

**PUBLIC PROSECUTOR**

**AND**

**SOFIAN BIN HJ SIGAI**

---

**(Court of Appeal of Brunei Darussalam)  
(Criminal Appeal No. 13 of 2014)**

---

Before: Mortimer P, Leonard and Burrell JJ A.  
**2<sup>nd</sup> December, 2014**

DPP Siti Nurjauinah @ Karmila Hj Kula for the Appellant  
Mr Ahmad Basuni Hj Abbas for Respondent

**Mortimer. P:**

This is an appeal by the Public Prosecutor under section 438A of the Criminal Procedure Code seeking to overturn an acquittal by Her Honour Judge Hanani on the 9 June 2014 of the respondent on the following charges:

***1<sup>st</sup> charge***

*That you, sometime in January 2013, inside the bathroom at B2, Barek Singa Menteri, Kuala Belait, did use criminal force on miss X to wait, by groping her breasts and touching her vagina,, intending to outrage the modesty of the said miss X, and, you have thereby committed an offence punishable under section 354 of the Penal Code, Chapter 22.*

***2<sup>nd</sup> charge***

*That you, sometime in March 2013, inside a bedroom at B2, Barek Singa Menteri, Kuala Belait, did commit rape by having sexual intercourse with one Miss X, without her consent and you have thereby committed an offence punishable under section 376(2) of the Penal Code, Chapter 22.*

***3<sup>rd</sup> charge***

*That you, sometime in July 2013, inside a Toyota Avanza bearing registration number KM 5130 in the vicinity of Taman Lama, Jalan Singa Menteri, Kuala Belait, did attempt to commit rape on Miss X, and you have thereby committed an offence punishable under section 376(2) of the Penal Code, Chapter 22 read with section 511 of the same.*

**4<sup>th</sup> charge**

*That you, sometime in August 2013, inside a bathroom at B2, Barek Singa Menteri, Kuala Belait, did use criminal force on Miss X to wit, by groping her breasts and touching her vagina, intending to outrage the modesty of the said Miss X, and, you have thereby committed an offence punishable under section 354 of the Penal Code, Chapter 22.*

The victim was the respondent's daughter. She was 14 at the time of the offences.

On 9 June 2014 the judge gave extempore reasons for acquitting the respondent:

*The prosecution's case was mired with several outstanding difficulties from the start. I will give my full reasons, but briefly:*

*As regards the rape and attempted charges under charge 2 and 3 these were framed as punishable offences under section 376 (2) Penal Code. Clearly, the victim was already 14 years old at the time of incident, and thus, section 376 (2) is not applicable. It is important to frame the right charges, as nonstatutory rape offences also involve issue of consent, whereas in statutory rape cases consent is irrelevant. As much as the court has discretion to amend, the fact of rape and attempted rape were not sufficiently particularised **nor made out** to allow the court to find the defendant guilty beyond reasonable doubt.*

*As for the Outraging Modesty charges, the particulars laid out in the charges were, at times, incongruent to miss X's own testimony in court, and there was no sufficient explanation for these inconsistencies.*

**Ratanlal:** *"the charge under this section is one which is very easy to make but one which difficult to rebut, and when such a charge is made, it is important to see whether it is supported by independent evidence, besides the woman herself, or is corroborated by the conduct and the surrounding circumstances and is consistent with ordinary probabilities."*

*The facts of the alleged outraging acts were scant and lacked sufficient particulars, and this was fatal to a successful conviction on both charges.*

*Therefore, I find the prosecution has failed to prove the case beyond reasonable doubt on all the charges. I acquit the defendant. My decision is not reflection on the credibility of Miss X, nor does it mean I don't believe her. This is a case where the prosecution failed to lead sufficient evidence on each of the charges for the court be able to make findings of guilt beyond reasonable doubt."*

When the judge expressed the view that Section 396 (2) of the Penal Code only applied when the victim was under the age of 14 years and gave this as a reason for acquitting it is hardly surprising that the Public Prosecutor was troubled and now seeks to appeal against the acquittal.

This is far from being an easy matter. If the judge acquitted purely because of her error of law that would have been an end of the matter. Necessarily the acquittal would have to be quashed. It would have been a 'wrong decision on a question of law' under section 438D (1) (b) of the Criminal Procedure Code.

The grounds for allowing an appeal against an acquittal under section 438D are:

- (a) that the acquittal should be set aside on the ground that it is unsafe or unsatisfactory; or*
- (b) that the acquittal should be set aside on the ground of a wrong decision on any question of law; or*
- (c) that there was a material irregularity in the course of the trial.*

However, it is necessary to examine the judge's reasons both those given on 9 June 2014 as well as the full reasons on 5 November 2014 to determine the effect of this error of law and whether it was the real or overwhelming reason for the acquittal.

### ***The reasons given on 9 June 2014***

We turn to examining the judge's reasons. First, her extempore reasons given on 9 June 2014.

In these extempore reasons when considering the rape charges she acknowledged her discretion to amend the charges. Had she done so her error probably would have come to light. But she decided that 'the fact of rape and attempted rape were not sufficiently particularised **nor made out** to allow the court to find the defendant guilty beyond reasonable doubt.' (Emphasis ours).

It is clear that the judge found that there was no sufficient or detailed evidence of rape or even attempted rape to support a conviction and therefore she acquitted of these charges. On this we will examine her later for reasons and some of the evidence.

Turning to the charges of outraging modesty the judge noted that the particulars in the charges were, at times, incongruent with the girl's evidence without explanation. Further that the evidence was scant and lacked detail. Again it will be necessary to look at the judge's full reasons.

In her final paragraph she makes it abundantly clear that on all the evidence she is not satisfied of guilt.

We pause in passing to note her comment that her decision did not reflect on the credibility of the girl nor did it mean that she did not believe her. Whereas this is somewhat unusual it does not follow that even if the victim is believed she is necessarily accurate or that there is sufficient evidence to establish guilt.

### ***The judge's full reasons***

We turn to the full reasons given by the judge on 5 November 2014. In these the judge examines the evidence and explains why she acquitted. We also will examine some of the evidence to which she refers.

On the rape charges the evidence of penetration to establish rape was confused and probably lacking. Even when the girl had demonstrated penetration by the use of dolls almost immediately afterwards having seen the defendant was on top of her she was asked:

- Q. Where was his private part?  
 A. He tried to put it in and I tried to push him away.  
 A. few answers later again she said that 'he tried to put it in'. She never said that she had been penetrated. Typical questions and answers now to be found when she was dealing with the March 2013 incidents she was asked:
- Q. Did it go in?  
 A. I am not sure.  
 And later:
- Q. He tried to insert? Elaborate  
 A. He came near me, and he tried to insert it but I fought.
- Q. What did he try to insert?  
 A. His private part to my private part.
- Q. Did he insert it?  
 A. Am not sure.

Having set out the evidence in some detail the judge formed the view that "her evidence was so scant for the court to say that there could even have been attempted rape. It was not sufficiently explained how penetration failed, if it was attempted, at all." An examination of the evidence shows that although the girl said on a number of occasions that "he tried to insert his private parts into my private parts" or words to the same effect the prosecution was unable to get any further details from the witness of attempted penetration or as the judge said why and how it failed.

On the question of detail the judge was inclined to blame the prosecution for not asking further questions that this may be unfair. The witness simply did not provide the evidence.

On the outraging modesty charges the judge acquitted because she considered the girl's evidence to be unreliable. She noted inconsistencies between the facts of the charge for example in charge 1 the allegation is not only that the defendant groped her breasts but also touched her vagina. She gave no evidence of touching her vagina. The judge also noted inconsistencies between what she had told other witnesses about this event – for example P3 said that she had complained of penile penetration.

Similarly for the last charge of outraging modesty the charge alleges a touching of her vagina whereas she gave no evidence of this. Also she gave evidence that her brother had seen her crying when leaving the toilet in which the offence was alleged to have taken place and no attempt had been made to call the brother. The judge noted the defendant's denial when he gave evidence. When making other complaints the girl had referred to sexual intercourse taking place on this occasion which she did not allege in her evidence.

The judge's final conclusion is:

*"In the event, I find the prosecution has failed to prove the case on all the charges, beyond reasonable doubt, and I acquit the defendant accordingly."*

### *Miscellaneous matters*

It is necessary to note that surprisingly the judge fails to deal with her error of law in the original reasons concerning the meaning and effect of section 376 (2) of the Penal Code. She ought to have done so and she ought to have explained what effect if any this had upon her overall acquittal of the charges. This is a serious omission.

In the course of her reasons the judge makes a number of criticisms of the prosecution for example in her assessment of the evidence she of the DPP that

*“She herself had not led sufficient evidence of any change in Miss X’s behaviour during prosecution case, and therefore it is erroneous that she should try to supplement her case with the defence evidence.”*

This criticism appears to be unfair. All relevant and admissible evidence is evidence in the case. If the prosecutor tried to enhance her case by cross examination of defence witnesses it was nothing less than her duty. Judges should be mindful that counsel often have undisclosed difficulties with their cases and should not be adversely critical without knowing the full facts.

### *Conclusion*

The judge saw and heard the witnesses for both the prosecution and the defence. She has a unique advantage over anyone reading the transcript of the evidence. It is a serious error for appellate courts to try to assess witnesses from a record of their evidence when they have not seen and heard them give it. Although a reading of parts of the evidence given by the girl may seem compelling in spite of the inconsistencies and lack of detail we cannot and must not assess her evidence in the absence of the judge being plainly wrong. This is not the position here.

In spite of the judge’s serious error of law at the outset of her extempore reasons for acquittal and her failure to explain that error or summarise its true effect the judge plainly stated when she acquitted on 9 July 2014 that she found that the prosecution had failed to prove the case beyond reasonable doubt on all the charges.

Although some of the points she makes in her full reasons of 5 November 2014 appear to be strained they are basically sound.

Whereas we have considerable sympathy for some of the prosecutor’s submissions in the result we are driven to dismiss the appeal.

**Order:** The Public Prosecutor’s appeal against the acquittal is dismissed.

**Mortimer, P.**

**Leonard, J.A.**

**Burrell, J.A.**