EDEE SOFINEE BIN OMAR

AND

PUBLIC PROSECUTOR

Court of Appeal of Brunei Darussalam
(Criminal Motion No. 1 of 2021)

Before: Burrell P, Seagroatt and Lunn JJ A.
Date of Hearing: 2nd November 2022
Date of Judgment: 19th November 2022

Headnote: Appeals against convictions and sentence dismissed on offences of outraging the modesty of the appellant's young daughters. Sentence of 13 years and 7 strokes upheld.

Appellant in person
DPP Nurul Fitri binti Kiprawi for Respondent

Burrell, P.:

This is an appeal against convictions on 9 charges and against sentence. The first 3 charges are of assault contrary to s.28 (1) of the Children and Young Person Act CAP 219. The victims of the assaults were the appellant's 2 daughters (Miss X and Miss Y) who were 11 and 13 at the time, in 2018.

The assaults alleged were slapping on the face either by himself or on his instruction to another person to do so. Charges 4-9 are contrary to s.354B of the Penal Code CAP 22 and concern very serious allegations of sexual assaults on the same two young girls between November 2018 and August 2019, when they were 13 and 14 years old. Further details of these allegation appear later in this judgment.

<u>The trial</u>

The trial commenced in the Intermediate Court on 16th December 2019 before Judge Pg Masni binti Pg Hj Bahar. It continued on divers days thereafter. The evidence concluded on 22nd April 2020. Submissions followed and judgment was delivered on 19th September 2020. All 9 charges were found to be proved beyond a reasonable doubt. The judge gave her written reasons in a lengthy and carefully considered decision.

The prosecution called 14 witnesses. Both daughters gave evidence and were referred to as PW1, Miss Y and PW10, Miss X. They were both cross-examined by the applicant. Other witnesses were from the girls' school staff, a consultant gynecologist, a medical officer and investigating officers from the police. The prosecution also produced

written statements made by the applicant under caution which largely contain denials but also some admissions of physical contact of a sexual nature. These were admitted into evidence after 'voire dire' proceedings. The prosecution invited the court to place due weight on the applicant's partial admissions.

The applicant elected to give evidence. In summary, his defence amounts to a submission that there was insufficient cogent evidence to support convictions and that his daughters had lied throughout and had fabricated their evidence. He called one witness, Dr Abang Bennett bin Abang Toha, a child psychiatrist who gave evidence about PW1's I.Q. He confirmed that she had "borderline intellectual ability" with a mental age of about 3 or 4 years less than her actual age.

It was his professional opinion that she could differentiate between reality and fantasy.

The allegations

The trial judge in her judgment recorded in commendable detail the evidence of each witness. It is throughout a fair and accurate record of what was said in court, it is unnecessary to repeat lengthy tracts of her summary in this judgment. Reference can be made to her judgment for greater detail; however herein we outline the allegations which were found proved. In short, the judge found both girls to be honest and accurate and rejected any possibility that they were fabricating or lying about what had been done to them.

Allegations concerning the younger daughter, Miss X, born in April 2006, are contained in charges 1, 5, 6 and 8. Charge 1 states that the applicant slapped her face and hit her body. In charge 5 it states that the applicant asked her to suck on his penis. In evidence she provided further evidence that the applicant ejaculated into her mouth on this occasion. In charge 6 that he rubbed his penis on her vagina whilst kissing her lips and in charge 8 that he asked her to rub his penis. These incidents were between January 2018 and August 2019. It was not part of the prosecution case that they were isolated incidents.

Against the elder daughter, Miss Y, born in November 2004, charge 2 states that the applicant instructed a young male, her elder brother, to slap Miss Y's face and in charge 3, three days later in April 2018 instructed the same boy to slap her again.

In November 2018, by charge 4, it is stated that the applicant inserted his fingers into his daughter's vagina. The same allegation is made in charge 7 which occurred in August 2019 and in charge 9 that he asked his daughter to rub his penis, also in August 2019. The evidence further revealed that in charge 8 and 9 the girls were instructed to take it in turn to rub his penis on the same occasion.

Notice of Appeal

The applicant was convicted on 19th September 2020 and sentenced on 21st October 2020. His Notice of Appeal is dated 5th January 2021 which is approximately 2 months late. The written particulars of his appeal against conviction is dated 25 August 2022.

We shall consider the merits of the appeal before turning, if necessary, to the reasons for the notice being out of time.

His written submissions, dated 25th August 2022 may be summarised as follows. In relation to the first 3 charges he says that no such incidents ever occurred. He observes that there are no photographs of any injuries.

On the occasion of the 4th charge he says he was working at the time of the alleged offence. Similarly with subsequent charges, he relies on the fact that he had a full time job at the fish market and was at work when the alleged offences occurred.

The respondent in its written submission refers to three grounds of appeal by the appellant, as follows.

1. That the trial judge erred in law and in fact in failing to consider the police statement of the applicant's mother.
2. That the trial judge failed to give proper weight to the inconsistencies in PW1 and PW10's evidence and finding PW1 and PW10 credible.
3. That the trial judge erred in rendering the applicant's police statement admissible.

In fact, there were more issues than those summarized above for the judge to consider. We turn now, briefly to consider how the judge dealt with the important matters of fact and law which arose in this case. We preface all the following by emphasing the crucial feature of this case. It ultimately turned on the question of the credibility of witnesses, particularly Miss X, Miss Y and the applicant. The judge had the advantage of seeing and hearing the witnesses. She concluded that there was no danger in accepting the girls' evidence and that the applicants bare denials were hollow and dishonest.

We can firstly deal briefly with the above three grounds in which we find there to be no merit.

1. Both the trial record and the written judgment clearly show that the appellant was afforded the opportunity of calling his mother as a witness but chose not to do so. She had made a written statement limited to the fact that the appellant was not at home because of his work on a regular basis. The trial proceeded without her evidence either written or oral. No criticism can be made of this.
2. Inconsistencies. The judge was clearly alive to the possibility of inconsistencies in a case such as this from the outset. At the commencement of her judgment she stated:

   "It is my duty to take into account of all the evidence given by the Prosecution witnesses and the cross-examination extended by the defendant. I have given consideration and proper weight before arriving at my conclusion. I take note of any inconsistencies in the evidence laid before me and contradictions between the testimonies of each and every witnesses.

Should there be any lingering doubt raised by the defence and or from the evidence given by the prosecution witnesses and that it is unsafe to convict, I should acquit the defendant accordingly."

And, towards the end of her judgment:-

"I reminded myself that both PW1 and PW10 are young person within the definition of young person by virtue of the Children and Young Persons Act (CYPA), CAP.

PW1 was 13 years old and PW10 was 11 years old when the alleged offences took place in 2018.

Having read their evidence, I am satisfied beyond reasonable doubt that the evidence given by PW1 and PW10 evidence was consistent and there is ample corroboration to support their evidence for me to find that PW1 and PW10 are credible witnesses."

It is of particular note that when assessing Miss Y's evidence the judge referred to the case of Halaftie bin Mamat v Public Prosecutor [2016] 5 SLR 636 quoting from it as follows:-

"In PP v Mohammed Liton Mohammed Syeed Mallik [2008] 1 SLR(R) 601 ("Liton") at [38], this court held that to be "unusually convincing", the witness's testimony must be "so convincing that the Prosecution's case was proven beyond reasonable doubt, solely on the basis of the evidence". Elaborating further at [39], the court held that a complainant's testimony would be unusually convincing if the testimony, "when weighed against the overall backdrop of the available facts and circumstances, contains that ring of truth which leaves the court satisfied that no reasonable doubt exists in favour of the accused."

Having decided the witness to be "unusually convincing" and noting the careful consideration of all the evidence which she saw and heard it would only be in exceptional and unusual circumstances for this court to interfere with such a finding.

The judge made a similar finding in relation to Miss X's evidence. Before concluding that she also was an unusually convincing witness she observed that:

"Bearing in mind that PW10 gave unsworn evidence and the requirement under section 133A and section 134 of the Evidence Act, I am satisfied that PW10 is a credible witnesses and there was ample corroboration to support her evidence in court. My findings are as follows:

Section 157 f the Evidence Act, Cap 108:

Prosecution adduced the statements given by PW10 which has been tendered and marked as P16 and P17. Prosecution relied on Section 157 of the Evidence Act to corroborate PW10's evidence in court.

Section 157 of the Evidence Act provides that:

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

Applying the law to the present case, PW10 gave the statements on the 14th of August 2019 (P16) and on the 20th of August 2019 (P17). Her statements were consistent with each other and were also contemporaneous as it was recorded without delay.

PW10 gave the same account of this incident when she gave her statement to the police in P17 question no 13 of P17. Her evidence to the police is consistent with the evidence she gave in court."

In this context the judge was also fully aware of, and referred to, the medical evidence, providing support for the girls' evidence. In relation to charges 4-9 concerning both girls she was able to, and did, rely on evidence in support from Dr Alice George Mathew who examined them on 19th August 2019 and made a written report the same day. The judge evaluated the findings in the report correctly, to which we briefly refer later in this judgment.

In a similar fashion she considered the evidence of Dr. Nurasiah binti Pg Omar in relation to the 1st charge and Dr Mirza Muhammad in relation to charges 2 and 3.

3. The appellant's police statements. Before admitting the appellant's written statements to the police the judge assessed their admissibility in "voire dire" proceedings. There are no complaints or criticism of the procedure adopted. The appellant maintains however that the judge erred in fact, when dismissing his explanation for the inculpatory parts of the statements. He accepts that he agreed his statements include admissions that he asked his daughters to scratch and rub his penis, but that he did so because he was in pain with a sore leg which had necessitated a hospital visit.

   The statements maybe categorised in law as "mixed" statements. They contain denials and admissions. The admissions relate to charges 8 and 9 which involve both daughters. The judge was entitled to rely on this evidence in support of the allegations. We find no error in her decision to rely on the written admissions. Placed in the context of the whole of the evidence we are satisfied that it was safe for her to do so and equally safe to reject his denials on the other matters put to him in the course of the interviews.

<u>Alibi defence</u>

In support of the appellant's defence that both his daughters had conspired to fabricate allegations of sexual abuse, he stated that he was always at work when these alleged offences occurred so that he could not be guilty of them.

The judge correctly set out the pre-trial requirements for calling alibi witnesses. These are designed primarily to give the prosecution an opportunity to test the veracity of the proposed evidence prior to trial.

As the appellant was unrepresented it is unsurprising that these requirements had not been complied with. Nevertheless, the judge gave the applicant every opportunity to call alibi evidence even though it was only raised in the course of the trial.

The transcript records that appellant understood that he would be allowed to call alibi evidence, namely fellow workers at the fish market, should he wish to do so.

Ultimately however he elected not to do so and relied solely on his own testimony in support of his alibi defence.

The judge rightly dismissed his alibi defence by, again placing it in context with the whole of the evidence, describing it as an "afterthought"

Medical evidence

Immediately after the allegations first came to light the school authorities commenced a careful investigation which included medical evidence. The judge has carefully set it out in full.

The findings by Dr. Alice Mathew, a consultant gynecologist included her statement that Miss Y's vagina had been repeatedly stretched. She did not accept the appellant's suggestions that this might have been as a result of "excessive washing" by Miss Y. Having considered all the evidence concerning the investigation and medical examinations the judge's conclusion that it provided independent support to, and was consistent with, the girls' testimony cannot be faulted. Her awareness and application of the law in this regard has already been to referred at page 5 of this judgment.

In conclusion, the judge made no errors of law in her judgment. Her findings of fact would only be interfered with by this court if they were either plainly wrong or against the weight of the evidence. She saw and heard all witnesses over many days of evidence including, most importantly, the girls' evidence in chief and their responses to the appellant's cross examination.

The application to appeal against all convictions out of time is dismissed.

Sentence

On 20th October 2020 Judge Masni sentenced the applicant to a total of 13 years imprisonment and 7 strokes, made up as follows:

For charges 1-3:	3 years imprisonment and 1 stroke on each charge.
For charges 5, 6 and 8 (Miss X):	5 years imprisonment and 3 strokes on each charge.
For charges 4, 7 and 9 (Miss Y):	5 years and 3 strokes on each charge.

There was no mitigation. He had pleaded not guilty thereby causing both girls to have to give evidence. All the allegations in charges 4 to 9 were particularly serious.

The degrading abuse maybe described as a traumatic experience for 2 vulnerable girls of tender years. The individual sentences are appropriate to reflect the seriousness of the offences. Having directed the three groups of offences to be served consecutively and the strokes cumulative we agree that the final sentence is neither manifestly excessive nor wrong in principle.

Having found there to be no merit in the appeals against either conviction or sentence we do not go on to consider why the notice of appeal was out of time.

All applications to appeal out of time are dismissed.

Burrell, P.

Seagroatt, J.A. **Lunn, J.A**