DT v Public Prosecutor
[2001] SGHC 193

Case Number : MA 107/2001

Decision Date : 23 July 2001

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Sashi Nathan (Harry Elias Partnership) for the appellant; Ng Cheng Thiam and Eddy Tham Tong Kong (Deputy Public Prosecutors) for the respondent

Parties : DT — Public Prosecutor

Criminal Law – Offences – Criminal force and assault – Using criminal force with intent to outrage modesty – Child complainant – Whether offences proven – s 354 Penal Code (Cap 224)

Criminal Procedure and Sentencing – Sentencing – Whether manifestly excessive – Benchmark for sexual offences involving victim's private parts -Whether totality principle breached

Criminal Procedure and Sentencing – Statements – Admissibility – Complainant's statement to police – Application by defence for court to refer to statement – Correct approach to such application – Whether court has discretion to refer to statement – s 122(2) Criminal Procedure Code (Cap 68)

Evidence – Weight of evidence – Sexual offences – Failure to report incident immediately to police – Whether need to report immediately exists – Whether delay in filing police report justified

Evidence – Witnesses – Evidence – Witnesses – Allegations of conspiracy and contamination of evidence – Whether allegations proven

Evidence – Witnesses – Corroboration – Sexual offences – Child complainant – Lack of independent corroboration – Approach of court

: This appeal raised an issue in relation to the operation of s 122(2) of the Criminal Procedure Code (Cap 68) (`CPC`). In the court below, District Judge Kow Keng Siong ruled against the appellant on this issue. With this and other issues on conviction and sentence, the appellant appealed. I heard his appeal and dismissed it. These were my reasons.

Background facts

The appellant was convicted of two charges of outrage of modesty under s 354 of the Penal Code (Cap 224) (`Penal Code`). He was sentenced to six months` imprisonment on the first charge, and to 18 months` imprisonment and four strokes of the cane on the second charge, the sentences to be consecutive, totalling 24 months and four strokes.

The complainant was the stepdaughter of the appellant. The appellant married the complainant`s mother, one Mdm Noraidah, sometime in November 1992. The complainant and her younger sibling, Fairoz, were from Mdm Noraidah`s previous marriage, which ended in a divorce. In 1993, Mdm Noraidah gave birth to a baby daughter, Nurulatika.

Since young, the complainant and her brother were cared for by her grandmother, Mdm Hajjah Zainon bte Abdullah (`Mdm Zainon`). They lived in Mdm Zainon`s flat at Empress Road. The appellant and Mdm Noraidah stayed in their flat in Clementi, but visited the children often.

In 1997, the appellant and Mdm Noraidah shifted to their new home at Choa Chu Kang. Shortly thereafter, Mdm Noraidah died in a tragic accident in Johor Bahru. The appellant was with Mdm Noraidah at the material time, but was unhurt. The complainant and her sibling continued to be cared for by their grandmother.

In June 1998, the appellant remarried. The alleged incidents of outrage of modesty took place before Mdm Noraidah`s death.

Case for the prosecution

The prosecution charged the appellant with two counts of molest over a three-year period as follows:

(1) that sometime between May or June 1993 he did use criminal force on the complainant, then aged 10, by pressing his body against her body; and

(2) that sometime in May 1996 he did use criminal force on the complainant, then aged 13, by using his fingers to touch her vagina.

The evidence advanced by the prosecution was simple. On 22 May 1998, the appellant met several members of his deceased wife`s family at his home in Choa Chu Kang for a family meeting. The appellant`s brother was also present. Somewhat unfortunately, the amicable mood at the commencement of the meeting degenerated into a confrontation and certain allegations were made by Mdm Zainon and Mdm Normalah, who was Mdm Noraidah`s sister, against the appellant. Against this background, the appellant filed a police report.

Defending their allegations, a report was also filed by the complainant. It transpired that the allegations made by Mdm Zainon and Mdm Normalah were accusations of impropriety by the appellant against his stepdaughter, and the police report was to the same effect. It was also not disputed that the complainant`s report was written on her behalf by her uncle, Mr Norazrin, who was a former police officer.

The complainant`s police report led to investigations of the alleged molest incidents. The first occurrence took place sometime in May 1993 outside her grandmother`s flat. The complainant was only ten then. Mdm Zainon was in Mecca, and the appellant and Mdm Noraidah had moved in to stay with the children temporarily. According to the complainant, the appellant told her to lean against the wall along the corridor, and lifted her skirt before pressing his penis against her groin. Both were clothed at all times and the appellant did not expose himself to her. Yet, the complainant felt very disgusted by the whole experience, but kept the incident to herself. She did not know what to expect, nor was she certain that what the appellant did was correct or acceptable.

When Mdm Zainon returned from Mecca, the complainant related the abovementioned incident to her. She also added that there was some rubbing involved. Mdm Zainon expressed her disbelief, contrary to the complainant`s insistence that it was true. In the end, she told the complainant not to continue `this nonsense`, and the complainant complied.

The second molest incident occurred several years later, when the complainant brought her younger brother to visit her mother and their stepsister. The complainant was then 13. Whilst she was in her mother`s bedroom, the appellant entered, and told the complainant to lie down on the mattress. He then unzipped her jeans, and told her to relax. Following this, he put his hands into her underwear and used his fingers to touch her vagina. The whole episode lasted for a short while. All this while, the

complainant was too frightened to do anything.

After touching her, the appellant instructed the complainant not to reveal what had occurred. The complainant zipped her jeans and walked out of the room. Despite her requests to leave the house immediately, this was rejected by Mdm Noraidah, who insisted on sending her and her younger brother home later. The complainant claimed she was angry with Mdm Noraidah for this, but was helpless. She did not reveal the molest incident to her mother for fear that she would not be believed, since it implicated her stepfather, nor did she want to hurt her mother`s feelings. Her mother might end up scolding her for it.

On her return home, the complainant went straight to her room and started crying. She felt disgusted, frustrated and violated by the appellant`s actions. Noticing her granddaughter`s behaviour, Mdm Zainon questioned her, and the complainant confided in her grandmother. She was asked to confirm the truth of her events, which she did without hesitation. Upon hearing this, Mdm Zainon was visibly upset. After a short silence, she instructed the complainant not to reveal the incident to anyone, including her mother. She also made the complainant promise not to tell anyone.

As a child often would, the complainant disobeyed her grandmother, and told her close friend, one Evelyn, about the appellant`s actions the very next day, but no details of the molest were disclosed. Evelyn had noticed that the complainant looked extremely upset and had been crying throughout the day. As a result, she pressed the complainant constantly for the reason. When asked if the complainant had made a police report, the complainant replied in the negative, indicating that her grandmother had forbidden her to do so.

After Mdm Noraidah`s unfortunate accident, the complainant thought time should just heal all wounds, and never brought up the incidents again. After all, there were now less reason for the appellant to visit her at her grandmother`s flat, as the appellant had remarried soon afterwards.

In so far as the complainant`s presence at the appellant`s home on 22 May 1998 resulted in her police report, the complainant testified that she went there only because she wanted to retrieve some of her deceased mother`s old photos and clothes. It was unexpected that her grandmother would inadvertently blurt out the said allegations and accuse the appellant of improper conduct towards the complainant in the past. According to the complainant, the appellant, who was then standing, slumped onto the couch upon hearing the allegations.

As regards the complainant`s police statement made that same night, the complainant admitted that she related the molest incidents to her uncle Norazrin who then wrote the report for her. Mdm Zainon confirmed the information regarding the number of occasions and the times when the incidents occurred.

The trial below

During the trial, defence counsel applied to be furnished with a copy of the complainant`s statement to the police in the course of their investigations under s 122(2) of the Criminal Procedure Code (Cap 68) (`CPC`), with a view towards impeaching the complainant and discrediting her testimony. This application was rejected by the district judge, who felt that, on a purposive reading of s 122(2), it did not compel him to refer to the complainant`s statement to the police, for the purposes of deciding if at all the appellant should be given a copy of that statement; rather, s 122(2) conferred on him a discretion whether to refer to the statement or not, and defence counsel had to show why he should in fact exercise his discretion to do so. This counsel had not done. In any event, the district judge

was of the view that counsel was on a fishing expedition for information in order to conduct a discovery of the prosecution evidence, and was determined that he would not countenance the use of procedural rules for such purposes.

Turning to the trial proper, the district judge found much force in the prosecution`s case. According to him, the district judge found the complainant`s testimony reliable. It was, in all respects, materially consistent and inherently credible. Her evidence, corroborated by her grandmother, her classmate Evelyn, her uncle Norazrin and her aunt Mdm Normalah, stood up against rigorous cross-examination by defence counsel. The complainant was, by all standards, an impressive witness who remained unshaken in her testimony. Even the defence conceded that she gave evidence confidently and with good attention to detail. The district judge concluded (at [para]76 of his grounds of decision):

> *After having carefully scrutinised [the complainant`s] testimony and demeanour against the totality of the evidence, I am of the view that she is a reliable witness. She did not strike me as a vindictive person who was motivated by malice to lie or embellish her evidence against the appellant.*

In considering the prosecution`s case, the district judge also paid particular attention to the evidence of Mdm Zainon, the complainant`s grandmother who shared an extremely close relationship with her and who substantially confirmed the complainant`s version of events. He was constantly mindful that Mdm Zainon`s evidence could possibly be infected because of her close proximity to the complainant, yet concluded that it was safe to rely on her evidence because it did not appear to be tailored to suit the testimony of the complainant. In all circumstances, much as Mdm Zainon and the complainant shared a maternal-like bonding between them, as regards her testimony, Mdm Zainon at all times acted independently giving her side of the story as she saw it.

The appellant`s defence was one of bare denial. He claimed that he got along well with the complainant, and defence counsel suggested that there were ulterior motives to frame him; first the complainant blamed the appellant for her mother`s death and, secondly, she was influenced by the rest of Mdm Noraidah`s family members, who wanted to claim the Choa Chu Kang flat which now belonged to the appellant. Both these submissions were rejected by the district judge, as there was no conceivable reason why the complainant or anyone else would want to falsely implicate or frame the appellant.

The appellant called only one other witness to support his version of events, and that was his brother, Ramli bin Othman (`Ramli`). Ramli did not lend weight or credibility to the appellant`s denial of misconduct against the complainant, and his evidence was only to the extent that he confirmed that the family meeting of 22 May 1998 turned sour. However, he could not recall any allegations of misbehaviour by Mdm Zainon or anyone else. He thought that the dispute which arose related to `some property matters`.

Having regard to the totality of the evidence, including the fact that the appellant was not a credible witness who had tailored his testimony to dissociate himself from evidence which could have implicated him on the charges of molest, and the highly frivolous contentions from the defence that the complainant and her relatives had a hidden agenda against the appellant, the district judge found that the prosecution had proven their case against the former beyond reasonable doubt. Accordingly, he was convicted and sentenced to a total of 24 months` imprisonment and four strokes of the cane; six months` imprisonment for the first charge and 18 months` imprisonment and four stokes of the cane for the second charge; both to run consecutively. This reflected the severity of the offences, particularly the second charge, and the abusing of the appellant`s status as her stepfather in whom

the complainant reposed trust.

The appeal

SECTION 122(2)

Amongst other issues, one of the grounds of appeal of the appellant related to the operation of s 122(2) of the CPC. It will be recalled that counsel for the appellant applied, by way of s 122(2), for a copy of the complainant`s statement to the police, with a view towards impeaching her credit (see [para]19 above). The following were the reasons for which the district judge refused the application (from [para]32-34 of his grounds of decision):

> *32 In my view, the word `shall` in section 122(2) should be construed in the directory and not the mandatory sense - in that the Court retains the discretion whether or not to refer to the witness` police statement. In my opinion, an applicant must assist the Court by stating why there are grounds for believing that material contradictions exist between a witness` testimony and his police statement before a Court can consider whether to refer to the witness` statement. To put it another way, a Court should not refer to the witness` statement when the application is hinged on mere suspicion by the applicant, without any basis, that such contradictions exists. My reasons for these views are as follows.*
>
> *33 Looking at section 122(2) in its entirety, it is obvious that the purpose of requesting the Court to refer to a witness` statement is to draw its attention to the possibility of material discrepancies between that statement and his testimony. This may be relevant in deciding whether there are grounds to proceed to impeach the witness` credit. Considering the objective behind section 122(2), it is incumbent on the applicant, at the very least, to show why there are grounds for believing that such discrepancies may exist.*
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> *34 If such an approach is not taken and the Court must refer to the witness` statement whenever there is an application under section 122(2), then there is a very real danger of our Courts being inundated with a flood of frivolous applications under that section by parties out on a fishing expedition. This would surely lead to the undesirable result of (a) trials being unduly prolonged, and (b) judicial efforts being unnecessarily expended in having to consider statements containing extraneous matters which usually would be irrelevant, inadmissible and sometimes even prejudicial. This would certainly defeat Parliament`s intention in enacting our Criminal Procedure Code, which must surely be to regulate criminal procedure for the effective, efficient and fair administration of criminal justice.*

He continued (from [para]36-38):

> *36 In the present case, the Defence did not (a) refer to any extraneous matter,*

(b) nor show in any way that [the complainant] had given evidence in such a manner, which would suggest that her testimony is different from her police statements. In any event, I found that there is no such evidence to suggest that such contradictions exist.

37 Instead, the basis of the Defence`s application under section 122(2) was that there were discrepancies between [the complainant`s] evidence and that of Mdm Zainon`s relating to what [the complainant] had told her about the nature of the molests. I am of the view that it would have been wrong for me to refer to [the complainant`s] statement on the ground suggested by the Defence.

a. Firstly, it does not logically follow that just because there are discrepancies between the evidence of 2 witnesses, one of them might have given a police statement which is inconsistent with his testimony. After all, it is common for witnesses to contradict each other for wholly innocent reasons, unconnected with their police statements: ***Chean Siong Guat v PP*** *[1969] 2 MLJ 63 .*

b. Secondly, a natural implication of the Defence position is that they would be entitled to invite the Court to refer to Mdm Zainon`s police statements as well, since she could also have contradicted herself when testifying in Court. If that is the case, is there any valid justification why the Court should only refer to [the complainant`s] statements and not Mdm Zainon`s? Would the Court have to be saddled with the task of referring to both their statements to consider whether there should be an impeachment exercise, and if so whom, thereby complicating the issues and protracting the trial?

38 The Defence argued that the Appellant would be prejudiced if I did not even refer to [the complainant`s] statement to discover whether the discrepancies in fact exist. Though this may seem to be an attractive argument at first blush, I did not find any merit in it. It is plain that the Defence application under section 122(2) for [the complainant`s] statements was in the nature of a fishing exercise. In effect, what the Defence was attempting to do was to enlist the services of the Court (under the guise of section 122(2)) to conduct a discovery of the Prosecution`s evidence. Our Courts have made it clear that they do not countenance the use of our procedural rules for such purposes: ***SM Summit Holdings Ltd & Anor v PP*** *[1997] 3 SLR 922 [commat] para 98;* ***Tan Khee Koon v PP*** *[1995] 3 SLR 724 ;* ***PP v IC Automaton (S) Pte Ltd*** *[1996] 3 SLR 249 [commat] 262A;* ***PP v Teoh Choon Teck*** *[1963] MLJ 34 [commat] 36;* ***Business Software Alliance & Ors v SM Summit Holdings Ltd & Anor*** *[2000] 2 SLR 733 [commat] para 36 & 37.*

The difficulty accepting the district judge`s reasoning, so argued counsel, was that it smacked against several authorities in our jurisdiction and our neighbour`s. Further, a literal reading of s 122(2) saw no requirement to establish grounds or provide evidence to justify the belief that the witness statement was different from his evidence before a court would refer to it, and decide its use so stated in the latter half of s 122(2). In other words, s 122(2) ***compelled*** a court, at the request of the accused or the prosecutor, to refer to any statement made by any witness (other than the accused) to the police in the course of police investigations, either with a view towards furnishing the

accused with a copy of that statement; and/or using the statement for impeachment purposes. There was no discretion on the court to refuse reference to that statement, even if the court did not subsequently allow the accused a copy of the statement, ie such an obligation of the judge was mandatory, not directory.

Section 122(2), for our purposes, reads:

> *When any witness is called for the prosecution or for the defence, other than the accused, the court **shall**, on the request on the accused or the prosecutor, refer to any statement made by that witness to a police officer in the course of a police investigation under this Chapter and may then, if the court thinks it expedient in the interests of justice, direct the accused to be furnished with a copy of it; and the statement may be used to impeach the credit of the witness in the manner provided by the Evidence Act. [Emphasis is added.]*

Counsel`s contentions hinged on the word ` ***shall*** `, which he argued connoted an obligation without discretion on the part of the court.

In support of his arguments, counsel advanced three cases. The first was the case of **Yohannan v R** [1963] MLJ 57 . This was a magistrate`s appeal of Chua J, decided on 21 December 1962. In this case, the accused was charged and convicted of the offence of rioting under s 147 of the Penal Code. During his trial, the accused sought to obtain the statement of the main prosecution witness, also the victim injured during the riot, made to the police under s 121(2) of the CPC (our equivalent of s 122(2)) on the ground that it did not disclose the offence charged. The magistrate denied the application.

On appeal, Chua J overturned the magistrate`s decision. Holding that the object of s 121(2) was to protect the accused against untruthful witnesses and the police, the learned judge continued (at p 58H):

> *The law appears to me to be perfectly clear. There is a definite provision [under s 121(2)] under which the Court is **obliged**, on the request of the accused, to refer to the statement of the witness to the police and the Court has a discretion, if it thinks it expedient in the interest of justice, to direct that the accused be furnished with a copy of it to enable the accused to impeach the credit of the witness in manner provided by the Evidence Ordinance. The right given to the accused by s 121(2) is a very valuable one and often provides important material for cross-examination of the prosecution witnesses. [Emphasis is added.]*

The legal effect of the magistrate`s error was this (at p 59A):

> *There is no doubt in this case that [the accused] had lost the chance of putting to the witness ... his previous statement in case it happened to be contradictory. The omission by the Magistrate to refer to the statement of [the witness] had prejudiced [the accused] and it cannot be said that [the accused] had a fair trial. There has been a failure of justice in this case and the conviction cannot be sustained. The conviction of [the accused] is quashed and the sentence set aside.*

Yohannan v R (supra) was referred to and followed in **Chandrasekaran v PP** [1971] 1 MLJ 153 . Here, two accused were charged and convicted of abetment of the offence of defrauding the government. Amongst the various grounds of appeal put forward, only one concerned the present case, namely that the court below erred in denying one of the accused his right to a copy of a statement made by a witness to the police for the purpose of cross-examination. The court gave its decision in the following terms (at pp 161I-162E):

> *Section 113(1) (**sic**) of the Criminal Procedure Code confers an unfettered discretion on the court to direct the accused to be furnished with a copy of the police statement for purposes of impeaching credit. If an accused or his counsel has reason to believe that the evidence which the witness gives in the witness box differs in material particulars from the police statement he or his counsel can request the court to refer to a particular passage or passages in the statement and the court is obliged to refer to them. Failure to refer to such statement is a denial of justice. (See **Yohannan v R** [1963] MLJ 57). The court then exercises its discretion whether to furnish the accused with a copy of the police statement. The true test when exercising such discretion seems to be that the police statement must afford material for serious challenge to the credibility or reliability of the witness on matters relevant to the prosecution case. (See **Mohamed Fiaz Baksh v The Queen** [1958] AC 167). If the court finds there is no material to afford a serious challenge to the credibility or reliability of the witness, the accused need not be furnished with a copy of the police statement. In the present case the learned president at the request of counsel had referred to the police statement and he had come to the conclusion that there was no material for serious challenge to the credibility or reliability of PW55. I do not think that, merely because he had rejected the application, it can be said that he had failed to exercise his discretion judicially and that he had applied the wrong test in applying the provisions of section 113 of the Criminal Procedure Code.*

Chandrasekaran v PP was a Malaysian decision. Section 113(ii) of the CPC in Malaysia was in pari materia with s 122(2), although the full section of s 113 dealt with statements to police not to be signed or admitted in evidence, as compared to s 122, which dealt with the admissibility of statements to police. I should point out that s 113(1) in the abovecited passage in fact referred to s 113(ii), as s 113(1) was non-existent under that section at the material time and s 113(i) was a general bar against statements made by any person to a police officer in the course of a police investigation to be used in evidence.

Section 113 has since been superseded, and the current s 113 in no way resembles the old provisions since ***Chandrasekaran v PP*** (supra) was decided. In the Malaysian context, there is now no provision akin to our s 122(2) which allows defence counsel to refer any court to any statements made to the police with a view towards obtaining them for purposes of impeachment except as provided in the following manner by s 113(1):

> *Where any person is charged with any offence any statement, whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by that person to or in the hearing or any police officer of or above the rank of Inspector and whether or not interpreted to him by another police officer or other person shall be admissible in evidence at his trial and, if the person charged tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.*

Section 113(1) is followed by several qualifications which are not relevant for purposes of this appeal.

The third case relied on by counsel was the case of **Samsudin v PP** [1962] MLJ 405 . ***Samsudin v PP*** concerned an appeal by the accused, who was convicted in the High Court of Penang for culpable homicide not amounting to murder. The accused argued that the trial judge erred in failing to supply him with copies of the statements of two witnesses made to the police, even though the trial judge had referred to the statements. His counsel had applied under s 124(2) of the CPC to be supplied with copies of these statements.

Upholding the decision of the trial judge, the court gave the rationale for s 124(2) (which was in similar terms to our s 122(2)) (at p 406H):

> *Obviously the policy behind the provisions of the subsection is that where a witness gives evidence in Court which the prosecution knows or the defence either knows or suspects to be in conflict with a statement which he has previously made to the police, it is in the interests of justice that the judge should be made aware of the discrepancy so that the credibility of the witnesses may be tested by cross-examination, under which he will either explain, or fail to explain, the discrepancy to the satisfaction of the Court.*

Samsudin v PP dealt with the application of s 124(2) of the CPC in 1962. The CPC in this instance referred not to the Federal Statutes of Malaysia, as was the case for ***Chandrasekaran v PP*** (supra), but to the Straits Settlements Ordinance, applicable in `the Islands and Territories known as the Straits Settlements` under the East India Co until they `became a separate Colony when the Government of the Straits Settlements Act 1866 was brought into force on 1 April 1867`. For what reasons this piece of legislation was applied, more so in 1962, than the Federated Laws of Malaysia in ***Chandrasekaran v PP*** was never made known, although s 124(2) was in exactly the same terms as s 113(ii).

The upshot of the three cases, argued by counsel, was this: the court`s reference to witness statements to the police under s 122(2) was premised upon the request of either the prosecution or the defence. Without even referring to the statements, the court would not be aware of the discrepancies therein, if any, and would therefore give more weight to the embellished accounts of the witness`s testimony in court than they deserve. The effect would be that the defence was deprived of the chance of testing the credibility of these witnesses under cross-examination.

Section 122(2) can be divided into two limbs, the first being the application by the prosecution or defence for the witness statement, whereupon the court ***shall*** refer to it, and the second being the court`s discretion, in the interests of justice, to furnish such statement to the accused, and/or for the purposes of impeaching the maker of the statement. Our concern was with the first limb, particularly so with respect to the defence. I say this as the reality of the situation is that the prosecution would invariably have a copy of any witness statements made to the police, and would therefore never have to ask the court to refer to it without any justifiable reasons.

Having thoroughly considered the three abovementioned cases, I took the view that counsel`s arguments, though highly attractive, were misconceived. It was a misunderstanding of the three cases that an application under s 122(2) for the court`s reference to witness statements did not require justification.

The facts in ***Yohannan v R*** (supra) were brief, and did not state in detail the circumstances of the case. However, there were, implicit from the facts therein, grounds for asking for the police statement of the witness as it was the belief that the contents were different from the testimony of the witness in court, such that it could absolve the accused of his offence charged. The facts of this case, in more detail, was this: the accused was arrested for injuring his victim. Prior to the arrest, the victim had made a police report wherein he claimed he was assaulted by several persons, one of whom was the accused. He made a second report, but was told subsequently that his case was one of a non-seizable nature, and that he had to take out a summons under s 323 to prosecute the accused for voluntarily causing hurt. For some reason which was not obvious from the facts, the accused was eventually charged with rioting under s 147 of the Penal Code. On this basis, in the course of cross-examining the victim, counsel for the accused requested the magistrate to refer to his second report under s 121(2). It was counsel`s contentions that the second report did not disclose an offence under s 147, rather it disclosed only an offence of voluntarily causing hurt. It was in this context that the magistrate refused the request, which decision led to the allowing of the appeal by Chua J.

Chua J`s ratio was in extremely wide terms, but read against the background facts, it was no different from the position that a court must be provided with justifiable reasons before referring to statements made to the police under s 122(2) which were not tendered in court as evidence. The district judge`s approach in the court below was not a departure from the approach in ***Yohannan v R*** , rather it was an endorsement of it.

Chandrasekaran v PP (supra) shed more light on this matter. It was tacitly stated in that case that there must be some reason to believe that the statement to be referred by the court was actually inconsistent with the witness`s testimony. This could be seen from the judgment where the court so held (also reproduced at [para]32 above):

> *Section 113(1) (**sic**) of the Criminal Procedure Code confers an unfettered discretion on the court to direct the accused to be furnished with a copy of the police statement for purposes of impeaching credit. **If an accused or his counsel has reason to believe that the evidence which the witness gives in the witness box differs in material particulars from the police statement he or his counsel can request the court to refer to a particular passage or passages in the statement and the court is obliged to refer to them. Failure to refer to such statement is a denial of justice**. (See **Yohannan v R** [1963] MLJ 57). [Emphasis is added.]*

The italicised passage was clear. There must be reason to believe that the evidence which a witness gave in the witness box ***differed*** in material particulars from his police statement. Only when the court was satisfied of this would they then be ***obliged*** to refer to the statement, and in this sense they had no discretion.

The position taken by the court in ***Samsudin v PP*** (supra) did not deviate from either ***Yohannan v R*** and ***Chandrasekaran v PP*** . On the contrary, it reinforced the position that unless `a witness [gave] evidence in Court which the prosecution [knew] or the defence either [knew] or [suspected] to be in conflict with a statement which he has previously made to the police` (per Good JA at p 406I), the court shall not entertain reference to that statement.

The resultant approach to s 122(2) was this: unless and until counsel showed, to the court`s satisfaction, grounds for belief that the witness statement ought to be referred to, more often than not because the statement was in contradiction to the witness`s testimony in court, the court shall

not refer to the said statement. Without this inherent checking mechanism, any criminal court would invariably receive a floodgate of frivolous applications based on pure speculation.

Naturally, once grounds were put forward, and the court was satisfied that there was reason to believe the existence of such contradiction or inconsistency, it shall have no choice but to refer to it to determine the factual basis of the application. On this basis, and this basis alone, the word `shall` in s 122(2) becomes mandatory. This approach not only discouraged the abuse of s 122(2), but also served as some form of sieving mechanism preventing vexatious and groundless applications. In addition, it was in the interests of justice that the court be aware of the contents of the statement to determine the true state of affairs surrounding the trial.

I believe that even counsel in the present case subscribed to this practice. In the trial below, he contended that there were discrepancies between the complainant`s statement to the police and that of her evidence in court. However, there was no basis for this contention, either on the facts of the case or otherwise. In the instance, the district judge concluded that counsel was in effect poking his hand in the dark hoping to discover something in his favour. He was, in the words of the district judge, on a `fishing expedition`, making use of the court under the guise of s 122(2) to conduct a discovery of the prosecution`s evidence.

My approach was consistent with my reasoning in **PP v Sng Siew Ngoh** [1996] 1 SLR 143 , where I undertook an extensive discussion of s 122. I explained the purpose of s 122, read from s 122(1), as thus (at p 151B):

> *Rather, s 122(1) ensures that evidence given out of court to police officers are only adduced as evidence if there is either a good foundation for the reliability of these out of court statements either as being exceptions to the hearsay rule or exceptions governed by policy considerations that is, being within one of the exceptions listed in ss 122(2), (3) and (5). This is reflected imperfectly in the contention expressed in **Yohannan** that a basis for the prohibition contained in s 122(1) is that witnesses may be untruthful.*

The intention of s 122 was to restrict all statements made out of court, except as provided by sub-ss (2), (3) and (5). It was a blanket prohibition on witness statements unless so expressed. If counsel`s arguments were correct, it would circumvent the whole restriction cast by s 122(1) and in effect allow for admission of witness statements by the back door. It could not be that the specific provision of s 122(2), stated as an exception to s 122(1), could virtually override the general prohibition in such a manner.

The practical effect of counsel`s arguments was akin to opening up a Pandora`s box on witness statements. It was also a mode of criminal discovery for the defence. Time and again, I have made the observation that the form of trial prescribed in our CPC has never been to provide for any form of pre-trial or trial disclosure by the prosecution. I reiterated this position again in my recent case of **Selvarajan James v PP** [2000] 3 SLR 750 at [para]18 and 19:

> *18 The procedure for criminal discovery in Singapore is governed by the Criminal Procedure Code (Cap 68) (the `CPC`). The CPC does not impose on the prosecution an onerous duty of disclosure. This differs from the requirements in civil cases where extensive rules of discovery are provided for in the Rules of Court. For criminal cases, there is no requirement in the CPC for the prosecution to disclose witnesses` statements to the defence ...*

> *19 The present duty of disclosure on the part of the prosecution in criminal cases, as provided for in the CPC, is minimal. This position is not necessarily the most ideal and it has been argued on numerous occasions that more disclosure and early disclosure on the part of the prosecution are desirable to ensure that the accused knows the case that has to be met and as such would get a fairer trial. However, it is not for this court to impose such requirements on the prosecution. It is for Parliament to decide if it wants to enact these revisions when it updates the CPC and, until then, the court cannot direct the prosecution to produce witnesses` statements to the defence.*

Section 122(2) was not the process to provide for criminal discovery, neither was this case the forum to do so. In the instance, counsel`s appeal on this issue failed.

The remainder of counsel`s appeal was canvassed along the line that the district judge erred in his findings of fact. I dealt with them in the following manner.

ULTERIOR MOTIVE AND CONSPIRACY AND/OR CONTAMINATION

This issue was similarly brought up in the trial below, and went along the following lines: there was a theory of conspiracy between Mdm Noraidah`s family against the appellant, the collective ulterior motive being to lay claim on the appellant`s Choa Chu Kang flat where he stayed with Mdm Noraidah before her death. Counsel argued that Mdm Zainon and the rest of the prosecution witnesses had ample motive and opportunity to conspire and tailor their evidence to support their allegations against the appellant.

I felt this contention bordered along the lines of frivolity. Even so, the district judge was alive to this remote possibility, but dismissed it after some consideration. I agreed with him.

The complainant was candid about the fact that the appellant became her stepfather after his marriage to Mdm Noraidah. For a child who never experienced the joys of paternal love and concern, the appellant`s arrival marked a welcome change in her life. In her words: `Basically I felt happy and I was telling myself finally I am having a father now.` It was evident that she bore no grudges against the appellant and had no reason to entrap him on allegations of wrongdoing. Likewise, the appellant admitted that he got along well with the complainant.

The appellant`s conspiracy theory was, in all respects, speculative in nature. There was not an iota of evidence from the defence to support such a theory, nor was it evident, if at all, from the evidence of the prosecution witnesses. Granted that it was possible that the latter`s evidence could be doctored together, yet that collective evidence was neither one-sided nor skewed entirely against the appellant. In fact, there were discrepancies which were highlighted by defence counsel, but nothing significant which affected the prosecution`s case against the appellant.

The conspiracy theory invariably tied in with the danger that the complainant`s family members might have corrupted their evidence by discussing the molest incidents with each other, each reinforcing the gravity of the offence whilst giving evidence in court. The district judge was fully conscious of this possibility. The law in this respect was contained in my judgment in **Lee Kwang Peng v PP** [1997] 3 SLR 278 at [para]95-97 and 110:

> *95 [W]here the allegation is one of innocent infection, and there is some*

evidence suggesting the opportunity for contamination, the court must always be alive to that possibility even if it considers the possibility to be slight. Where an allegation is one of infection (as opposed to conspiracy), the accused is objecting to the probative value of the evidence and not its` (***sic*** *) validity. He is not challenging the evidence as an outright lie, but saying that the degree of veracity of the evidence and the strength of recollection of the witness must be subject to scrutiny.*

96 To require the prosecution to prove beyond reasonable doubt that there was no risk of contamination would be oppressive as - and this has already been pointed out - the possibility of contamination must as a necessity always be in the court`s mind so long as the opportunity for contamination was present. If the court must remain sensitive to the possibility of contamination as a matter of legal principle and fairness to the accused, it would be illogical to adopt a test requiring the prosecution to remove all doubt from the court`s mind.

97 The duty of the trial judge in such a position is to consider the evidence of the complainants and to assess the risk and opportunity for contamination. The trial judge must then ask himself or herself what weight is to be attached to the testimony of these witnesses in light of that assessment. The final question is whether that evidence, together with the other evidence before the court, satisfies the standard of proof required of the prosecution.

...

110 Insofar as an allegation of `innocent infection` is concerned, so long as there has been proof of some opportunity of contamination, the weight of the respective complainants` evidence is accordingly diminished. In cases where the opportunity of contamination is so slight as to be insignificant, then the allegation of collusion is not made out and it is safe to convict on the evidence of the complainants provided it is `unusually convincing`. Where, however, the opportunity of contamination is a real opportunity, such that the truth of the complainants` evidence is subject to scepticism, something more is required to justify a conviction. It is conceivable that there will be cases in which the very strength of the complainants` `unusually convincing` evidence derives entirely from the innocent infection. As a result of the potential for injustice which springs from such conspiracy, the law demands evidence originating from some independent source which is capable of confirming the credibility of the complainants` evidence.

Turning to the evidence, there was nothing which showed that Mdm Zainon`s evidence, and the rest of the prosecution witnesses` evidence, were in any way affected by their prior communication with the complainant, or with each other. Apart from confirming the gist of the complainant`s allegations against the appellant, I accepted that none of their testimonies which elaborated the scheme of the appellant`s misbehaviour suggested any hint of contamination. In the event, counsel`s arguments on conspiracy and contamination failed.

NON-REPORTING OF MISCONDUCT

A common ground of appeal, and one that did not escape counsel, was the non-action of the complainant to report the acts of sexual abuse by the appellant to the police and to any other family members. It was not the prosecution`s case that the complainant never reported the molest incidents, rather it was reported several years after the occasion of the molests. Counsel suggested that this was not consistent with the usual behaviour of victims, although in this case his contention was very much directed at Mdm Zainon, who claimed she prevented the complainant from reporting the molest incidents, either to the police or to anyone else. In the instance, counsel urged me to take the view that the molest incidents could only be fabricated.

I must stress again that, in our context, there is no general rule which requires victims of sexual abuse, or those cognisant with the same matters, to report them immediately, more so to the police. Many cases have repeated this, which stemmed from the conservative nature of our society. In **Tan Pin Seng v PP** [1998] 1 SLR 418 , I elaborated on this point (at [para]29):

> *... While it is not usual human behaviour for a victim not to make a quick complaint to her family or friends, the same cannot be said of a failure to make a prompt police report. In my experience, there is a natural reluctance on the part of victims of sexual offences to make a police report. This stems from a variety of reasons. The victim may keep silent for fear of being stigmatised or disbelieved. She may view the police investigation and the court process, both of which are potentially intrusive and distressing, with trepidation, or she may have been so traumatised by the experience that reporting the offence is simply a very low priority. She may even have been threatened with retaliation if she reported the offence. Her first recourse will invariably be her family and friends rather than the police. Indeed, many of those who do eventually make a police report do so only after they have been persuaded to do so by their family or friends.*

I recalled this statement was made in the light of **Tang Kin Seng v PP** [1997] 1 SLR 46 , where I wrote (at [para]79):

> *The evidential value of a prompt complaint often lay not in the fact that making it renders the victim`s testimony more credible. The evidential value of a previous complaint is that the failure to make one renders the victim`s evidence **less** credible. The reason is simply common human experience. It is not usual human behaviour for a victim not to make a quick complaint. However, as in all cases where common human experience is used as a yardstick, there may be very good reasons why the victim`s actions depart from it. It would then be an error not to have regard to the explanation proferred (**sic**). All these merely illustrate the fallacy of adhering to a fixed formula.*

The justification given by Mdm Zainon for the inactivity in reporting the appellant`s actions, both to the police and to other family members, was three-fold. One, the complainant was only 10 and 13 respectively when she complained of the appellant`s actions. It was only natural that such allegations, serious in their nature, were viewed with a tint of suspicion by Mdm Zainon, resulting in her instructions to the complainant never to repeat the same to anyone else, lest it turned out to be a silly prank of hers. In my mind, this manner was highly consistent with any other adult in the same circumstances, treading the situation with extreme caution. Next, Mdm Zainon felt it could potentially jeopardise the relationship of the appellant with her daughter if these allegations were let out, since

her daughter`s marriage to the appellant was in its infancy. Her daughter had a previous failed marriage, and Mdm Zainon wanted the current one to work. After all, the complainant was staying with her, and she felt that this considerably lessened the chances of a recurrence of molest. Essentially, Mdm Zainon made a judgment call in disallowing the complainant to report the abuse to anyone else. It was not for this court to criticise this call, so long as it was justified.

Finally, it was an embarrassment, amongst family members no less, if the appellant was accused of misconduct towards his own stepdaughter. I accepted that the potential awkwardness and shame which could result from publicising the matter hung on Mdm Zainon`s mind constantly. This was similar to the scenario in **Soh Yang Tick v PP** [1998] 2 SLR 42 (at [para]78):

> *... I have noted that often, the main reason, amongst others, for not making a police report soon after such an incident is not because the victim has something to hide, rather it is because the victim is afraid of the shame it would bring to the family, should others know about the incident. Making a police report and subsequently having the case dealt with by the courts often attracts undue attention which can be very traumatic for the victim as well as for the family. Also, some victims may be afraid that their word may not be believed. Therefore, they would rather suffer in silence than to see that the culprit is punished. It is for this reason that victims are often reluctant to report any matters to the police. In view of this therefore, the failure to make an early police report will no longer be seen as fatal to the prosecution`s case, unless it can be ascertained with certainty that this failure was due to other reasons which might cast doubt on the victim`s claim of the offence.*

I took the view that Mdm Zainon`s explanation was valid given the present situation, and accepted it as justifying the delay in reporting the appellant`s actions to the police. It was conceivable to expect Mdm Zainon to be cautious of her granddaughter`s allegations. Every explanation of non-reporting must be justified, and in this case it was. It was quite by chance that a police report was finally made, although I did not hold this against the complainant.

In any event, the crucial point was that the complainant did complain of the molest incidents promptly, first to her grandmother and then to her close friend Evelyn. This negated any adverse inference which might be drawn in the event of non-reporting or a delay in reporting the offence to the police. Given the circumstances, it was not reasonable to expect the complainant to open her heart to her mother of the appellant`s assaults. It was quite clear that Mdm Zainon was her closest kin.

EVIDENCE OF THE COMPLAINANT AND THE APPELLANT

Like previous cases which I have decided, the present case was one of a child complaining of a sexual crime committed by the appellant. Much as there was corroboration of the complainant`s testimony, the corroboration was not independent. It was accepted that the rest of the prosecution`s evidence on the molest offences originated from the complainant, and the complainant alone. No one else saw the actual acts of assault. In such a case, the general approach of the courts was not to treat the complainant`s evidence at face value, unless there were reasons to believe the evidence of the complainant was nothing but the truth. Two cases by way of example illustrated this approach. The first was ***Lee Kwang Peng v PP*** (supra at [para]70):

> ***Tang Kin Seng*** *and* ***Teo Keng Pong*** *were cases involving a single complainant who made allegations against an accused person. The principle emerging from these cases was that, unless the complainant`s evidence alone is so strong*

that it proves the prosecution`s case beyond reasonable doubt, corroboration is required. By extension, where the complainants` evidence is not so strong as to prove the case beyond reasonable doubt, but where the other prosecution witnesses, for example, an eye-witness, can provide ***direct*** *evidence of the offence, such that the combined effect of the evidence is to satisfy the burden of proof, corroboration is similarly not required.*

The passage from ***Lee Kwang Peng v PP*** was derived from another of my decisions in ***Tang Kin Seng v PP*** (supra), where a similar passage so alluded (at [para]43 and 44):

43 ... There is no legal requirement that a judge must warn himself expressly of the danger of convicting on the uncorroborated evidence of a complainant in a case involving sexual offences. There is, however, authority to the effect that it is dangerous to convict on the words of the complainant alone unless her evidence is unusually compelling ...

44 ... ***the right approach is to analyse the evidence for the prosecution and for the defence, and decide whether the complainant`s evidence is so reliable that a conviction based solely on it is not unsafe. If it is not, it is necessary to identify which aspect of it is not so convincing and for which supporting evidence is required or desired*** *. [Emphasis is added.]*

I could only state, having gone through the evidence of the appellant in some detail, that it suggested a pattern of tailoring his evidence to refute the evidence of the prosecution witnesses. He was evasive, and could not provide legitimate answers to questions posed to him in the court below.

In contrast, I accepted the district judge`s findings that the complainant`s evidence was unusually convincing. She appeared to me, by the way her testimony went, a sensible and intelligent girl, who knew and understood the offences perpetrated on her. It was highly unlikely that the allegations which she made `could have been born from her wild imaginings as a child after her mother remarried and started a new family or could have been the result of blaming the appellant for her mother`s death or could have been the fruit of suggestions planted in her mind by other family members`, as contended by the defence. There was no evidence to show that the appellant and the complainant never got along, or that she had an axe to grind.

The conclusion of the district judge, which I fully endorsed, was this (at [para]66 of his grounds of decision):

Nonetheless, the Defence urged me to disbelieve [the complainant`s] allegations against the Appellant, arguing that her evidence was `somewhat coached and rehearsed`. Defence submitted that [the complainant`s] confidence in Court is incompatible with that of a victim of molest. I am unable to accept this contention. Having carefully considered her demeanour and her evidence, it was clear to me that her confidence and ready replies to pointed questions about the molest incidents stem from the fact that she was testifying on matters in which she had personally experienced. Indeed, when she was asked why she could remember the molest incidents so clearly, she replied indignantly:

If something like this were to happen to you, are you going to simply forget about it or let it stay as a reminder?

Having regard to the totality of the evidence against the appellant, and the appellant`s own testimony, the only conclusion I drew was that the appellant was guilty of the offences as complained. Counsel raised nothing which warranted overturning the findings by the district judge. The law was clear, findings were not to be disturbed in the absence of justifiable reasons.

Sentence

In so far as sentencing was concerned, counsel appealed on the basis that the district judge imposed a manifestly excessive sentence on the appellant. He referred to two cases in support: **Ng Chiew Kiat v PP** [2000] 1 SLR 370 , where the appellant was sentenced to nine months` imprisonment on each of three charges of molest which were more aggravated than the present case, and **PP v Chia Fook Kun** (Unreported) where a single charge of molest of a more serious nature drew a sentence of 15 months` imprisonment. In addition, in his written submissions, counsel highlighted the fact that the prosecution did not seek any enhanced sentence in the court below, nor did they ask for a deterrent sentence.

It was almost axiomatic to say that each case depends on its own facts and circumstances when it comes to sentencing, and that no pre-established sentence can be applied in respect of a particular offence. Yet, I was mindful that no sentence should ever be pronounced in a vacuum, and that it is essential to be aware of what has been stated in similar cases.

In the present case, I could not but think that the overall sentence was acceptable given the circumstances of the case. The first charge drew a fairly lenient sentence of six months` imprisonment, given that I had decided as far back as in 1993 that `for this sort of offence in Singapore, the standard sentence where a victim`s private parts or sexual organs [were] intruded is now nine months` imprisonment`, with caning: see **Chandresh Patel v PP** (Unreported) (judgment dated 31 August 1993). In ***Chandresh Patel v PP*** , the molest act was somewhat similar to the present situation, where it was not an innocent act, nor was it aggravated in nature.

As for the second act of molest, which drew the appellant a sentence of 18 months` imprisonment and four strokes of the cane, I felt that it appeared to be on the high side. It was not disputed that this offence was more serious than the first charge, or that in ***Chandresh Patel v PP*** , which inevitably warranted a more severe sentence. The appellant had, in his position as a stepfather, abused his relationship with his stepdaughter as well as the trust reposed in him. He had taken advantage of a defenceless child and his act went to the core of intrusion, touching the complainant`s private parts. The complainant, frightened and confused as she was, had little choice but to give in to an adult, who could easily have overpowered her. These were deliberate acts of infringement of one`s personal privacy.

However, mindful of the authorities submitted by counsel, and the fact that the DPP did not produce any authorities to the contrary, I was prepared to accept that the sentence on the second charge tended to be slightly on the high side. Yet, it could not be said that it was manifestly excessive, given that it deviated from ***PP v Chia Fook Kun*** (supra) by a mere three months. In any event, there have been cases where more severe punishment has been meted out: see **PP v Johari bin Samad** (Unreported) , although this case was discontinued before it reached me.

I agreed with the DPP that the overall sentence combined for the two convictions did not offend the totality principle in respect of the appellant`s punishment. It could not be said to have a crushing effect on the appellant under the circumstances. He violated the complainant`s innocence, and the total sentence reflected not only the serious nature of these offences, but also the punitive aspect of the conviction.

In the instance, I dismissed the appellant`s appeals against conviction and sentence.

Outcome:

Appeal dismissed.