

Rizal bin Abdul Razak v Public Prosecutor
[2000] SGHC 148

Case Number : MA 52/2000
Decision Date : 24 July 2000
Tribunal/Court : High Court
Coram : Yong Pung How CJ
Counsel Name(s) : Selva K Naidu (Naidu Mohan & Theseira) for the appellant; Jennifer Marie and Tai Wei Shyong (Deputy Public Prosecutors) for the respondent
Parties : Rizal bin Abdul Razak — Public Prosecutor

JUDGMENT:

Grounds of Judgment

This was an appeal against the decision of district judge Kathryn Low Lye Fong on 17 February 2000. The learned judge found the appellant guilty of three charges of rape and one charge of abetment of rape. The charges were as follows:

DAC 45555/99

That you,

On or about the 14th day of July 1999 between 4.30 am and 5.30 am, at Blk 526 Bukit Batok St #02-90, Singapore, did commit rape on one Marzalina Bte Mohammad Ali (D.O.B. 25.7.1983), a female Malay aged 15 years old and you have thereby committed an offence punishable under Section 376(1) of the Penal Code, Chapter 224.

DAC 45556/99

That you,

On a second occasion, on or about the 14th day of July 1999 between 4.30 am and 5.30 am at Blk 526 Bukit Batok St 52 #02-90, Singapore, did commit rape on one Marzalina Bte Mohammad Ali (D.O.B. 25.7.1983), a female Malay aged 15 years old and you have thereby committed an offence punishable under Section 376(1) of the Penal Code, Chapter 224.

DAC 45557/99

That you,

On a third occasion, on or about the 14th day of July 1999 between 4.30 am and 5.30 am at Blk 526 Bukit Batok St 52 #02-90, Singapore, did commit rape on one Marzalina Bte Mohammad Ali (D.O.B. 25.7.1983), a female Malay aged 15 years old and you have thereby committed an offence punishable under Section 376(1)

of the Penal Code, Chapter 224.

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DAC 45558/99

That you,

On or about the 14th day of July 1999 between 4.30 am and 5.30 am at Blk 526 Bukit Batok St 52 #02-90, Singapore, did abet one Muhammad Zainudin B Sanwan, M/20 by instigating the said Muhammad Zainudin B Sanwan to commit rape on one Marzalina Bte Mohammad Ali (D.O.B. 25.7.1983), a female Malay aged 15 years old and you have thereby committed an offence punishable under Section 376(1) of the Penal Code, Chapter 224.

2 Initially, the appellant was to be jointly tried with Muhammad Zainudin Bin Sanwan, PW8 ('Dino'). Dino faced one charge of rape against the same victim, Marzalina Bte Mohammad Ali, PW3 ('Nana') and one charge of abetting the appellant to commit rape on Nana. With the consent of the appellant and Dino, the joint trial was held in the district court. On the first day of the trial, Dino pleaded guilty to the charge of rape and consented that the charge of abetting the appellant to commit rape be taken into consideration for sentencing purposes. Dino was sentenced to five years' imprisonment and six strokes of the cane.

The prosecution's case

3 The case for the prosecution was largely based on the evidence proffered by Nana and her friend, Nazariah Bte Nazlan, PW4 ('Yana').

4 According to Nana, she accompanied Yana to Bukit Batok on 13 July 1999 at about 6.00 pm. Yana wanted to collect some belongings from her ex-boyfriend Mohammad Hairil Bin Rosle, DW2 ('Hairil'). They reached Bukit Batok at about 8.00 pm and met Hairil at a sepak takraw court. At that time, Hairil was playing sepak takraw with some boys who were also Yana's friends. Among the boys was the appellant, whose nickname was 'Boy'. Nana, Yana and Adek (the appellant's girlfriend) watched the game and chit-chatted while the boys played sepak takraw.

5 After the game ended at about 10.00 pm, the appellant escorted his girlfriend to the bus-stop and went home to change his clothes. In the meantime, Nana, Yana, Hairil and his friends remained at the sepak takraw court and chit-chatted. At about 11.40 pm, they went to Hairil's two-storey flat at Blk 526 Bukit Batok St 52 #02-90 and watched television. The appellant joined them at Hairil's flat. Subsequently, the appellant, Yana and a few others went to a 7-Eleven store to buy coke, stout, Jack Daniel's whisky and some snacks. Thereafter, they proceeded to 'little Guilin' lake, which is in the vicinity of Hairil's flat, and had some drinks there. In the meantime, Nana, Dino, Hairil and another boy by the name of Romi remained at the flat.

6 At about 3.00 am, the appellant and Yana went to Hairil's flat and invited Nana and Dino to join them at the lake for drinks. The four of them then went to the lake. At the lake, Nana consumed about one-eighth to a quarter of the bottle of Jack Daniel's whisky and became drunk. She recalled that she was also offered Guinness stout and coke but threw up after consuming them. Further, she attempted to jump into the lake in her drunken state. She passed out at one point and found herself lying with her head on Dino's lap when she came to. She then went to a cave with Dino and vomited there. After that, she asked Dino to bring her back to Hairil's flat. Dino then asked the appellant to help him bring Nana back to the flat. By this time, Yana had already returned to the flat on her own.

7 Nana claimed that, although she was drunk, she was not totally unconscious. She recalled that Dino and the appellant brought her to Hairil's flat. She recognised them by their voices. She also recalled that she was carried by either Dino or the appellant at

some point along the way to Hairil's flat. According to Dino, it was almost 5.00 am when he and the appellant reached Hairil's flat with Nana. Nana stated that she was placed on the sofa in the living room on the lower floor of the flat. She recalled that she was lying with her head on the left side of the sofa. From this position, she could see the staircase to the upper floor of the flat. She could also tell that all the lights on the lower floor of the flat were switched off. When she was about to doze off, she felt her shorts being pulled down and then felt an object, which she later realised was a penis, moving in and out of her vagina. Nana claimed that she saw the appellant's face about 2 feet in front of her as she opened her eyes. She felt pain in her private part and realised that she was being raped by the appellant. She wanted to put up a struggle but was too exhausted and drunk to do so.

8 The appellant's thrusting action lasted about two or three minutes. After that, Nana heard the appellant ask Dino to help him carry her from the sofa to the floor. Dino then carried her by her shoulders while the appellant carried her legs. When she was on the floor, Nana felt the hard object moving in and out of her vagina again. She opened her eyes and saw the appellant's face before her again. Then, Nana heard the appellant ask Dino, "Din, do you want to do it or not?". Dino replied, "Alright". At this point, the appellant was still having sexual intercourse with Nana. The appellant then rose and went into the kitchen. Nana did not see his face but could see the structure of his body. Dino then started to have sexual intercourse with Nana for about two or three minutes. Nana thought that everything was over when Dino stopped. However, she then felt something hard moving in and out of her vagina again. She turned her head and saw the appellant's face in front of her. The thrusting lasted for two or three minutes. After that, the appellant pulled up Nana's panties and told Dino to carry her upstairs to Hairil's room. Nana slept on the floor in Hairil's room until the next day.

9 Nana woke up the next morning and found Dino sleeping next to her. She told Yana in private that Dino and the appellant had had sexual intercourse with her and that she felt pain in her private part. Yana suggested that they talk about it later and told Nana to behave as though nothing had happened. They both went back to sleep.

10 When Yana and Nana woke up in the afternoon, Romi, Hairil, Dino and the appellant were in the room. Nana felt frightened and kept quiet as Dino and the appellant were Yana's friends. She left Hairil's flat with Yana at about 6.00 pm. On the way home, Nana told Yana more about the incident. Yana then advised her to lodge a police report. However, Nana was afraid to do so as she had consumed liquor when she was underage. At home, Yana called Dino and the appellant on the phone and confronted them about the incident. They both denied that they had had sexual intercourse with Nana.

11 Nana told her mother, Mariamah Bte May, PW7 about the incident one week later. Despite her mother's advice, Nana refused to lodge a police report. On 1 August 1999, she lodged a police report at 4.00 am at the Marine Parade police post. Subsequently, she was sent for a medical examination. Dr Lisa Wong, PW6, conducted the examination and concluded on 10 August 1999 that there were hymenal tears at the 4 o'clock and 9 o'clock positions.

12 Apart from Nana and Yana's account of the facts, the prosecution relied on the following evidence:

(a) Dino, PW8, testified that he witnessed the appellant having sexual intercourse with Nana on three occasions on the morning of 14 July 1999. He also stated that the appellant had asked him, while he was having sexual intercourse with Nana on the floor of Hairil's flat, if he wanted to 'do it'.

(b) Nana's mother, PW7, testified as to what Nana had told her approximately one week after the incident.

(c) The photographs, P7 to P17, showed the vicinity where the flat was located, the layout of the corridor and rooms in the flat, the 7-Eleven store and the 'little Guilin' lake. In addition, there were sketch plans (P18, P18A and P19) of the lower and upper floors of Hairil's flat.

(d) Dr Leow Kee Fong, PW5's medical report at P21 stated that there was no indication of impotence in the appellant.

(e) The Investigating Officer, Inspector Soh Kien Peng, PW9 stated that the lighting at the scene of the crime (the living room of the flat) was sufficient. He came to this conclusion after investigating the flat on 7 August 1999 and surveying the visibility conditions of the living room at 2.00 am. Initially, PW9 noted that there was a 24 hour coffee shop (Aliff Restaurant) opposite the flat, a mirror in the living room that reflected light from outside the flat and lighting from the corridor outside the flat. However, PW9 subsequently corrected his earlier position and stated that the coffee shop opposite the flat was no longer operating on a 24-hour basis. PW9 also revealed later that the purpose of the visit to Hairil's flat on 7 August 1999 was to ambush and arrest Dino, whom he figured might look for Hairil at the flat. PW9 had gone up to the flat with his colleague, Inspector Abdul Halim at about 1.00 am, and had only entered the living room 'for a second' to see if Dino was there. PW9 had also walked to the balcony to have a quick look. Accordingly, PW9 had only made a brief and casual observation of the conditions of the flat at that time.

The defence

13 The crux of the appellant's defence was that he was not at Hairil's flat at the time Nana was said to have been raped. He claimed that he was wrongly identified by Nana.

14 The appellant claimed that he helped Dino bring Nana back to Hairil's flat from the lake at about 4.50 am to 5.00 am. At first, the appellant and Dino supported Nana by placing her hands over their shoulders. When Nana became more unsteady, the appellant carried her in his arms. He later asked Dino to support her as she was getting too heavy. They reached the flat about half an hour later. At the door, he held Nana while Dino opened the door. He then passed Nana to Dino and told the latter that he wanted to go home. Accordingly, the appellant left Hairil's flat at about 5.15 am to 5.30 am and reached home between 5.30 am to 5.45 am. When he reached home, his mother asked where he and his brother had been. The appellant replied that he had been downstairs. He then went to his room and slept.

The decision below

15 The judge was persuaded that the case against the appellant had been proven beyond a reasonable doubt. Accordingly, she convicted him on all four charges.

16 The judge considered the following issues before arriving at her conclusion:

(a) whether Nana correctly identified the appellant as the person who raped her on three occasions and who asked Dino if he wanted to 'do it' on the morning of 14 July 1999; and

(b) whether Dino's evidence that he saw the appellant raping Nana on three occasions on 14 July 1999 and that he was asked by the appellant to 'do it' could be relied upon.

17 The judge held the appellant had been correctly identified by Nana. Although Nana was drunk, she was not completely unaware of what was happening around her. She was able to tell that she was assisted by Dino and the appellant on the way back to Hairil's flat. She could also explain how the appellant was positioned when he was having sexual intercourse with her. She said that the appellant's upper body was at an angle facing her and that he supported himself with his two arms which were placed by her side. Nana could also hear the words exchanged between the accused and Dino prior to Dino having sexual intercourse with her. In addition, she saw the appellant's back as he went to the kitchen after having sexual intercourse with her.

18 Further, the judge found that Nana's identification of the appellant was corroborated by Dino. In court, Dino had said that he saw the appellant having sexual intercourse with Nana on three occasions on the morning of 14 July 1999. As Dino was a co-accused until halfway through the first day of the trial, the judge felt that there was no question of collaboration between Nana and Dino. Dino was also no longer in court when Nana gave her identification evidence. The fact that Dino pleaded guilty to the charge of rape against him and consented to the charge of abetting the appellant to commit rape being taken into consideration further buttressed the prosecution's contention that Nana had correctly identified Dino as one of the two persons who had non-consensual sexual intercourse with her on 14 July 1999.

19 The judge did not think that the poor lighting in Hairil's flat rendered Nana's identification of the appellant unreliable. Hairil stated that his living room would not be in complete darkness even if the lights were switched off. Although Inspector Soh, PW9, misrepresented the nature of his visit to Hairil's flat, the judge did not doubt that he did in fact go up to the flat to see if Dino was there at about 2.00 am on 7 August 1999. Inspector Soh had found that the flat was not in total darkness. He claimed that one could recognise a person who was standing on one side of the living room from the other side if one knew the person. In this case, Nana should not have had difficulty identifying the appellant as the person who raped her as his face could not have been more than 2 to 3 feet from hers. The judge also noted that the appellant and Dino were not complete strangers to Nana. She had met them earlier in the evening and even knew them by their nicknames.

20 The judge also took into account Yana's recollection of what Nana had told her on the MRT ride home after they left Hairil's flat. Yana's account of the rape incident was substantially the same as that given by Nana and Dino in court. In essence, she said that Nana told her that the appellant and Dino had had sexual intercourse with her. Despite the substantial consistency of Yana's evidence, the judge felt that Yana's evidence was not corroboration by independent evidence although it fell within s 159 of the Evidence Act (Cap 97) which provides:

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-In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Applying *Tang Kin Seng v Public Prosecutor* [1997] 1 SLR 46, the judge was of the view that Yana's statement was only valuable as evidence of consistency.

Reliability of Dino's evidence

21 Counsel for the defence argued that Dino's evidence was unreliable for two reasons. First, Dino was an accomplice. Thus, his evidence should be treated with caution in accordance with illustration (b) of s116 of the Evidence Act. Secondly, Dino's evidence was inconsistent. In court, Dino stated that he saw the appellant having sexual intercourse with Nana on three occasions on the morning of 14 July 1999. However, he stated in his statement to the police on 7 August 1999 that he did not know if the appellant had had sexual intercourse with Nana. Due to this inconsistency, counsel for the defence applied to impeach Dino's credit during the trial.

22 The judge held that the fact that Dino was an accomplice did not render his evidence unreliable. As stated in *Chai Chien Wei Kelvin v Public Prosecutor* [1999] 1 SLR 25, the presumption under illustration (b) to s 116 of the Evidence Act was not

mandatory but permissive. If the court, after examining the circumstances of the case, did not see an attempt by the accomplice to minimise his own involvement or exaggerate that of the accused there was no reason to regard his evidence as being unreliable. In this case, there was no reason for Dino to falsely implicate the appellant. Dino had pleaded guilty and had been convicted and sentenced. Far from implicating the appellant, Dino had tried to exclude references to the appellant in his statement of facts in the charge against him. In spite of that, Dino could not avoid making reference to the fact that the appellant had had sexual intercourse with Nana in the statement of facts. He also had no choice but to give evidence when required by the prosecution to do so. Accordingly, the judge did not think that Dino had reason to falsely implicate the appellant.

23 The judge was also of the view that Dino's credit had not been impeached. Dino felt that he would benefit by saying that he did not see the appellant having sexual intercourse with Nana in his statement to the police. He was under the impression that, by admitting to the crime alone, the crime would be viewed as being less severe and he would only be charged under the Women's Charter (Cap 353). It appeared that Dino was 'advised' by a fellow remandee at the Queenstown Remand Prison and was unrepresented by counsel throughout. Although there were other minor inconsistencies between Dino's evidence in court and his statement to the police, the judge found that his credit had not been impeached.

24 After considering the evidence before the court, the judge was of the view that the elements of the three charges of rape against the appellant had been proven beyond a reasonable doubt. As regards the offence of abetment by instigating Dino to commit rape, the judge was persuaded that the appellant 'actively suggested' that Dino commit the offence of rape on Nana by asking Dino if he wanted to 'do it' (see *Jimina Jacee d/o Athanasius*, MA 120 of 1999). Thus the offence of abetment of rape had also been made out. Accordingly, the judge convicted the appellant on all four charges.

Sentences

25 The appellant was sentenced to seven years' imprisonment and six strokes of the cane in respect of each of the four charges. As two of the sentences were made to run consecutively, the appellant was sentenced to a total of 14 years' imprisonment and 24 strokes of the cane.

The appeal

26 The two primary issues that were raised on appeal were as follows:

- (a) Whether the appellant was correctly identified by Nana; and
- (b) If yes, whether Dino's evidence was sufficient corroboration of Nana's identification.

I shall address these issues in turn.

Whether the appellant was correctly identified by Nana

27 In my opinion, the judge was correct in her finding that the appellant was properly identified.

28 It was clear from her grounds of decision that the judge took into account the fact that Nana was drunk when she saw the appellant. The judge also noted that Nana retained some measure of alertness despite her drunken state. This was demonstrated by Nana's ability to recollect that it was Dino and the appellant who brought her back to Hairil's flat.

29 The judge further acknowledged the fact that the lighting in the living room was poor when the rape took place. Despite this, the judge concluded that this did not render Nana's identification of the appellant unreliable. The judge considered the fact that the appellant's face was not more than a few inches from Nana's face and that the appellant was not a stranger to Nana. Hairil's testimony that one could tell identify a person at close range in the dark living room was also considered. Further, the judge considered the Investigation Officer's evidence that the living room was not in total darkness during the wee hours of the morning.

30 It was against this factual matrix that the judge concluded that Nana's identification of the appellant was not open to challenge. The judge arrived at this conclusion after a thorough analysis of the relevant facts. I agreed with her finding and saw no reason for appellate intervention in this regard.

Whether Dino's evidence was sufficient corroboration of Nana's identification

31 The judge found that Dino's testimony in court amounted to an independent corroboration of Nana's account of the rape incident.

32 Although defence counsel had applied to impeach Dino's credit on the basis of inconsistencies between his statement to the police and his statement in court, the judge found *as a fact* that Dino's credit was not impeached. In court, Dino stated that he saw the appellant having sexual intercourse with Nana three times on the morning of 14 July 1999. In his statement to the police, Dino claimed that he saw no such thing. Dino later admitted that he had lied in his statement or was mistaken. He explained that he believed that the crime would be considered less serious if it was thought that he alone committed the rape. The judge noted that Dino had been advised by a remandee at Queenstown Remand and was otherwise unrepresented by counsel throughout the trial. Even though the inconsistencies were material, the judge accepted Dino's explanation in this respect.

33 In any event, the judge did not think that Dino's evidence was unreliable simply because he was an accomplice. Dino had already been convicted on the basis of his guilty plea. Further, the evidence did not suggest that Dino had any other reason to falsely implicate the appellant.

34 I agreed with the judge's finding that Dino's credit had not been impeached. I further agreed that Dino's testimony amounted to independent corroboration of Nana's testimony as there was no discernible reason to think that there might have been collaboration of any sort between Nana and Dino. Accordingly, there was no reason to disturb the judge's finding of fact that the Dino's credit was not impeached.

Conclusion

35 In view of the above reasons, the appeal against the conviction was dismissed.

Appeal dismissed.

Chief Justice

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