

Public Prosecutor v Chang Ying Leong
[2001] SGHC 110

Case Number : CC 12/2001
Decision Date : 24 May 2001
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Mohamed Nasser Ismail and Jared Pereira for the prosecution; Aqbal Singh (Chan Ng Aqbal) for the accused
Parties : Public Prosecutor — Chang Ying Leong

JUDGMENT:

Grounds of Decision

1. The accused faced two charges of rape that he

1st Charge

sometime on the 19th day of December 1999, at or about 3 am, at Blk 359 Yung An Road #08-87, Singapore, did commit rape on (the complainant), a female then of 18 years of age and (he had) thereby committed an offence punishable under section 376(1) of the Penal Code, Chapter 224

and

2nd Charge

sometime on the 19th day of December 1999, at or about 3 am, on a second occasion, at Blk 359 Yung An Road #08-87, Singapore, did commit rape on (the complainant), a female then of 18 years of age and (he had) thereby committed an offence punishable under section 376(1) of the Penal Code, Chapter 224.

2. The accused and the complainant had known one another for less than three weeks, having met on 1 December 1999 at the Sole Luna pub at Holland Village. The complainant who is known as Annie, was a part-time waitress there. The accused was 23 years old and was a Second Sergeant with the Singapore Armed Forces. He was smitten by her and was courting her assiduously although she was not interested in him. They had one uneventful date on 10 December.

3. On 18 December the accused invited the complainant to a farewell party at the Sole Luna for his friend Frankie. She accepted his invitation and arrived there at about 10.10 pm. The accused and some of his friends were there, but Frankie was at another pub, the Sultan of Swing, at Central Mall. The accused and his friends went to join Frankie at the Sultan of Swing at about 11 pm while the complainant remained at the Sole Luna. She was still there when the accused returned from the Sultan of Swing at about midnight.

4. She had about six bourbon cokes and vodka limes and they had their effect on her. She was resting her head on the bar counter, crying. At around 2 am, the Sole Lunas closing time, the complainants friends and colleagues were leaving the pub. The complainant was assisted by the accused and his friends on her way out of the pub. They got her into a car, but she got out, vomited and declared that she did not want to be taken home. The accuseds friends carried her into another car. They went through her hand bag and found that she stayed at Jalan Bahagia. They also telephoned her home and informed her brother that they were sending her home. However as the complainant maintained that she did not want to go home, they took her to the

accuseds home at Yung An Road on his suggestion.

5. The complainant was asleep on the way there. When they reached the block where the accused stayed, she was carried to the void deck where she rested for a while as she wanted to vomit. After that she was carried to the lift, and when they reached the floor the accused resided, they stopped once more because the complainant wanted to vomit again.

The events in the apartment

The complainants account

6. The complainant described the events in her conditional statement which was admitted in evidence at the trial. She remembered being carried into the apartment and onto a bed and dozing off. She was asleep until the sound of her pager woke her. She checked her pager and noticed that there was a message for her. She borrowed the accuseds mobile phone, accessed her voice mail and went back to sleep. She could not remember anything about the message except that it was recorded at 3.17 am.

7. She was awoken again when she felt the accused touching her private parts. He proceeded to remove her skirt and panties and inserted his penis and moved it in and out of her vagina. When she gave him a push, he got up and put on her skirt and panties. She got up from the bed feeling giddy and nauseated. She went to the toilet to vomit, then returned to the bed and lied down again as she was still very giddy.

8. After a short while the accused removed her skirt and panties and inserted his penis into her vagina again. He tried to kiss her, but she turned her head away. She pushed him off, but he climbed back on her body and penetrated her again. When he eventually stopped, she felt something wet and fluid outside her vagina. He then put on her skirt and panties for her again.

9. She got up, went to the toilet and washed her face. She then returned to the bedroom and told the accused she wanted to go home. She left the apartment and went home.

10. She did not sleep when she returned home because she was frightened by the events. At about 9 am she changed her clothes and went to the market with her aunt. When they returned from the market at about 9.30 am, she washed the clothes and panties she wore previously and took a bath.

11. Later that day she spoke to several persons on the telephone and recounted the events at the accuseds apartment and sought their advice. They were Kristine Chia Meng Moy, Jean Woon Teng Teng and Denise Ho Shu Ying, her former schoolmates, Daniel Sin Fu Wei, a colleague at Sole Luna, and Max Chua Wee Hua, who is referred to as her god-brother. Each of them confirmed that the complainant had told them of her experience. Denise Ho and Max Chua were with the complainant when she made her police report that afternoon.

The accuseds account

12. The accused gave three different accounts of his sexual intercourse with the complainant. They were firstly, his investigation statement of December 1999, secondly, his further statement of 31 May 2000 and thirdly, his statement at the trial tendered under s 371 of the Criminal Procedure Code.

13. In the investigation statement of 31 December 1999 which was admitted in evidence without objection he said

I then lie down on the bed beside Annie with the intention to sleep. I had the

urge to have sex with Annie and I started to kiss Annie on her lips. She responded and kissed me back. I then started to lift up the spaghetti strap shirt that she was wearing and removed the shirt. I then pulled down her skirt. I then unhooked her bra and then I removed her panty. All the while when I was removing her shirt, skirt, bra and panty, she also assisted me by lifting up her arms and buttock. When Annie was naked, I then started to remove my T-shirt, shorts and underwear. I then lie on top of Annie and I spread open Annies leg and I inserted my penis into her vagina. I then thrust my penis in and out of her vagina. She lain on the bed without any movement of her body or limbs but she was groaning. *About 15 minutes later, Annie lifted her hands and pushed me on my shoulders so I got up from Annie.* She did not say anything when she pushed me and her eyes were closed. I then put on her bra, panty, her shirt and then her skirt for Annie. I then put on my underwear and shorts. I then went out of my room to the kitchen to drink some water. I did not close my bedroom door. After I drank, I went back to my bedroom and closed the bedroom door. I went back to the bed to sleep. Just as I laid down on the bed, the alarm clock sounded and it was 6 am. I got up from bed and woke Annie up. Annie opened her eyes and asked me for a cup of warm water. I then went out of my room to get a cup of warm water from the kitchen and then I went back to the bedroom with the water and gave the water to Annie. She sat up on the bed and drank the water. After drinking about half the cup, Annie passed the cup back to me. She then got up from the bed, took her bag which was placed on my study table and asked me to open the main door for her as she wanted to go back home. (Emphasis added)

14. Several questions were put to him by the investigation and recording officer ASP Any Ting -

Q5) Before you started to have sex with Annie, did you at any time ask Annies permission to have sex with her?

A5) Yes when I laid down on the bed beside her and before I started kissing her, I asked her whether I can have sex with her.

Q6) What was Annies response when you asked her for sex?

A6) She was mumbling something but I cannot make out what she said.

Q7) What gave you the impression that she had agreed to have sex with you?

A7) I thought she was mumbling was yes.

Q8) If Annie had agreed to have sex with you, why do you think that she pushed you away?

A8) *She does not want to have sex but I let go when she pushed me.* (Emphasis added)

15. On 31 May 2000 after taking a lie detector test he presented himself to ASP Ting. This statement was also admitted in evidence without objection.

16. I set out the more significant parts of the statement -

Q8) Is there anything you want to tell me now which you had omitted in your previous statements?

A8) I took advantage of Annie.

Q9) When did you take advantage of Annie?

A9) On 18 December 1999.

Q10) Where did you take advantage of Annie?

A10) At my house.

Q12) Why did you say that you had taken advantage of Annie by having sex with her?

A12) It was impulse and without her consents.

Q13) Why do you say that you had sex with Annie without her consent?

A13) Because I acted on impulse.

Q14) Did Annie at anytime agree to have sex with you that night?

A14) No.

Q15) Did you at anytime ask Annie whether you can have sex with her that night?

A15) No.

Q16) Since you did not ask Annie whether you could have sex with her and she did not at anytime agree to have sex with you that night, why did you still engage in sexual intercourse with Annie?

A16) I had the urge to have sex.

Q17) Did Annie respond to you physically or verbally when you had sex with her that night?

A17) She was groaning.

Q18) In your further statement recorded on 31.12.99 in A5, you stated that when you laid down on the bed beside Annie and before you started kissing her, you had asked her whether you can have sex with her. However, just now at A15, you had stated that you did not at anytime asked Annie whether you can have sex with her that night. Can you explain which is the correct version?

A18) *The correct version is that I did not ask her for permission to have sex with her.*

Q19) Since you did not ask Annie for permission to have sex with her, why did you state in your further statement recorded on 31.12.99 that you had asked Annie for her permission to have sex with her?

A19) After going through the Lie-detector test, the examiner spoke to me and asked me to tell the truth. So I told him the truth that I had the urge to have sex with Annie and I did not ask her for permission.

Q24) *That night in your house, do you think that Annie had allowed you to have sex with her that night?*

A24) *Not sure.*

Q25) Since you are not sure, that night, whether Annie allowed you to have sex with her, what made you go ahead to have sex with her?

A25) I just had the urge to have sex with her.

Q26) In A12 just now, you had stated that you had taken advantage of Annie by having sex with Annie on impulse and without her consents. Why did you say that Annie did not consent to the sex?

A26) Because after going through the lie detector test, I decided to tell you the truth.

Q27) So what is the truth now?

A27) *I had sex without Annies consent.*

Q28) Why didnt you tell me when I first recorded your statement on 31.12.99?

A28) I just wanted to go home that time.

Q29) Since Annie did not consent to have sex with you, what made you think that Annie would allow you to have sex with her?

A29) I dont know.

Q30) *Did Annie do anything to indicate that she allowed you to have sex with her?*

A30) *No.*

(Emphasis added)

17. In his statement tendered in his defence he described the events thus

37. Annie was still sleeping on the bed. As I entered the room, Annie got up from the bed and stood up and said that she wanted to vomit. So I followed her out of the room and she walked by herself to the kitchen toilet.

38. She vomited in the toilet. Just at this moment my sister (Lina Chang Ying Siew) woke up and came out of her room, which was next to my room.

39. She asked me why I was opening and closing the door so loudly. At that time Annie was in the toilet. I told my sister to go back to sleep. My sister went back to her room.

40. After Annie finished vomiting, I followed her back to my bedroom. I placed her on the bed. At this moment Annie's pager sounded. I took her pager, which was on my study table and gave it to her.

41. After looking at her pager, she asked for a phone and I gave her my handphone. She called someone and she spoke to someone by the name Kelvin. Then she hung and gave me back the phone and went back to sleep on my bed.

45. I then lay down on the bed beside Annie, intending to sleep.

46. I remember I fell asleep for a short while.

47. When I woke up, I had the urge to have sex with Annie.

48. I started to kiss Annie on the lips. She responded and kissed me back. She put her tongue in my mouth, and I put my tongue in her mouth.

49. I then started to lift the spaghetti strap blouse that she was wearing and removed the blouse.

50. I then pulled down her skirt.

51. I then unhooked her bra (it was a back-fastening bra) and I removed her panties.

52. All the while when I was removing her blouse, skirt, bra and panties, she also assisted me by lifting up her arms and buttocks.

53. When Annie was naked, I then started to remove my T-shirt, shorts and underwear.

54. Then, I lay on top of Annie and I spread open Annie's legs and I inserted my penis into her vagina.

55. I had no difficulty penetrating her. She was lubricated in her vagina.

56. Then I thrust my penis in and out of her vagina.

57. When I was thrusting my penis in and out of her vagina, both her hands were holding onto my arms. Apart from this, she just lay on the bed without any movement of her body or limbs, but she was groaning.

58. We stopped having sex because I could not maintain my erection. I did not

ejaculate in her or outside her.

18. He referred to his statement of 31 December and retracted that part where he had said that the complainant pushed him off while he was having sex with her. His explanation was that he made the statement so that he would complete the statement and go home earlier lest ASP Ting would question him in a threatening manner. This has to be considered against his acceptance that this statement was a voluntary statement and against the fact that it was never put to ASP Ting that she was impatient or threatening towards him during the recording of his statements.

Evaluation of the evidence

19. There was no dispute that sexual intercourse took place. The accused conceded that he did not obtain the complainant's oral consent for that. The defence that can be deduced from his last statement (which I shall refer to as his s 371 statement) was that she had consented by conduct by responding to his kiss and raising her arms and buttocks when he undressed her.

20. There were difficulties with the defence. There was the contrary account in the statement of 31 May 2000 which was recorded on his initiative.

21. The May statement was made five months after the rape investigations against him commenced. He was aware that the investigations were ongoing as he was required to go for a lie detector test. He went back to ASP Ting after the test and told her that he wanted to make a further statement. Then he told her that he had sex with the complainant on an impulse without seeking or obtaining her consent, and further that she had not done anything to indicate that she allowed him to have sex with her. In the statement he confirmed that it was voluntarily, and he was not threatened or assaulted, that no promise had been made to him, that he chose to speak in a mixture of English and Mandarin during the recording, and that he understood the investigation officer fully during the recording.

22. When his counsel brought him through the statement, he elaborated that he had taken advantage of the complainant because she was upset and she was vulnerable.

23. After revising the account given in December 1999 with the May statement, the accused gave a third version of the events in his s 371 statement.

24. When counsel went into the issue of consent with him, he explained that when he referred to consent in the May statement, he meant verbal consent as he was under the impression that rape was sex without verbal consent.

25. I did not accept the explanation. The accused was 23 years old. He had obtained his N level certificate as well as a Certificate on Office Skills from the Institute of Technical Education and was serving as a Second Sergeant in the Singapore Armed Forces. Having observed him, and taking into account his background, I found that it was not credible that he thought that consensual sex is sex with oral consent, and that without it, it is rape however willing the partner may be. In any event, he went beyond verbal consent in the statement, and confirmed that there was also no consent by conduct.

26. It must be remembered that the statement of 31 May was made entirely on the accused's initiative. Neither the officer who conducted the lie detector test nor ASP Ting requested him to make the statement. He told the former that he wanted to see the latter, and he went to see ASP Ting because in his own words, he decided to tell the truth and make changes to his earlier statements.

27. When I considered the complainant's evidence, it was clear that she had had too much to drink. She was unhappy and was crying, and did not want to be sent home because she did not want her parents to know she was drunk. She was vomiting intermittently and feeling nauseated, and even after arriving at the accused's apartment she had to get up from the bed to go to the toilet to vomit again returning to the bed to sleep. When her sleep was interrupted by her pager, she went back to sleep after

accessing her voice mail.

28. The complainant could not be in an amorous state in that condition. Her evidence that she had not consented to have sex with the accused was confirmed by the accused himself. Her calls to her friends recounting the events corroborated her evidence.

29. I invited defence counsel to suggest a reason for the complainant to cry rape if she had consented (the accused did not offer any explanation himself). Counsel's response was that the burden was not on the defence to deal with that. While he was correct that there was no duty on the defence, it would have helped the defence if a persuasive reason was offered. To his credit, counsel tried to assist, submitting that it is very hard to attribute motives and that "(w)e can only go by a person's conduct and by a simple account of what happened. That's all we have. When it comes to motives we are really, really hard put."

30. In the closing submissions counsel complained of shortcomings in the recording of the accused's statements. The accused made his statements in a mixture of English and Mandarin and ASP Ting could not recall the Mandarin expressions used which were recorded as "consent", "agree", "allow" and "permission".

31. Nothing really turned on this. ASP Ting's knowledge of Mandarin was not questioned as she majored in Chinese Studies at the university. The statements themselves were recorded in simple language, and the accused had not alleged that anything he said was omitted, or that what was recorded did not emanate from him or was wrongly recorded. What was recorded was simple and clear that she did not give verbal consent or do anything which indicated consent.

32. Counsel also referred to the complainant's ability to access her voice mail and the calls that she was alleged to have made from the mobile phone reflected her actual condition that morning.

33. The complainant's use of her pager and the mobile phone fit in the overall picture of her state in the apartment. It was not the prosecution's case that she was totally physically or mentally disabled. The evidence was that she could go to the toilet to vomit, she was aware of the accused's advances, she resisted him to a point by turning her head to avoid his kisses and by pushing him. Her ability to use the pager and the mobile phone was not exceptional in the circumstances.

34. After reviewing the evidence, I found that the prosecution had proved its case against the accused on both charges and that he had not raised any doubt that he had sex with the complainant without her consent in any form.

Sentence

35. In the commission of the offences, there was no violence, threat of violence, abduction or wrongful confinement. There was also no preconceived plot by the accused. He could not have known that the complainant would be drunk, or that she would not want to be sent back to her own home. The offences were committed because of his impulse to have sex with the complainant when the opportunity presented itself. The accused has no antecedents and there is no real likelihood that he would repeat the offence. On the other side of the scale, he denied the charges and went through a trial of seven days. Keeping in mind the principles set down in *Chia Kim Heng Frederick v PP* [1992] 1 SLR 361, I sentenced the accused to eight years imprisonment and six strokes of the cane on the first charge and eight years imprisonment on the second charge, with the custodial sentences to run concurrently in view of the proximity in time and other circumstances of the two offences.

Judge

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