

Public Prosecutor v ABC
[2003] SGCA 14

Case Number : Cr App 20/2002
Decision Date : 31 March 2003
Tribunal/Court : Court of Appeal
Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ
Counsel Name(s) : Winston Cheng Howe Ming, Tan Wee Soon (DPP's) for the Appellant; Respondent in person
Parties : Public Prosecutor — ABC
Criminal Law – Offences – Outrage of modesty.

Evidence – Principles – Function of appellate court in assessing findings of fact made by trial judge.

Evidence – Witnesses – Corroboration – Treatment of uncorroborated evidence of a child complainant of sexual offences committed against her.

Delivered by Chao Hick Tin JA

1 This was an appeal by the Public Prosecutor against an order of acquittal of the respondent, ABC, on a charge of outraging the modesty of his young step-daughter ("the victim"), who was then eight years old. The name of the respondent is being withheld to protect the identity of the child. We allowed the appeal and convicted the respondent on the charge and now give our reasons.

The background

2 On 4 October 2002, ABC was charged and tried in the High Court for five offences, namely, two charges of outraging modesty and three of rape of the victim –

First Charge

Rape of the step-daughter in February 2002 when she was 14 years old, under s 376(1) of the Penal Code.

Second Charge

Rape of the victim in January 2002 when she was 14 years old, also under s 376(1).

Third Charge

Rape of the victim during the period October-November 2001 when she was 13 years old, under s 376(2).

Fourth Charge

Outraging the modesty of the victim in 1996 when the victim was just eight years old, under s 354.

Fifth Charge

Outraging the modesty of the victim in 1995 when she was 7 years old, under s 354.

3 At the conclusion of the trial on 30 October 2002, ABC was convicted on the first, second, third and fifth charges and was sentenced to a total of 24 years' imprisonment and 24 strokes of the cane. The trial judge rejected his evidence that he did not commit any of the crimes alleged against him by the victim. To explain away the victim's hymen's tear at the positions of seven and eleven o'clock, ABC contended that it could be due to either an injury sustained in the course of exercise or the victim having sex with her boyfriend. The trial judge, however, rejected his claim of innocence and accepted the evidence of the victim. ABC appealed against his conviction and sentence.

4 On the evidence tendered at the trial, there was no basis for us to overturn the findings of the judge below that ABC did rape the victim as she had described and that he had outraged her modesty in 1995. The trial judge had reached this conclusion even though he had approached the victim's evidence with the utmost caution. He also bore in mind that the complaint was made against ABC after a lapse of time and that in her first information report to the Police, the victim had mentioned only one incident of rape which occurred in January/February 2002.

5 As far as the rape charges were concerned, the trial judge was convinced that the victim was a reliable witness. In his words:-

... the victim's accounts in relation to the rape charges were recounted by her without any evasion or equivocation. Her testimony in court was cogent, compelling and convincing in relation to all the three charges and had an impress of truth.

6 While the trial judge was satisfied that the fifth charge had been proven, he entertained some doubts about the victim's reliability as far as the fourth charge was concerned. It was in relation to this acquittal that the Public Prosecutor had appealed. We overturned the acquittal and substituted in its place a conviction on the charge. The present grounds are issued to explain why, in our judgment, the acquittal of ABC on the fourth charge was plainly wrong.

The evidence on the s 354 charges

7 In order to appropriately appreciate the evidence of the victim on the fourth charge, it is also

necessary to deal with her evidence on the fifth charge. The fifth charge related to an incident of outraging modesty which occurred in 1995. The fourth charge related to an incident which occurred a year later in 1996.

8 First, it is necessary to give a brief account of the background of the victim's family. The victim's mother is one, XYZ, a Filipino, who resides in Singapore on short-term social visit passes. The victim was conceived out of a relationship between XYZ and her ex-boyfriend, a Filipino American. The victim was born on 15 December 1987 and was aged 14 at the date of trial.

9 In September 1991, XYZ married ABC in Singapore. At the time, the victim was nearly four years of age and was living with her maternal grandparents in the Philippines. Before their marriage, ABC knew that XYZ had a child, the victim, and agreed to adopt her as his own. In December 1993, when the victim was about six years old, she came over to Singapore to stay with XYZ and ABC. As far as the victim was concerned, she had always understood that ABC was her natural father, as that was what her mother, XYZ, had told her.

10 Because ABC was constantly out of a job, the family was often in financial difficulties and had to move from one flat to another. When the victim came over to live with ABC and XYZ, their home was at Yishun Street. By then, ABC and XYZ also had two other children from their marriage, a son and a daughter, with the son being the older.

11 In 1994, the family moved from Yishun Street to Gardenia Court and it was at this location that the first incident of outraging modesty occurred in 1995 when the victim was in Primary One. She related that one day, as she was entering the master-bedroom, ABC came out of the shower of the master-bedroom with a towel wrapped around his waist. ABC complained to the victim that his back was painful and asked the latter to help him with an exercise. She was told to face the wall with her hands placed against the wall above her head. ABC then pulled her shorts and panty down to the level of her knees. He leaned against her back and placed his hands on her hips. The victim felt the lower part of the body of ABC pressing against her buttocks and that something fleshy was being pushed in and out of her buttocks. She experienced some pain. After a while, ABC stopped what he was doing and pulled up the victim's panty and shorts. ABC then held the victim's hand and pulled her to the prayer room where he made her promise before the Hindu gods that she would not tell anyone about what happened. She was threatened that, if she should break that promise, something would happen to her maternal grandparents in the Philippines.

12 The next day, ABC was hospitalized as a result of severe pain to his back. When XYZ asked the victim what had happened the day before, she was too frightened to say anything other than to say that ABC had pushed against her back which caused her some pain.

13 The victim's evidence on the 1995 incident was corroborated to an extent by her mother. XYZ

recalled that on the day ABC was admitted into hospital, the victim had mentioned to her, while they were at home, that she was wondering whether she was to be blamed for ABC's back condition, namely, for not helping him with the exercise the day before. When XYZ probed further into this "exercise", the victim told her that ABC had stood behind her and was "rubbing and pushing up and down" at her buttock area and that she had felt some pain. XYZ then called her husband on the phone to ask him what happened. ABC explained that he was doing his exercise, without elaborating on what it involved and said that perhaps the exercise he did might have been too hard on the victim and she thus could have felt some pain. XYZ did not pursue the matter further.

14 Sometime in mid-1995, the family moved house again and this time to Yishun Central. One evening in 1996, the victim, together with her half siblings, were in the flat with ABC. They were watching television in the living room. XYZ had gone out with ABC's sister and her family. After a while, the victim went into the kitchen to get a cookie. She did not switch on the kitchen light. The cookie jar was on the table top and she stood on a chair to reach it. At that moment, ABC came into the kitchen and held her hips with his hands. He pushed his body against the victim's back. She felt something hard being pushed in between her buttocks. Just then her half sister came into the kitchen and asked ABC what he was doing. He replied, saying he was not doing anything and her half sister went back to watch television.

15 ABC held the victim's hand and pulled her into the guest room and closed the door. He did not switch on the lights of the room. On his instruction that he needed her help with an exercise, she leaned against the side of the bed with her knees on the floor and both the palms of her hands outstretched on the bed. ABC held her hips from behind and pulled her shorts and panty down to her knees. He then pushed his lower body against her back and she felt something hard and warm being pushed in and out of her buttocks. He explained to the victim that he was doing an exercise. A while later, the victim heard a lorry's horn which she recognised to be that of ABC's sister's husband's lorry. That also indicated that her mother had come back. ABC stopped what he was doing and quickly pulled up her panty and shorts. He again warned her not to tell anyone about this event.

Reasons for the acquittal

16 With regard to the victim's evidence relating to the fifth charge, the trial judge found her evidence to be clear:-

... the victim's narration in relation to the events in 1995 that the accused made her face the wall and rubbed his penis against her buttocks after pulling her panties and shorts down, had a convincing ring of authenticity. Although she was only about 7½ years of age at the time of the offence she had conveyed this to her mother the very next day so much so the mother had in fact confronted the accused the next day with her queries.

In my view, although the victim was only about 7½ years old at the time of the commission of the offence in 1995, her recall of the events and her mentioning to her mother the next day about what happened at home was confirmatory of her testimony in court. As for the accused, in my finding he was

trying in vain to fudge the issues by his false claims that he fell over her, dropped on the edge of the bed and fell face down over her. I found his claims to be nothing but fabrication.

17 However, with regard to the fourth charge, the trial judge hesitated and gave the following reasons for declining to convict ABC on that charge:-

... I was impelled to note that unlike in relation to the offence committed by the accused in 1995, there was no referral to anyone by the victim until 2002 when she made the statements to the police. Although I had accepted the evidence of the victim in relation to the 1995 incident and the offences of rape which took place in 2001 and 2002, I was left in some doubt whether there was an innocent overlapping of events in the mind of the victim in relation to the fourth charge. Although I was satisfied that her maturity and intellectual faculties were above par and amply developed at the time she was testifying in court, I was, nonetheless, left with a lingering yet real doubt that her recall of events in relation to the 1996 charge might well have been superimposed by her recollection of the events of 1995 – on which there was clearly some confirmatory evidence from her mother. I was, in the circumstances, inclined to give the benefit of doubt to the accused in relation to the fourth charge and held that the prosecution had not proven its case beyond a reasonable doubt in relation to this charge only.

Analysis of trial judge's grounds

18 It would be seen that the trial judge had essentially two reasons for not accepting the victim's evidence:-

(i) The victim might have been confused with regard to the second incident of outraging modesty, or, in the words of the judge, there might have been an "innocent overlapping of events in the mind of the victim"; and

(ii) Unlike the 1995 incident, the victim did not mention the 1996 incident to any other person; there was no corroboration.

19 We accepted that, in acquitting ABC of the fourth charge, the trial judge was making a finding of fact. It is trite law that an appellate court should not upset a finding of fact based on the credibility and veracity of the witnesses whom the trial judge had seen and observed when giving evidence unless it was plainly against the weight of the evidence and unsupportable: see *Lim Ah Poh v PP* [1992] 1 SLR 713 at 719 and *PP v Sugianto & Anor* [1994] 2 SLR 1 at 5.

First ground

20 The trial judge said that he entertained a reasonable doubt on the fourth charge because the victim could have confused the events relating to the fourth charge with those of the fifth.

21 It was important to bear in mind that the trial judge found, at the time the victim appeared in court to testify, that "her maturity and intellectual faculties were above par and amply developed." More importantly, the victim was able, in both her statement to the police and her oral evidence in court, to differentiate and give distinct details with regard to each of the two incidents.

22 The first incident occurred when the family was living at Gardenia Court. She was entering the master-bedroom and he was coming out of the toilet with a towel wrapped around his waist. She was told to lean and face the wall. After ABC had completed his mischief, he led the victim to the prayer room, compelling her to promise not to tell anyone of what he had done or otherwise something would happen to her grandparents. The second incident occurred when the family had shifted to Yishun Central. It happened when she was going into the kitchen to get a cookie from a jar which was on the table top. As she was standing on a chair to reach the jar, ABC came into the kitchen and held her hips from behind. He was interrupted by the victim's half-sister coming into the kitchen. He then pulled the victim to the guest room where the despicable act was carried out. ABC stopped his mischief upon hearing the horn of the lorry belonging to his sister's husband, indicating that the victim's mother had returned from her outing.

23 It would be noted that the two incidents occurred at different locations and how it occurred in each instance was also different. The victim was also able to describe how each incident came to an end. Bearing all these in mind we were, with respect to the trial judge, unable to see how there could conceivably be an overlapping of events in the mind of the victim. The trial judge did not give any reasons why he thought there could be "an innocent overlapping of events in the mind of the victim." There was nothing in the answers given by the victim in court which warranted that thought. With respect, he drew the inference of a possible confusion in the mind of the victim without any basis.

Second ground

24 The second factor which seemed to have affected the conclusion of the trial judge on the fourth charge was that, unlike the fifth charge, there was no confirmatory evidence from a third party.

25 As the trial judge had noted, in rape and other sexual offences, the rule that there should be corroboration is one of prudence and practice rather than of law. Moreover, where the offence involved children, further caution must be exercised with regard to their evidence. But again, this is also a rule of prudence and practice. As stated by Lord Goddard in *Mohamed Sugal Esa Mamasan Rer Alalah v The King* (1946) AIR PC 3 at 6 –

It is a sound rule in practice not to act on the uncorroborative evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law.

26 Some of the reasons for treating children's evidence with further caution was alluded to by Thomson CJ in *Chao Chong & Ors v PP* [1960] MLJ 238 as follows:-

It is a matter of common knowledge that children at times find it difficult to distinguish between reality and fantasy. They find it difficult after a lapse of time to distinguish between the results of observation and the results of imagination.

27 There was no doubt that the trial judge had, in accordance with prudence and practice, approached the evidence of the victim with caution, indeed in his words, with "utmost caution". As for her evidence relating to the three rape charges, he found her testimony "cogent, compelling and convincing" and had an "impression of truth". As for the fifth charge, the trial judge found the narration of the victim had a "convincing ring of authenticity", relying also on the fact that she had told her mother the next day about the "exercise" which ABC had with her.

28 In relation to the other charges, the trial judge found the victim to be a reliable witness. But he did not allude to any fact which gave him grounds to suspect the victim's narration of the events relating to the fourth charge. Neither did he identify any circumstances which led him to think that what the victim said was inaccurate or could not be true. The incident forming the fourth charge was even more recent than that of the fifth. If what she stated on the fifth charge was true and accurate, then, unless there were grounds for the trial judge to think otherwise, and he did not indicate any, her recall of a more recent event should have been better or at least the same.

29 We would, moreover, point out that even on the fifth charge the victim did not directly complain to the mother of what ABC did to her. It arose because she was concerned about ABC's backache and the need for hospitalisation. She mentioned to her mother about the "exercise" which ABC had with her and wondered whether she had, in any way, contributed to ABC's backache. She did not intend to tell her mother everything for fear of what would befall her grandparents. This explained why she did not, at any time, mention to her mother about the second "exercise" which took place in 1996.

30 With due respect to the trial judge, it was our opinion that he erred in thinking that the victim had confused the second "exercise" in 1996 with that of 1995. As mentioned before, he failed to point to any fact or circumstance which suggested that there could have been a confusion in the mind of the victim. The two events were so separate, and the accounts given by the victim so distinct, that we were unable to see how it could be said that the victim could have been confused. All that ABC raised in defence was that the incident never happened. Accordingly, we held that the trial judge's finding that the prosecution had failed to prove the fourth charge beyond a reasonable doubt was against the weight of the evidence and clearly wrong.

31 For this conviction, we imposed a penalty of two years' imprisonment and two strokes of the cane. We ordered that the prison term be served concurrently with the prison term already imposed by the court below in respect of the other charges on which he was convicted. With regard to the caning,

as the court below had also imposed in respect of the other charges the maximum of 24 strokes permissible by law, there would be no increase in the overall number of strokes which ABC would be receiving.

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