Public Prosecutor v Kamsari bin Jumari
[2000] SGHC 105

Case Number : CC 34/2000

Decision Date : 05 June 2000

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Elaine Tan [Attorney-General's Chambers] for the prosecution; Accused in person

Parties : Public Prosecutor — Kamsari bin Jumari

JUDGMENT:

GROUNDS OF DECISION

1. The accused is 38 years old. He was tried before me on two charges of raping his daughter (on 12 and 13 November 1998 respectively), and one charge of molesting her on 11 November 1998. His daughter was 15 years old at the material time. The accused was divorced from his wife (the daughter's mother) in 1990 or 1992 (the evidence was not clear on this point) and the three children of the marriage including the daughter and her two younger siblings then aged (8) and (6) respectively lived with the accused and his sister and parents. From 1994 to 1998 the accused was in remand in a drug centre and the children were looked after by their paternal grandmother.

2. The prosecution adduced evidence from the daughter by way of her conditioned statement. The accused had no objection to this. Her evidence was that about 7pm on 11 November 1998 the accused brought the daughter to a void deck of a Housing and Development Board ("HDB") flat and there they sat smoking cigarettes for a while. The accused then asked the daughter to move closer to him. She did. Then he pulled her to his lap and pulled her pants and panties down to her thigh. She told him not to do so, and even shouted at him. She also pushed him with one hand while holding on to her cigarette with the other. The accused then inserted a finger into his daughter's vagina and tickled her there. She told him "that it was enough" and he then stopped. On the way home he asked her to smell his finger but she pushed it away remarking that "it was disgusting".

3. The next morning, while the accused's sister and father were at work and his mother went out, the accused hugged his daughter from behind and then called her to the bedroom saying that he wished to talk to her. At that time her younger siblings were playing computer games in the living room. She went into the bedroom with the accused and sat on the bed next to him. He told her that he was not satisfied after the previous night. He "pushed [her] on the bed with her legs dangling down". The daughter deposed that she thought that he was "going to do the same thing as what he did to me last night. So I just lay there and smoked". The accused pulled down her pants and panties and inserted his penis into her.

4. On the afternoon of 13 November 1998 when all the other adults were out of the flat the accused and his daughter played computer games together. After losing a "bowling game" to his daughter on the computer the accused sat behind her while she continued playing. She deposed that she could feel his penis rubbing behind her back but she did not do anything because she thought that he was masturbating behind her and she did not care. Shortly after that he pulled her down in a supine position and had sex with her. She said that she tried to push him away because she did not want to do it with him. He asked her to perform fellatio but she refused. After some initial difficulty due to the flaccidity of his member he managed to complete the sexual act. He told her that he had ejaculated in

her and went to the toilet to wash himself. When he returned he told her "tak best" and she understood that to mean "having sex with me was not satisfying".

5. The prosecution sought to admit five statements of the accused including three cautioned statements under s.122(6) of the Criminal Procedure Code. These statements were recorded in the afternoon of 19 January 2000, 25 and 26 January 2000. The accused challenged these statements on the ground that the statements were not made voluntarily. He said that on the morning of 19 January 2000 he was brought into a small interview room by the investigating officer S/Sgt Chan. He was stripped naked and forced to stay in a "half-squat" position. He was kept like that for about 45 minutes. He stole some moment's rest when S/St Chan left the room. An Indian officer whom he identified as one of the two officers who arrested him on 18 January 2000 (later ascertained to be S/Sgt Lawrence) entered the interview room and told him to admit to the charges. S/Sgt Chan also told the accused that unless he admits to the charges he will continue to treat him in the same manner. When the accused finally agreed to admit to the charges the investigating officer treated him "normally", he had no problems after that. This account was denied by the two officers.

6. The accused testified that after he was stripped S/Sgt Chan took a photograph of his penis. He had earlier shown S/Sgt Chan a small stone which he had inserted under the skin of his penis. Under cross-examination S/Sgt Lawrence admitted that there was a Polaroid camera in the office adjoining the interview room. However, he denied that it was used to take the photograph of the accused.

7. Three different interpreters were used in the recording of the five statements. They were called to testify that no treat, inducement or promise was made to the accused. However, one of the three, namely, Miss Sapiathun Mohd Ali agreed with the accused that during a moment's break when S/Sgt Chan (who was recording the statement) left the interview room, the accused told her that he had given his statement under duress. She asked him for details so that she record them. The accused did not elaborate. The accused explained that he did not do so because at that point S/Sgt Chan returned to the room and so he was afraid to talk to Miss Sapiathun further.

8. Weighing all the evidence of the witnesses in the trial-within-a-trial I am of the view that the accused had raised a reasonable doubt that the statements were not voluntary statements. I need not, and do not make a finding that his allegation was true. Although the learned DPP Miss Tan submitted that the alleged duress or oppression occurred on 19 January and should not have operated on his mind on 25 or 26 January, I am of the view that it would be too close a call to make. Every allegation of threat, inducement or promise must be considered in the context of the individual case. Sometimes an identical threat may operate differently on different accused persons, and even on the same accused in different circumstances. Similarly, the length of time an act of oppression or duress may linger to intimidate an accused person depends on the facts of each case. Counsel referred me to the alleged acts of oppression in Chai Chien Wei Kelvin v PP [1999] 1 SLR 25. I was the trial judge in that case and had admitted a statement even though the accused alleged that he was knocked on the head by a senior police officer and asked to tell the truth. Miss Tan draws my attention to a comment by the Court of Appeal in that case that asking an accused person to tell the truth does not amount to a threat or inducement. She submits that asking an accused to admit the charge is the same as asking him to tell the truth. I am unable to accept this submission. I think that there is a material and critical difference between the two. The statements of the accused Kamsari were, therefore, not admitted in evidence.

9. The evidence against the accused in this case comes mainly from the complainant. There is no rule in law that that would not be sufficient evidence to support a conviction. However, to justify convicting a man of a serious offence such as rape the evidence of the complainant must be convincing and leave the court with no reasonable doubt that it is true.

10. The charge against the accused was made by his daughter, then 15 years old. She was more worldly wise than her age suggests. By her own admission she had a boyfriend then, played truant, smoked and engaged in pre-marital sex. Her parents divorced in 1992 and she was under the care of her paternal grandmother. The accused was in a drug centre from 1994 to 1998.

11. It cannot be assumed that a girl with such a background cannot be raped; but it forms part of the context in which the court must determine whether her evidence is adequate.

12. The complainant made three serious allegations against him for molest and rape, occurring in three successive days from 11 to 13 November 1998.

13. She maintained that she did not consent to any of the three acts against her. However, in two of the three incidents, she was, by her own admission, enjoying a cigarette smoke whilst the offence was being committed.

14. Quite apart from the casual attitude that her evidence clearly imparted, it leads one to seriously question why she did not use her lighted cigarette on her assailant. It is obvious to me that this complainant was not a timid person; but even if she was, some explanation ought to have been elicited from her as to why she did not do so. The court ought not enter the arena and complete the lacuna, especially when the accused person was unrepresented.

15. The third offence was allegedly committed on 13 November 1998, thereafter the complainant ran away from home (which was, on the prosecution's own evidence, not the first time she did so). She said she told her boyfriend, her friend Aishah and her mother that evening. Nonetheless, no police report was made until 23 November. It is not known what accounted for the delay and therefore its significance, if any, is lost at trial. I would expect some explanation to account for the delay but none of the witnesses offered any.

16. What is more important, is that when the complainant eventually lodged her report, she only alleged that she was raped on 12 November 1998. There was no report of the offences of 11 and 13 November. No explanation was given for this inconsistency.

17. On the prosecution's evidence alone, I think that there is a serious doubt as to the guilt of the accused. The prosecution was unable to create any material dent in the testimony of the accused who denied that he had performed any of the acts complained of.

18. I am not finding as a fact that the complainant clearly lied or that the accused was clearly telling the truth; the law does not require me to go that far. It is sufficient where, as in this case, I find the accused to be a more reliable witness than the complainant, which is already more than what he needed to succeed in his defence. With respect, I do not find him evasive as the learned DPP submitted I should. I accept his evidence that his daughter had seen the lump on his penis sometime before the incidents. I think that it is reasonably possible.

19. Why a daughter would accuse her father of rape is an important and pertinent question; but we must not forget that it is only a question. It is not evidence and, without evidence that question becomes a dangerous statement: that when a child accuses her father of rape it must be true. The difference between the theory of law and the practice of law is that the former is concerned with the question "would a man in these circumstances have committed the offence?"; the latter goes further and enquire, "did this man in these circumstances commit the offence?". The last question must be answered by a broad but critical review of all the evidence; at the end of which the court must be satisfied that it is safe or unsafe to convict as the case may be. Evidence comprises not only the

story but the way it is told.

20. In this case, I am of the view that I cannot safely convict on the evidence before me. Accordingly, the accused was acquitted and discharged on all three charges.

CHOO HAN TECK

JUDICIAL COMMISSIONER