Goh Han Heng v Public Prosecutor
[2003] SGHC 226

Case Number : MA 73/2003

Decision Date : 30 September 2003

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : S Radakrishnan and Adelia Maler James (Arthur Loke Bernard Rada & Lee) for appellant; James E Lee (Deputy Public Prosecutor) for respondent

Parties : Goh Han Heng — Public Prosecutor

Criminal Procedure and Sentencing – Appeal – Finding of fact by trial judge – Challenge to reliability and veracity of witnesses' testimony – Approach to be adopted by appellate court

Evidence – Proof of evidence – Onus of proof – Defence alleging that complainant had motive to falsely implicate accused – When burden of proof to show lack of such motive shifts to Prosecution

Evidence – Witnesses – Corroboration – Post-incident distress – Approach to be adopted by courts – Exceptions to general approach

Evidence – Witnesses – Corroboration – Sexual offence – Approach to be adopted by the courts – Examination of substance and relevance of evidence – Whether necessary for judge to expressly warn himself of danger of convicting on uncorroborated evidence of complainant

1 The appellant was convicted of one charge under s 354 of the Penal Code (Cap 224) and was sentenced to a term of imprisonment of four months. He appealed against his conviction only. I dismissed his appeal against conviction and I now give my reasons.

Background

2 The appellant was a 41 year-old man who claimed trial to the following charge:

> That you, on the 6th day of August 2002 at or about 7.25 pm, inside basement 1 male toilet of Ngee Ann City, Singapore, did use criminal force on one Ashley Sham Bin Haroon, male 22 years old, intending or knowing it to be likely to outrage his modesty, to wit, by squeezing his genital and you have therefore committed an offence punishable under section 354 of the Penal Code, Chapter 224.

3 His defence at the trial below was a complete denial that the entire incident had occurred, save that they were both in the toilet at the same time. Hence, the issue that arose for consideration at the trial below and at this appeal was whether the actus reus of the offence had occurred as the existence of the mens rea was not in dispute if the incident had occurred.

Testimony of the victim, Ashley

4 The victim, Ashley Sham Bin Haroon ("Ashley"), was a police national serviceman who had just completed his full time service and was waiting to start his training with CISCO. On 6 August 2002, at about 7 pm, he was walking around Ngee Ann City with his girlfriend, Nordalifah Binte Mohd Shahril ("Nordalifah").

5 Ashley had to ease himself and he went to a toilet in Basement 1 of Ngee Ann City. He was standing at the urinal (in the middle of the row of urinals) when the appellant entered the toilet. There was no one else at the row of urinals then. The appellant went to the urinal just to the left of

Ashley. Ashley sensed that the appellant was looking at him. He turned to his left and saw the appellant looking at his face. The appellant then smiled at Ashley, looked down at Ashley's genital area and looked at Ashley again. Ashley looked away.

6 After Ashley had finished easing himself, he zipped up and began to proceed to the wash basin area on his left. However, before he could move off, the appellant reached out his right hand and cupped Ashley's private parts and squeezed them. Ashley was shocked and confused. He mechanically moved to the wash basin area and washed his hands.

7 While Ashley was washing his hands, he looked into the wash basin mirror and saw that the appellant was still using the urinal. The appellant then looked at Ashley and smiled. Ashley looked away and continued to wash his hands. The appellant came to the wash basin area and used the wash basin to Ashley's right.

8 Ashley was still washing his hands when the appellant leaned towards him and stretched his hand out. At that moment, a male Chinese entered the toilet and the appellant withdrew his hand. Ashley then took out his police national service identity card and showed it to the appellant. The appellant looked at it and apologised to Ashley.

9 Ashley then asked for the appellant's identity card and questioned the appellant as to how long he had been doing "this". The appellant did not reply. Ashley further asked how long the appellant had been coming here to "do this" and the appellant said that he came here once or twice a month.

10 The appellant then handed over his identity card and Ashley asked him to follow him outside the toilet. Ashley further questioned the appellant. Outside the toilet, Ashley used his handphone to try and call his ex-police supervisor but the line was engaged and Ashley could not get through.

11 Ashley then told Nordalifah, who was waiting for him, that the appellant had molested him. Nordalifah confronted the appellant who started apologising to her. A short while later, a Ngee Ann City security guard, Eunos Bin Ikhwan ("Eunos"), walked out of the toilet and Nordalifah called out to him and told him about the incident. Eunos asked them to follow him to the security room where he called the police.

Evidence of prosecution witness, Nordalifah

12 Nordalifah testified that she was waiting for Ashley outside the toilet and she was using her handphone as Ashley came out with the appellant. She noticed that they were talking at one side and only went over after she had finished her call.

13 Ashley told her that the appellant had molested him. She was shocked and asked the appellant what had happened. The appellant replied: "Nothing, I am sorry." She further questioned him as to why Ashley had then taken his identity card and the appellant just kept on replying: "I am sorry, I am sorry." Eunos then walked by and she informed him that Ashley had been molested and they followed Eunos back to the security room.

The appellant's testimony

14 At the trial below, the appellant chose to give evidence. His version of events was that, on the fateful day, he had gone to Ngee Ann City to procure some goods. He admitted going to the toilet at Basement 1 to ease himself. He had entered the toilet and wanted to use the first urinal.

However, there was a pool of water underneath that urinal so he used the urinal next to it, which happened to be to the left of the urinal that Ashley was at.

15 He denied touching Ashley. After he had finished easing himself, he had walked to the wash basins and Ashley was still there washing his hands. Ashley had smiled at him and he had smiled back. Ashley had then taken out his wallet and the appellant thought that Ashley had recognised him from some event project that he had organised and had wanted to exchange name cards. The appellant thus took out his wallet and got ready to exchange name cards. I would note that all this had supposedly occurred in silence.

16 Ashley had then showed the appellant his police national service identity card and asked for his identity card. The appellant thought that it was a spot check and readily complied. Ashley had then questioned the appellant. The appellant thought that he was being suspected of touting and replied accordingly. Ashley had then asked the appellant to follow him out of the toilet before using his handphone to make a call. A moment later, Ashley told the appellant that he was very lucky that the phone line was engaged.

17 Outside the toilet, Ashley then spoke to Nordalifah who further questioned the appellant. The appellant had then replied that he did not know what had happened and told her to ask Ashley. At that point, a security guard, Eunos walked out of the toilet and Nordalifah stopped him and told Eunos about the molest incident. The appellant said that he was completely stunned at being accused of molesting Ashley and he nearly experienced a blackout and squatted down. He had then followed them to the security office where the police was called.

18 The appellant further testified (and this was not challenged by the prosecution) that he had subsequently, on 14 August 2002, tendered a letter to the investigating officer. This letter was hand-written in English by Ricky Soh, a friend of the appellant, under dictation by the appellant in Mandarin as the appellant's English was poor. The letter contained an account of the entire incident based on the appellant's story and was written in an attempt to persuade the investigating officer to ask from the management of Ngee Ann City for a video tape from a closed circuit television camera located outside the toilet. This letter was then transcribed into a police statement by the investigating officer. The statement was read and translated into Hokkien by the investigating officer to the appellant. The appellant had signed on each page of the statement. The statement included the following exchange ('MM' refers to Malay male, i.e. Ashley, while 'I' refers to the appellant): -

> MM: You very lucky. The phone cannot get through.
>
> I : **Sorry, give me a chance. I will never come again**. (I hope to finish off there and rush to collect orders and meeting).
>
> MM: Then you go to other toilets.
>
> I: Both of us remain silent for a few moments.
>
> [Emphasis added]

Decision of the Court below

19 The trial judge found that Ashley was a "truthful and credible witness, and his evidence consistent and coherent." He found that Ashley's "credit remained unshaken and his account of what happened in the toilet was clear and cogent" despite being subjected to "intense cross examination

by the learned defence counsel." The trial judge further found that Ashley's testimony was corroborated by Nordalifah's testimony as well as Eunos' testimony.

20 In comparison, the trial judge found that the appellant "was not a credible witness and [the trial judge] further found his testimony to be unbelievable." The trial judge noted that the appellant was "either evasive or unconvincing" on cross examination. The trial judge further noted that the appellant's testimony, especially his denial of ever apologising to Ashley, was contradicted not only by Ashley's and Nordalifah's testimony but most importantly by his own statement (as highlighted above) which he had tendered to the investigating officer.

21 As such, the trial judge found that the prosecution had proved its case beyond a reasonable doubt and convicted the appellant. The trial judge then noted that the benchmark sentence for this type of offence was a term of imprisonment of nine months and caning, but he sentenced the appellant to a term of imprisonment of four months after giving the appellant full credit for his years of voluntary contributions to the community as a grassroots leader.

The appeal

22 In this case, Ashley's evidence was the most important as it established the actus reus of the offence and debunked the appellant's defence that Ashley had framed him. Not surprisingly, counsel for the appellant devoted a substantial portion of his arguments towards challenging the reliability and veracity of Ashley's evidence and establishing the creditworthiness and consistency of the appellant's evidence. In such a scenario, the burden falling upon the appellant's shoulders is a heavy one. This is trite law and for authority, it will suffice for me to refer to my earlier decision in *Public Prosecutor v Azman bin Abdullah* [1998] 2 SLR 704 where I stated that:

> It is well-settled law that in any appeal against a finding of fact, an appellate court will generally defer to the conclusion of the trial judge who has had the opportunity to see and assess the credibility of the witnesses. **An appellate court, if it wishes to reverse the trial judge`s decision, must not merely entertain doubts whether the decision is right but must be convinced that it is wrong**.
>
> [emphasis added]

23 Having examined the evidence for myself, I was of the view that the trial judge's findings were neither against the weight of the evidence nor plainly wrong. In particular, I could not agree with counsel for the appellant when he contended that the layout of the urinal rendered Ashley's account of the incident "highly improbable". This was a simple case of outrage of modesty. Having examined the photographs of the toilet for myself, I could not see how it can be said that the incident was "highly improbable." Furthermore, I agreed with the trial judge that the appellant's story, especially his account of how he had thought that Ashley was going to exchange name cards with him without a word being said on either side, was "totally absurd".

Corroboration and Motive

24 There are only two further arguments that I wish to address. First, counsel for the appellant had argued that the trial judge erred in holding that Ashley's testimony had been corroborated by Nordalifah's testimony. He argued that this was not corroboration by independent evidence and relied upon the following passage from my judgment in *Khoo Kwoon Hain v Public Prosecutor* [1995] 2 SLR 767 that: -

> Hence, a previous complaint goes beyond the question of consistency and is admissible evidence. In

> my view, although s 159 has the effect of elevating a recent complaint to corroboration, the court should nevertheless bear in mind the fact that corroboration by virtue of s159 alone is not corroboration by independent evidence. It would be dangerous to equate this form of corroboration with corroboration in the normal sense of the word. I can see no reason why a s159 corroboration of a complainant`s testimony should necessarily carry more weight than a s159 corroboration of the accused`s denial. Both appear to me to be equally self-serving.

25 I am aware that there is no class of offences in which fabrication is so easy and refutation so difficult as in the arena of sexual offences as all that the court has before it are very often the word of the victim against the denials of the accused. It was against this backdrop that I had previously stated that while there was no legal requirement for a judge to warn himself expressly of the danger of convicting on the uncorroborated evidence of a complainant in a sexual offence case, it would be dangerous for him to convict on the words of the complainant alone unless the testimony is unusually compelling or convincing: *Kwan Peng Hong v Public Prosecutor* [2000] 4 SLR 96 at 104; *Tang Kin Seng v Public Prosecutor* [1997] 1 SLR 46 at 58, *Teo Keng Pong v Public Prosecutor* [1996] 3 SLR 329 at 340 and *Soh Yang Tick v Public Prosecutor* [1998] 2 SLR 42 at 50.

26 Furthermore, in dealing with corroborative evidence, the approach that our Courts have adopted is a flexible and commonsensical one. We do not wish to be bogged down by mere technicalities especially where these technicalities do not have any bearing on the case at hand. To us, what is important is the substance and the relevance of the evidence especially in relation to corroborating any aspect of the victim's testimony that is not so compelling or convincing. A vital quality of corroborative evidence is its independence since it is this quality of independence that lends the evidence its probative weight: *Kwan Peng Hong*.

27 In view of the authorities cited, I could not agree with counsel for the appellant. First, I noted that the trial judge had analysed Ashley's evidence with great care. He had found that Ashley was a credible witness and his account was clear and cogent. There was no reason for him not to believe Ashley's testimony. That alone would have been sufficient for the trial judge to convict the appellant especially since he had disbelieved the appellant's entire defence. As such, there was no need in the present case for the trial judge to rely on corroborative evidence as the prosecution's case was already proved beyond reasonable doubt. In other words, even if the trial judge had wrongfully relied on Nordalifah's evidence as corroborative evidence, the appellant's conviction would not have been rendered unsafe.

28 Secondly, the passage cited from *Khoo Kwoon Hain* does not assist the appellant. In that case, the accused had been charged with two counts of aggravated outrage of modesty. He had allegedly hugged the victim while touching her breasts, body and buttocks. The next day, the victim told her sister that she had been molested. Her sister had then brought her to the police station to lodge a police report. The corroborative evidence relied upon by the trial judge there was the victim's sister's testimony and the police report. It was clear that such evidence, while technically corroborative evidence under s 159 Evidence Act, was little more than the retelling of the victim's story by different persons and therefore was of little evidential value.

29 In contrast, the corroborative evidence in the present case consisted mainly of Nordalifah's account of how the appellant had responded to her questioning. It cannot be said that this testimony had originated from the victim. As such, I was of the opinion that the trial judge was correct in holding that Nordalifah's testimony constituted corroboration by independent evidence.

30 At this juncture, I find it necessary to add that I had disagreed with one aspect of the trial judge's decision: where he had stated that Nordalifah's testimony as to Ashley's adverse reaction

outside the toilet had corroborated Ashley's testimony. In dealing with evidence of such post-incident distress, our courts must adopt a guarded approach before treating it as corroborative evidence. After all, such distress can arise from other causes disassociated with the alleged offence or can be an act: *R v Wilson* (1979) 58 Cr App R 304. Hence, such evidence would often amount to nothing more than evidence of consistency and its importance is probably felt more in its absence than its presence. The position may of course be different where the victim did not know that he was being observed: *R v Redpath* [1962] 46 Cr App R 319. However, given my earlier comments at ¶27 - ¶29, I did not find that this error rendered the appellant's conviction unsafe.

31 I would also mention that I was aware that Nordalifah was Ashley's girlfriend and of the fact that her testimony may have been coloured as a result. This does not, however, mean that the Court cannot rely on her evidence. Rather the weight to be accorded to her evidence would depend on the degree to which the witness is interested and the significance of her evidence. In this respect, I would note that the trial judge had found "Nordalifah to be a truthful witness, who was candid in her testimony." Thus I saw no reason to reject the trial judge's appraisal of her credibility and accorded her testimony full weight.

32 The second argument raised by counsel for the appellant was that the prosecution had failed to discharge their burden of proof of showing a lack of motive on the part of the victim to falsely implicate the appellant. He cited me the following passage from my judgement in *Khoo Kwoon Hain:*

> **The burden of proving a lack of motive to falsely implicate the appellant is on the prosecution**. Even though the prosecution was making a negative assertion, the burden of proof is still on it. It is not for the defendant to prove that the complainant had some reason to falsely accuse him. This is a fact that would be wholly within the complainant`s knowledge and nobody else`s. The defence therefore cannot be expected to prove this. It would be a circular argument to believe the complainant when [he] said that [he] had no reason to falsely accuse the appellant, and then say from that that the complainant is believed because [he] had no reason to falsely accuse the appellant. It is precisely because there can well be reasons why a complainant would make false allegations against an accused that it is often unsafe to convict in cases of sexual offences where there is no independent evidence to corroborate the complainant`s allegations. [emphasis added]

33 I disagreed with counsel. All that the passage means is that where the accused can show that the complainant has a motive to falsely implicate him, then the burden must fall on the prosecution to disprove that motive. This does not mean that the accused merely needs to allege that the complainant has a motive to falsely implicate him. Instead, the accused must adduce sufficient evidence of this motive so as to raise a reasonable doubt in the prosecution's case. Only then would the burden of proof shift to the prosecution to prove that there was no such motive. To hold otherwise would mean that the prosecution would have the burden of proving a lack of motive to falsely implicate the accused in literally every case, thereby practically instilling a lack of such a motive as a constituent element of every offence.

34 Furthermore, in deciding whether the accused has raised a reasonable doubt, it is necessary to juxtapose the motive to falsely implicate the accused against the circumstances of the alleged offence. In this case, counsel for the appellant would have had me believe, based solely on the appellant's testimony, that Ashley had been offended by the appellant smiling and looking at Ashley's genitals. Being homophobic, Ashley had then decided to concoct the story of the appellant grabbing and squeezing his private parts. I could not find any merit whatsoever in this entire argument. I was incredulous that a young man would choose to take upon himself, on the basis of a minor staring incident, the embarrassment of admitting to his girlfriend, security guards and the police that he had been molested as well as the trouble of being interviewed by the police and testifying in court, simply

to falsely implicate a man whom he had never met before. I had no hesitation in dismissing this entire argument.

Conclusion

35 After considering the various issues involved, I found that there were no grounds whatsoever for allowing the appeal. As such, I dismissed the appeal against conviction.

Appeal dismissed.