

KHAIRUL BIN HJ DAGANG

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Motion No. 27 of 2020)

Before: Steven Chong, C.J., Burrell and Seagroatt, JJA

Date of Hearing: 6th June, 2023.

Date of Judgment: 10th June, 2023.

*Criminal law – Rape contrary to section 376(3)(c) of the Penal Code – Conviction after trial -
Prior rape convictions - Sentence*

Appellant In Person.

DPP Nurul Fitri Binti Kiprawi for Respondent.

Steven Chong, C.J.:

On 31 August 2019 the appellant was convicted of an offence of rape contrary to section 376(3)(c) of the Penal Code after trial before Justice Pg Datin Paduka Hajah Rostaina Binti Pg Hj Duraman lasting 17 days. It commenced on 1 November 2018 and concluded on 31 August 2019 when she imposed a sentence of 25 years' imprisonment in respect of the substantive offence of rape, and added a consecutive sentence of six months' imprisonment under section 376(5), by reason of the appellant's exemption from whipping under section 258 of the Criminal Procedure Code being over 50 years of age.

The appellant appeals against conviction and sentence.

The nature/circumstances of the alleged offence

The appellant is 56 years of age. The victim is the grandniece of the appellant. She was 9 years of age at the time of the offence and 11 years when she gave evidence.

The offence was alleged to have taken place on the 8th October 2017. At that time she was staying in a house owned by her grandparents with a large number of her family members, including her mother, and the appellant.

In the evening in question she had cause to go to the appellant's bedroom upstairs. When she was at his door he pushed her onto a mattress, tied her hands behind her back, covered her mouth with a pillow, took off her clothing and raped her. He told her not to tell anyone, and if she did, he would do it again. She said she went downstairs and cried.

The following day she spoke to an aunt who asked why she was in pain when urinating. She said that the appellant had caused it. A report was made to the police on the 3rd November 2017.

The Prosecution case

The victim gave evidence via live television link and her video recorded interview on the 11th November 2017 was adduced. This contained her demonstration, by the use of anatomically correct dolls of what the defendant did to her. Her evidence as given, and the contents of the video recorded interview, were consistent.

Under sustained and somewhat repetitive cross-examination, she remained consistent. She was then 11 years old and denied any of the suggestions put to her. At one stage she appeared to misplace the month of the alleged offence but corrected herself later. This was not material or significant.

The judge was satisfied that she was of sufficient intelligence to give unsworn evidence and knew the duty of speaking the truth. She was satisfied that she was credible and truthful. On reading the transcript of her evidence we formed the same view and of course the Judge had the great advantage of seeing her and listening to her.

There was powerful supporting medical evidence from Dr Mitra Dhanaraj of the RIPAS Hospital, an experienced gynaecologist who examined the young girl on the 4th November 2017, being just over 5 weeks after the incident. Unsurprisingly there were no signs of fresh injuries. There was evidence however of a tear in her hymenal tissues on the left side – *“probably the injury was more than 2 weeks prior.”*

It was possible for the child to have *“some discomfort whilst passing urine”*. Although cross-examined by the appellant, her evidence remained unchallenged and the appellant's attempt to establish that the life of sperm could last 21 days was effectively dismissed by the doctor as being a mere 72 hours. The learned Judge dealt with the remaining evidence, much of it of a formal nature, in careful detail.

The Defence case

The appellant gave evidence on oath. He was not represented but from the transcript it is clear that he was well aware of procedure, and from past experience knew what matters to explore in such a case.

However, his defence was essentially an alibi claiming that he was living with his cousin on the evening in question. He did not call any witnesses to support this.

In an interview recorded on the 7th November 2017 he made a number of points which constituted an attempt by his family to incriminate him.

"My family do not like me because we have a problem about property inheritance of both parents."

"[They] incited the girl to accuse of raping [her]."

"They are also drug addicts-syabu."

"Nurul told me...her private parts were shoved by Angkal Asnan" (suggesting another member of the family had raped her).

"Nurul also said Asnan gave her money."

"On the day of the incident 8th October 2017 at 8.00 p.m., at that time I was at Kampong Mulaut....home of my first cousin."

His cross-examination of witnesses and his own evidence was geared to an accusation that the victim and others were part and parcel of a conspiracy to incriminate him and that if the victim had been sexually assaulted, it was by Angkal Asnan.

The Judge had little difficulty in rejecting the appellant's evidence as not creditworthy. She pointed out that it was not until the 17th November 2017 – ten days after his initial statement – that he raised the notion that she had been raped by another male family member. His concern with the absence of DNA evidence was dismissed, in accordance with the medical evidence, almost a month having passed since the alleged offence by the time an investigation in this regard could be carried out. The appellant had been somewhat obsessed with this topic, no doubt by reason of his experience of previous offences of rape of which he had been convicted.

He had said, in the course of his cross-examination of the first police officer:

"I want the DNA report of the sample on the victim's body. I need it because I need to know if my DNA is present on the victim's body."

No such sample could be taken. It was never part of the prosecution case to adduce DNA evidence. If there was no sexual contact between him and the girl, it is difficult to understand why he was so keen to “*know if [his] DNA was on the victim’s body.*”

The Judge correctly and fully directed herself on the necessary approach to the evidence of an allegedly sexually abused child. Her careful and detailed review and assessment of all the evidence led to her inevitable conclusion that the prosecution had proved its case beyond doubt.

There is no merit in this appeal against conviction. It is dismissed.

Sentence

The punishment for rape under section 376(3)(c) of the Penal Code is imprisonment for a term of not less than 15 years and not more than 30 years and whipping not less than 12 strokes.

A repeat offender is punishable with a term of imprisonment of not less than 20 years and not more than 50 years and whipping not less than 20 strokes.

The appellant is a repeat offender. In 1994 he was convicted of two rape offences involving a girl aged 14 and a woman aged 25. He was sentenced to 16 years’ imprisonment and 20 strokes (ICCT No. 30 of 1994).

In 2009, within months of his release from prison after serving that sentence, the appellant was charged and convicted of the rape of a woman aged 18 at knifepoint. He was sentenced to 14 years’ imprisonment and 14 strokes (HCCT No. 4 of 2008).

The appellant’s history of sex crimes goes as far back as 1985 when he was convicted of outraging the modesty of a woman contrary to section 354 of the Penal Code.

There is no basis for suggesting the sentence of 25 years 6 months’ imprisonment is excessive. Indeed, we think it is unduly lenient. The appellant was convicted after a trial in which the victim was subjected to persistent cross-examination on various aspects of the circumstances she had to endure. There are three serious aggravating factors present. First, the young age of the victim. She was only 9 years old. Second, the rape occurred at home where the victim should have been safe. Third, the appellant has three previous rape convictions.

This sex offender is an obvious threat to women across age range. We think the sentence of the court below is inadequate to protect women from the appellant. We therefore increase the sentence to 30 years’ imprisonment.

Steven Chong, C.J.

Burrell, J.A.

Seagroatt, J.A.