MOHAMMAD AMIROL BIN HAJI ABDUL RAZAK

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 12 of 2016)

Before: Mortimer P, Leonard and Burrell JJ A.
17th November 2016

Headnote: Conviction under section 376(2) Penal Code (rape of 13 year old girl without her consent) CAP 22 upheld. Sentence of 15 years imprisonment and 12 strokes upheld. Breach of trust case in which appellant was a 30 year old serving soldier in a position of authority.

Mr. Hj Muhammad Zainidi bin Hj Abd Hamid (Messrs. Hale Zainidi Ong Advocates and Solicitors) for Appellant
DPP Sharon Yeo Mian Yie for Respondent

Burrell, JA.:

On 21st April 2016 the appellant was sentenced by Steven Chong J to 15 years imprisonment and 12 strokes having been convicted after trial of an offence punishable under s.376(2) of the Penal Code CAP 22, namely rape of a girl under 14 years old without her consent. The imposition of 12 strokes was a mandatory punishment for this offence.

The trial had commenced on 3rd March 2015. The evidence concluded on 15th March 2016, one year later. The evidence was actually heard over approximately 24 days mainly between October 2015 and February 2016. The total time taken to hear the trial is a ground of appeal to which we shall return later.

The Prosecution case

In his reasons for verdict the judge gave a detailed summary of the prosecution's case against the appellant. We shall summarise it further.

On 25th August 2014, the victim, Miss X, was 13 years old. She was the sixth of ten children living with their parents in a flat in Tutong Camp.

At 2.00a.m on 25th August 2014 the appellant, who was a member of the Regimental Police at Tutong Camp went to Miss X's flat. At the time she was awake watching television with some of her siblings. The appellant said he was looking for a gay youth known as Ijual who was the boyfriend of one of Miss X's brothers. He was told that Ijual was not in the flat. He then said he was required to take one of Miss X's sisters, Anisa to the camp in connection with a recent theft case. There followed some discussion between the appellant and the parents, who had by this time been awoken, as to who should accompany the appellant

should he be permitted to take Anisa to the camp. It was decided, perhaps surprisingly, that he should take Anisa, aged 12 and Miss X aged 13 with him into the camp at about 2.15a.m.

Thereafter, according to the evidence of the two young girls the suggestion that the reason for going into the camp in connection with either a search for Ijual or in connection with a recent theft case was a mere ruse.

Once inside the camp the appellant took Miss X into a toilet building whilst Anisa was told to wait in the car. In his judgment the Judge recited the crucial part of her evidence as follows:-

> "*....he (the defendant) requested me to stand near the sink and he seated himself and (took) off my t-shirt and he (pulled) down his pants and asked me to suck his private part but I refused then he forced me and then he carried me and (laid) me on the floor and there he took off my (panties) and inserted his private part into my private part. I (tried) to avoid him and pushed him but since I was afraid that he (would) hit me, I just let him do that sexual act. At that time I (felt) pain (on) my private part and was uncomfortable and I just (cried).*"

She also said that he ejaculated not inside her or on her, but onto the toilet floor which he washed before they both left together. According to both girls he and Miss X were inside the toilet for about 20 minutes. In cross examination she re-iterated this account and confirmed that she saw him clean the floor after he ejaculated and that her private parts felt wet.

In short, her evidence, if unchallenged, constitutes an allegation of the appellant having sexual intercourse with her, without her consent, when she was 13 years old.

The salient features of the prosecution case concerning the events which followed the sexual intercourse can be summarised as follows.

The appellant drove the girls back to their flat. He gave Miss X $5 and told her not to tell anyone what had happened. In fact, after a short while she did tell her parents what had happened and gave the $5 to her father. Miss X, her parents and another elder sister then went to the guard room of the camp to lodge a complaint and a report and thereafter to the RIPAS Hospital where she was examined and the police were called.

The car which the appellant had used to go to Miss X's home and take her and Anisa into the camp belonged to a fellow guard, SLD Hazlizam. They had been on guard duty together at 2.00a.m when the appellant asked if he could borrow his car during their rest period. SLD Hazlizam agreed, the appellant drove off in the car and returned a little over an hour later.

The appellant's written statements

The appellant made 3 statements at 11.45p.m, 25th August, 10.00a.m 26th August and 9.52a.m 27th August. The first was written by himself, the second is recorded in question and answer form. The third was a statement pursuant to s.117(3) of the Criminal Procedure Code which states "Yes, I admit it to be wrong but I did not force the victim during the incident and it was consensual." This statement was consistent with his earlier statements in which he admitted that he had had sexual intercourse with Miss X in the toilet but had not ejaculated and that it had been with her consent.

At trial the admissibility of the statements had been challenged on the basis that they had not been made voluntarily. Having heard evidence on the issue of voluntariness the judge determined that they were admissible. In short, the written statements constitute a confession to an offence of rape punishable under s.376(1), due to the victim's age but contends that it was with her consent.

Medical evidence

The relevant medical evidence revealed that Miss X had been sexually active before this incident. She admitted that she and a cousin had had sexual intercourse 3 or 4 times, the first time being when she was 10 years old and the most recent about 6 months before this incident. Swabs taken from Miss X's vagina were negative for spermatozoa and prostate specific antigen. Neither was there any DNA evidence linking the appellant and Miss X. In other words the medical evidence was inconclusive.

Additionally, there were no signs of any injuries to her body consistent with force being used at the time of intercourse.

The appellant's evidence

The appellant's explanation for going to Miss X's flat at 2.00a.m. was that he had seen Ijual enter the camp by car and drive towards where Miss X lived. As Ijual was a person who had been banned from entering the camp he went to Miss X's flat to investigate. Ijual was not there so he asked Miss X's father if he could take Anisa with him to look for Ijual. He also asked for someone to accompany Anisa. Miss X was the sibling selected to accompany Anisa.

In passing, it should be noted that when Miss X's mother gave evidence she said that Miss X was reluctant to go with the appellant because he was "cheeky" and minutes earlier, in the absence of the parents, had "groped" her. Albeit reluctantly the parents allowed Anisa and Miss X to be taken by the appellant in the borrowed car.

The search for Ijual was unsuccessful and the appellant said he was about to drive the girl back to the flat when Miss X said she wanted to use the toilet. Instead of driving back to the flat he did a u-turn back to the "Corporal Club" where there was a toilet which Miss X used. He also used the toilet, then they all drove the short distance back to her residence.

The appellant denied that he had given Miss X $5. He denied that he had 'groped' Miss X when at the flat. When asked why a false allegation of rape had been made against him he said it could have been 'revenge' for the fact that the family had been investigated by the regimental police on three previous occasions for theft and drug related matters.

When cross examined he accepted that the correct procedure, when a banned person is seen entering the camp, is to notify a senior officer. It was not correct for him to leave the guard room without permission, even during a rest period. He disagreed that Miss X's parents were reluctant to allow him to take their 12 and 13 years old daughters out in his car at 2.00a.m. When asked why he did not simply take Miss X back to her flat when she said she wanted to go to the toilet he answered that it was she who pointed to the Corporal Club as a place to use a toilet, as they drove past it.

Grounds of Appeal

The appellant, through his solicitors, filed a notice of appeal dated 10th May 2016. The perfected grounds of appeal are dated 8th October 2016. There are six grounds. In outline they are that:

i. The judge was wrong to accept the evidence of L/CPL Aliuddin, a friend and colleague of the appellant's, that the appellant had verbally admitted to him that he had had consensual sexual intercourse with Miss X because the L/CPL was involved in the investigation and there was therefore a "conflict of interest."
ii. Having admitted the appellant's written statements admitting consensual sexual intercourse the judge was wrong to disbelieve the contents and find him guilty of non-consensual sexual intercourse.
iii. In the absence of any medical evidence and DNA evidence the judge was wrong to rely solely on Miss X's evidence
iv. The judge should have drawn inferences adverse to the prosecution arising out of their failure to call Miss X's father as a witness.
v. The judge failed to attach sufficient weight to the appellant's explanation for visiting Miss X's flat in the early hours of the morning.
vi. The hearing of the evidence spanned several months which "would have made it impossible for the learned judge to recall the veracity of witness evidence..."

The appellant also appeals against his sentence of 15 years as being "excessive and unjust."

Taking each ground in turn.

1) <u>The role played by L/Cpl Aliuddin</u>

As we understand this ground, the thrust of the complaint is as follows. In the voir dire it was put to PW17 (L/Cpl Aliuddin) that firstly, the appellant had not made a verbal admission of rape to him prior to making the written statements, upon which the prosecution relied and, secondly, that PW17 had dishonestly said to the appellant that the prosecution had DNA evidence in support of their allegation, thereby inducing him to confess.

As PW17 was known to the appellant and a friend of his family, it is submitted that he was in a position of a "conflict of interest" and should have played no part, or no important part in the investigation. It is further submitted that, on the evidence, the role he did play was more than minor and accordingly no reliance should have been placed on his evidence relating to the verbal admission and the written statements should not have been admitted into evidence as it was made following an untrue inducement.

Mr. Zainidi, in both his written and oral submissions refers to a number of extracts in the notes of evidence in support of his contention that PW17's evidence was "tainted" and that the judge erred in both allowing him to give evidence and placing any reliance on it.

We consider there to be no substance in these submissions. Firstly, the nature of the relationship between PW17 and the appellant does not and could not render his evidence inadmissible. It is no more than a factor which may affect the weight to be attached to it and may cause a judge to treat it with an element of caution.

That said, his evidence gives rise to purely factual issues which, we are satisfied, the judge dealt with fairly and correctly.

Ms. Yeo, for the respondent, makes the point, with which we agree, that when considering the veracity of PW17's evidence the fact PW17 was a colleague of the appellant's could more likely weigh in the appellant's favour rather than to his disadvantage.

Mr. Zainidi's reply to this submission was that "bias is bias, it doesn't matter which way the bias goes". We do not agree with this proposition. In any event, the allegation of bias is not supported by the evidence and whether or not PW17's evidence was unreliable, for whatever reason, was a matter for the judge to assess.

It is also correct to state that, at trial, the issue of PW17's role being tainted only arose in the context of the voir dire proceedings. In the circumstances it is not surprising that the judge made no specific comment on the issue other than when he evaluated the evidence in the voir dire as follows:

> *'I evaluated the veracity and reliability of the evidence given by the defendant and the police witnesses concerned in the taking of the statements. I also considered the submissions made by the prosecution and defence. I disbelieve and rejected the allegation made by the defendant regarding the threats, promises, inducement and oppression. On the evidence of the police witnesses involved in the statements, which I accepted as truthful and reliable....'*

2) Evidential value of the appellant's written statements

It seems to be submitted on the appellant's behalf that the written statements, judged to have been made voluntarily, had no "probative value vis-à-vis the charge preferred against the appellant" and accordingly should not have been taken into account at all.

This is an unusual submission.

They plainly contained admissions which had "probative value vis-à-vis the charge preferred." The ingredients of the charge preferred were (i) the age of the girl (ii) that sexual intercourse took place and (iii) that the sexual intercourse was without the girl's consent. The written statements were a clear admission of ingredient (ii). The statements contained no admissions of lack of consent. Taken together they constituted a "mixed statement", party inculpatory and partly exculpatory. Inculpatory in that sexual intercourse was admitted but exculpatory in that lack of consent was not admitted.

As such the whole of the statements, both the admissions and non-admissions, are to be taken into consideration as evidence in deciding where the truth lies. Thus, in the present case the statements are compelling evidence that sexual intercourse took place but add no support to the contention that it was without the girl's consent.

To submit that the statements should not have been taken into account at all is wholly without merit.

On appeal Mr. Zainidi informed the court that no challenge would be made against the trial judge's ruling that the written statements were made voluntarily. Accordingly they were admitted into evidence as part of the evidence in the case as a whole. They clearly constituted an admission of sexual intercourse with Miss X, who was 13 at the time. The judge then had to decide if the admissions were true, again based on the whole of the evidence.

His evaluation of this part of the evidence cannot be faulted. Having decided that the written statements were voluntary and true in so far as sexual intercourse having taken place, the offence of rape, i.e. the offence charged, was proved. That is, rape by virtue of sexual intercourse with a girl aged 13 "with or without her consent." If with her consent it is punishable under s.376(1), if without her consent it is punishable under s.376(2).

The prosecution allegation was of the more serious type namely "without her consent". Had the judge been unsure of the evidence in relation to this separate issue he would have convicted and sentenced the appellant under s.376(1).

3) <u>The lack of medical and DNA evidence.</u>

In view of the judge's unassailable finding that sexual intercourse between the 13 year old girl and the appellant was proved the lack of medical evidence, in particular the lack of semen or P.S.A on the swabs taken from Miss X, the lack of any bruising or abrasions on Miss X's body and the lack of any DNA from the appellant, all fall to be considered in the context of the issue of consent or lack of it.

Both Miss X's evidence and the appellant's written statements state that the appellant did not ejaculate inside Miss X or on her body at all. This scenario is consistent with there being no semen or P.S.A on the vaginal swabs. With regards to the lack of DNA evidence it should be noted that only Miss X's undergarment was tested so again, in the circumstances it is perhaps not surprising that none of his DNA was found on her undergarment. In any event, we regard the judge's approach when he said "it is undesirable to speculate.." to be entirely correct.

Finally, no bruises or abrasions were found on Miss X's body when she was medically examined. We accept that had there been, particularly on her back as she said that her top garment was removed, it could have been evidence in support of lack of consent. Accordingly, the absence of any marks could be relied on as support for the opposite. However, the importance of the trial judge seeing and hearing the witnesses during a trial cannot be overstated. On this critical issue, this experienced judge said:

> *"I accept the evidence of Miss X that she did in the beginning try to resist the defendant by avoiding and pushing him but then submitted herself to him for fear of being hit by him. I find Miss X was overawed into submission and this explains the absence of physical injuries on her. It is important to remember that Miss X was only 13 at the time."*

4) <u>Failure to call Miss X's father, Alihasin, as a witness</u>

Mr. Zainidi refers to a number of occasions when Alihasin was mentioned by other witnesses. He submits that he should have been called which could have resulted in

further discrepancies in the evidence which might affect the credibility of witnesses on crucial issues. In particular, Miss X stated that the appellant gave her $5 and told her not to tell anyone what had happened. Miss X said she gave the $5 to her father. Mr. Zainidi submits he should have had the opportunity of cross-examining Alihasin on this and other matters.

Reliance is placed on s.114(g) of the Evidence Act which, relevantly, states:

> *"The court may presume –*
> *(g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it."*

It has been emphasised many times that this is a discretionary provision. The court "may" presume. It is an uphill task to persuade this court that the trial judge exercised his discretion not to make any presumption adverse to the prosecution erroneously. He saw "no reason to presume" any adverse inference. Moreover, s.114(g) uses the words "withholds" when referring to the evidence not called. It is arguable that this suggests a deliberate decision to "withhold" rather than a decision that the evidence actually called was sufficient, as in the present case.

5) Failure to attach sufficient weight to the appellant's explanation for taking Miss X and her sister into the camp

We find no grounds upon which to interfere with the judge's findings of fact on this crucial matter.

In his written judgment he made clear findings in relation to (i) the appellant's evidence in the vore dire proceedings (ii) his verbal admission of sexual intercourse (iii) his explanation for going to Miss X's residence, (iv) his conduct and conversations at Miss X's residence (v) his explanations why he, contrary to regulations, left the guard room at about 2.00a.m.(vi) the course of events inside the camp and (vii) his explanations as to why false a allegation of rape might be made against him.

The judge, having considered the whole of the evidence from both the prosecution and the defence disbelieved the appellant on all crucial issues. We cannot say that he was wrong to do so.

6) Delay

It is always a matter of concern when criminal trials are heard in a piecemeal fashion. Broadly speaking, in the present case the first half of the prosecution case was heard during October 2015 and the second half during December 2015. Rulings on the voire dire and a submission of no case to answer were delivered in early March 2016 and the appellant's case heard in mid March. Whilst it is obvious to say that it would have been preferable if the trial had been heard without adjournments and it is fair also to say that it would have been better if the adjournments had been shorter, we have had many cases of longer delays than this. We are satisfied that in the hands of a senior and experienced judge such delays that occurred did not adversely prejudice the appellant. He received a fair trial.

Conclusion

Having considered each ground of appeal individually it is now necessary to consider the whole matter in the round.

Given the judge's unassailable ruling on the voluntary nature of the appellant's written statements and given the judge's finding of fact that the contents of the statements were true , in so far as the act of intercourse is concerned, there can be no serious challenge to the fact that the appellant was, at least, guilty of rape by consensual sex with a 13 year old girl.

The final question is therefore a simple one. Did the judge err in concluding on the whole of the evidence, that the ingredient of lack of consent was also proved beyond a reasonable doubt?

We note the following extracts from his written judgment which are relevant to this issue.

> "*Recent complaints made by a rape victim can amount to corroboration by virtue of section 157 of the Evidence Act. However, common sense dictates that this form of corroboration cannot be equated with independent evidence as it is essentially self-serving.....*"
>
> "*The court may accept the evidence of a rape victim even without any corroboration if convinced she is telling the truth and her testimony is reliable. But it is crucial to examine the veracity and reliability of such uncorroborated evidence with great care before relying on it.....*"
>
> "*Having seen and heard Miss X testify, and evaluated her testimony and the evidence in totality (including from the defendant), I have no hesitation in accepting her as a credible witness and that her account of being raped by the defendant as stated in the charge is truthful and reliable in essential details....*"
>
> "*I have come to the conclusion on Miss X's credibility cognisant of the following factors: (1) she was only 13 at the time and therefore at an impressionable age; (2) she was a school dropout from a deprived family background; (3) she had sexual intercourse when she was only 10; and (4) her family members have a history of trouble with the law and the Regimental Police in Tutong Camp.....*"
>
> "*I acknowledge there are inconsistencies in the evidence of Miss X on several issues, for example, her previous experience of sexual intercourse. In my judgment the inconsistencies are not so serious as to affect the veracity and reliability of her evidence on the material issues and in particular that she was raped by the defendant in the manner she described...*"
>
> "*...Miss X's conduct shortly after the incident was consistent with that of a girl who had been raped. Accordingly to Rosni (Miss X's mother) and Anisa (Miss X's sister), when Miss X was questioned she cried and said the defendant had raped her.*"
>
> "*I disbelieved and reject the defendant's assertion in his verbal admission that he had consensual sexual intercourse with Miss X and his claim in his written statements that (1) Miss X "flirted" with him and touched his private part while he still had his trousers on; (2) Miss X did not perform oral sex on him; and (3) he had consensual sexual intercourse with Miss X. I find the defendant contrived this fictitious account of the events to persuade the police he did not rape Miss X and she had consented to sex.*"

The above is not a comprehensive list of the relevant extracts but they are sufficient to demonstrate that the judge took great care in coming to his conclusion that the sexual intercourse was not consensual which we are satisfied that he would not have done lightly and from which we find no reason to depart.

The appeal against conviction is dismissed.

Appeal against sentence

Under section 376(2) even if a man pleads guilty to this offence a sentence of 8 years must be passed together with 12 strokes. It follows that, after a trial in which a young victim is required to give evidence, a sentence of 12 years would be at the lowest end of the appropriate range.

The present case is one where the victim was 13, she did not consent, she was tricked into going to the camp, the appellant was a 30 year old soldier in a position of trust who deliberately breached regulations in order to achieve his ends and who was in a position of authority and wearing his military uniform at the time.

In all the circumstances a sentence of 15 years cannot be criticised.

The appeal against sentence is dismissed.

Mortimer, P.

Leonard, J.A. **Burrell, J.A**