Malaya, Kuala Lumpur
Collin Lawrence Sequerah J
[Criminal Appeal No: WA-42LB(A)-2-08/2017]
21 March 2019

Case(s) referred to:
Balachandran v. PP [2004] 2 MLRA 547; [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2005] 1 AMR 321 (refd)
Benmax v. Austin Motor Co Ltd [1955] AC 370 (refd)
Looi Kow Chai & Anor v. PP [2002] 2 MLRA 383; [2003] 2 MLJ 65; [2003] 1 CLJ 734; [2003] 2 AMR 89 (refd)
Periasamy a/l Sinnappan & Anor v. PP [1996] 1 MLRA 277; [1996] 2 MLJ 557; [1996] 3 CLJ 187; [1996] 2 AMR 2511 (refd)
P'ng Hun Sun v. Dato' Yip Yee Foo [2013] 5 MLRA 661; [2013] 6 MLJ 523; [2013] 2 AMCR 350 (refd)
PP v. Mohd Radzi bin Abu Bakar [2005] 2 MLRA 590; [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203 (refd)
Watt (or Thomas) v. Thomas [1947] 1 All ER 582 (refd)

Legislation referred to:
Criminal Procedure Code, s 316
Penal Code, s 376(1)

Counsel:
For the applicant: Nurakmal Farhan; DPP
For the respondent: Norman Mohd Nasir; M/s Norman & Co

[Dismissed the appeal.]

JUDGMENT

Collin Lawrence Sequerah J:

A) Introduction

[1] The Respondent abovenamed was charged at the Kuala Lumpur Sessions Court for the following:

> "Bahawa kamu pada 28 August 2016 antara jam lebih kurang 2.00 pagi hingga 6.00 pagi, bertempat dibilik No 213 TA Hotel Jalan Pudu Kuala Lumpur, dalam Daerah Wangsa Maju,Bandaraya Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur, telah merogol XXXXXXXXX Binti Sulaiman, No KP: XXXXXX-XX-XXXX. Oleh

yang demikian kamu telah melakukan satu kesalahan di bawah s 376(1) Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama Akta itu."

[2] The Respondent claimed trial to the charge and at the conclusion of the prosecution case, the learned Sessions Court Judge ("SCJ") held that the prosecution had failed to make out a *prima facie* case against the Respondent and acquitted and discharged him without calling for him to make his defence.

[3] The prosecution (Appellant) being aggrieved at this finding has filed an appeal against the decision.

B) Pertinent Facts

[4] The facts as presented by the Appellant is that the Respondent is a police officer who was acquainted to the victim who was a single mother (PW4) through an incident when he had conducted a raid in PW4's uncle's house on 22 August 2016.

[5] Thereafter, both the Respondent and PW4 went out for a movie on 25 August 2016 after which they went to a bar called the Bamboo Club which was where PW4 also lost her hand phone.

[6] On 26 August 2016 the Respondent called PW4 and informed her that her hand phone had been found and told her that she could retrieve it on 27 August 2016. On 27 August 2016 PW4 retrieved her hand phone and the Respondent and PW4 went to the Bamboo Club at around 12.30 midnight.

[7] PW4 then was given a pill known as Eramin 5 by the Respondent to be consumed. However, PW4 pretended to swallow the pill but did not in fact consume the pill. PW4 then informed the Respondent that she wanted to go home.

[8] During the journey however, the Respondent stopped near a hotel and invited PW4 to go in for a while but she refused. The Respondent then proceeded to threaten and to force PW4 to go inside but she refused and stopped a passing car for assistance.

[9] The Respondent however spoke to the occupants of the car and told them that it was in fact a family misunderstanding which he was having with PW4. He then identified himself as a police man and requested a lift from them to send him and PW4 to the nearby police station where the Respondent was based.

[10] The Respondent then pulled at PW4 which caused her clothing to tear While this was happening a radio car passed by and PW4 sought help from two police officers in the car namely, PW5 and PW6, whom PW4 requested to take her back. The said car however left soon after without PW4.

[11] The Respondent then forced PW4 into the TA Hotel where he raped her

PW4 was then sent back to her car and went home. The next day, PW4 related what had happened to her to her sister, PW7. A police report (P5) was lodged thereafter.

[12] The Respondent was arrested and subsequently charged under s 376(1) of the Penal Code.

C) Principles Regarding Appellate Interference

[13] The duty upon a court hearing an appeal from a subordinate court is set out in s 316 of the Criminal Procedure Code ("CPC") and reads:

> 316. Decision on appeal
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> At the hearing of the appeal the judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may:
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> (a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried, as the case may be, or find him guilty and pass sentence on him according to law;
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> (b) in an appeal from a conviction or in an appeal as to sentence:
>
> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or
>
> (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;
>
> (c) in an appeal from any other order, alter or reverse such order.

[14] In the case of *Periasamy a/l Sinnappan & Anor v. PP* [1996] 1 MLRA 277; [1996] 2 MLJ 557; [1996] 3 CLJ 187; [1996] 2 AMR 2511, Gopal Sri Ram JCA, (as his Lordship then was) had this to say:

> In the state of the law, what was the duty and function of the learned judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.
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> In *Lim Kheak Teong v. PP* [1984] 1 MLRA 126; [1985] 1 MLJ 38; [1984] 2 CLJ 219, the Sessions Court acquitted the accused on two charges under the Prevention of Corruption Act 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefor an order of conviction. The accused applied under the now repealed s 66 of the Courts of Judicature Act

1964 to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court, whose judgment was delivered by Hashim Yeop Sani FJ (later CJ (Malaya)) said (at pp 39-40):

> "... we gave leave because firstly we felt that there was no proper appraisal of *Sheo Swarup v. King-Emperor* AIR [1934] PC 227 and secondly purporting to follow Terrell Ag CJ in R *v. Low Toh Cheng* [1940] 1 MLRA 535; [1941] 1 MLJ 1, the appellate judge went into conflict with the trend of authorities in similar jurisdictions."

With respect, what Lord Russell of Killowen said in Sheo Swarup was that **although no limitations should be placed on the power of the appellate court, in exercising the power conferred "the High Court should and will always give proper weight and consideration to such matters" as:**

> **(1) the views of the trial judge on the credibility of the witnesses;**
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> **(2) the presumption of innocence in favour of the accused;**
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> **(3) the right of the accused to the benefit of any doubt; and**
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> **(4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.**

Lord Reid reiterated this same principle in *Benmax v. Austin Motor Co Ltd* [1955] AC 370 at 375 where he quoted from Lord Thankerton's judgment in *Watt (or Thomas) v. Thomas* [1947] 1 All ER 582 that:

> **"Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion."**

The learned appellate judge held that the learned President had "misdirected himself on the explanation of the accused". Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was "plainly unsound"? (*Watt (or Thomas) v. Thomas*). On the facts of this case we do not think so.

[Emphasis Added]

[15] The principles that operate to justify a court hearing an appeal interfering with the decision of the trial court has also been set out in the case of *P'ng Hun Sun v. Dato' Yip Yee Foo* [2013] 5 MLRA 661; [2013] 6 MLJ 523; [2013] 2 AMCR 350, where the Court of Appeal held:

> When the finding of the trial judge is factual, however the fact finders decision cannot be disturbed on appeal unless the decision of the fact finder is plainly wrong (see *China Airlines Ltd v. Maltran Air Corp Sdn Bhd (and Another Appeal)* [1996] 1 MLRA 260; [1996] 2 MLJ 517; [1996] 3 CLJ 163; [1996] 1 AMR 2233; *Zahara bt A Kadir v. China Airline Ltd v. Maltran Air Corp Sdn Bhd & Anor Appeal* [1996] 1 MLRA 260; [1996] 2 MLJ 517; [1996] 3 CLJ 163; [1996] 1 AMR 2233; *Zaharah bt A Kadir v. Ramuna Bauxite Pte Ltd & Anor* [2011] 2 MLRA 507; [2012] 1 MLJ 192; [2012] 1 AMR 209; *Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2013] 3 MLRA 179; [2013] 2 MLJ 650; [2013] 3 CLJ 813; [2013] 4 AMR 55.
>
> The findings of fact of the trial judge can only be reversed when it is positively demonstrated to the appellate court that:
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> a) By reason of some non-direction or misdirection or otherwise the judge erred in accepting the evidence which he or she did accept; or
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> b) In assessing and evaluating the evidence the judge has taken into account some matter which he or she ought not to have taken into account; or
>
> c) It unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he or she cannot have taken proper advantage of his or her having seen and heard the witnesses; or
>
> d) In so far aside the Judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witness which he or she accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answe.
>
> [Emphasis Added]

D) Analysis And Findings

[16] The main thrust of the Appellant's appeal is that the SCJ had failed to take into account the testimony of the complainant ("PW4"). It was also argued that the SCJ had erred in placing undue emphasis on the contradictions by the complainant in comparison to the elements of the offence.

[17] It was also contended that the evidence disclosed absence of consent on the part of the victim and the SCJ had erred in not considering this fact.

[18] It was also contended that the fact that the medical evidence disclosed there were old tears to the hymen of the victim was not relevant because the complainant was a single mother.

[19] In examining the matters raised by the Appellant, it is necessary to consider the ingredients of the offence with which the Appellant was charged for in the context of this particular case which are as follows:

> i) Sexual intercourse occurred between the accused and the victim and that the act was not consented to by the victim; and
>
> ii) Penetration
>
> See *Ratanlal & Dhirajlal's Law of Crimes*, 27th edn, Vol 2 at p 2296.

[20] An examination of the grounds of judgement by the SCJ ("grounds") will reveal that she had arrived at her decision that the prosecution had failed to make out a *prima facie* case against the Respondent based upon two main grounds, namely the credibility of the complainant, PW4 and the testimony of PW1.

Suspect Credibility Of PW4

[21] A perusal of the grounds will reveal that the credibility of PW4 left a lot to be desired. Several issues regarding the credibility of PW4 were raised by learned counsel for the Respondent.

[22] Among the instances mentioned by the SCJ in the grounds was that PW4 initially denied her occupation only to later agree to the suggestion. PW4 in her testimony said that she had never worked as a Guest Relations Officer ("GRO"). Later however, after repeated questioning, PW4 admitted that she had worked as a GRO at Happy City.

[23] PW4 denied consuming alcohol on the day of the alleged rape and also denied being drunk on the date of the rape although there were witnesses who clearly stated otherwise namely, PW5 and PW6.

[24] In particular PW6 testified that he smelt alcohol emanating from PW4. This occurred when PW6 was engaged in a conversation with PW4.

[25] During cross-examination PW4 had testified that she was unsure if she was raped by the Respondent whereas she testified in re-examination that she was indeed raped by the Respondent.

[26] PW4 testified that the Respondent had tried to orally administer to her the pill Eramin 5 but that she had managed to throw it away in the toilet. This

however contradicted her police report (P5) when she stated that she suspected that her drink was spiked.

[27] PW4 also testified that there was nobody manning the guard post. This was contrary to what PW5 and PW6 stated when they saw two persons at the guard post. If this were true, then PW4 could have summoned for help.

[28] PW4 had stated on numerous occasions that that after the Respondent had forced her into the hotel and raped her, her clothes were torn whereas PW5 and PW6 made no mention of this except to say that PW4 had worn sexy clothing.

Evidence Of PW1

[29] PW1 was the medical examiner who examined PW4 on 29 August 2016. According to PW4 the rape was alleged to have occurred on 28 August 2016.

[30] The examination by PW1 of PW4 revealed the presence of old hymen tears at the 1, 3, 5, 8, 11 o'clock positions. This of course was not unusual bearing in mind that PW4 was a single mother PW1 said that there were no other bruises or other lacerations.

[31] More pertinently however, PW1 said that there was no sexual activity that occurred within 72 hours prior to the examination. PW1 reaffirmed this in re-examination. PW1 explained that any form of sexual activity or anything that caused insertion into the vagina will result in some tissue injuries, laceration and even bleeding but said that this patient did not exhibit any signs of these.

[32] Based upon the above, the SCJ was justified in entertaining doubts as to whether the fact of penile penetration was proved. The SCJ also stated that even if there was penetration, there was a doubt whether the act was in fact consensual. In doing so, it was clear that the SCJ entertained grave doubts as to where the truth of the matter lay.

[33] Now, it is important to note that both the issue regarding whether there was penetration and if so, whether the same was consensual or otherwise, are matters that go to the very ingredients of the charge itself.

[34] This means that if the fact of penile penetration and the absence of consent are not proven on a maximum evaluation basis, a *prima facie* case is not made out by the prosecution.

[35] The observations made by the SCJ were essentially findings of facts having had the audio visual advantage of the witnesses and therefore they are not to be lightly disturbed save for good reason. I do not, after perusing the evidence and the grounds, find that there existed any or any sufficient cause for interfering with such findings of fact.

[36] Besides there being no corroboration here in the form of medical evidence, there was also no forensic evidence to connect the Respondent to the

alleged act.

[37] The evidence of PW7, the sister of PW4, also did not inspire any confidence and did not assist the cause of the Appellant.

Conclusion

[38] The SCJ had applied the correct test when she asked the question of whether in the event the court were to call upon the Respondent to enter his defence and if he elected to remain silent, the court would convict him as per the charge.

[39] The SCJ had correctly based upon the evidence answered the question in the negative. See *Looi Kow Chai & Anor v. PP* [2002] 2 MLRA 383; [2003] 2 MLJ 65; [2003] 1 CLJ 734; [2003] 2 AMR 89, *Balachandran v. PP* [2004] 2 MLRA 547; [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2005] 1 AMR 321 and *PP v. Mohd Radzi bin Abu Bakar* [2005] 2 MLRA 590; [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203. Suspicion was no substitute for proof.

[40] Under all the circumstances, the SCJ had not erred in deciding that the Appellant had failed to make out a *prima facie* case against the Respondent and in acquitting and discharging him without calling for him to make his defence.

[41] Based upon the case law and principles regarding the hearing of appeals referred to earlier, this was not a case which merited appellate interference.

[42] The appeal was therefore dismissed.