

AJIMAN BIN HAJI MOMIN

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 14 of 2017)**

Before: Mortimer P, Burrell and Seagroatt JJ A.
10th May 2018

Headnote: *Appeal against conviction and sentence – s.377 Penal Code CAP 22 Carnal Knowledge against law of nature – s.354 Penal Code CAP 22 outraging modesty – Total sentence of 7 years and 3 strokes upheld – Convictions upheld on application of proviso s.415(2) Criminal Procedure Code – s.134A Evidence Act CAP 108 considered – part of clinical psychologist’s report relating to credibility of a witness inadmissible.*

Mr Sheikh Noordin bin Sheikh Mohammad for Appellant
DPP Hjh Suhana binti Haji Sudin for Respondent

Cases cited in the Judgment:

Zainal Abidin Jahad V PP (CA No 24 of 2016)

Mortimer P:

On the 21 September 2017 the appellant, a single man of 30 years, was convicted after trial by Hairol Arni Majid J of 3 offences. 2 counts of having carnal knowledge against the order of nature with the same boy (section 377 of the Penal Code) when he was aged 5 and 11, and one offence of outraging his modesty (section 354 of the Penal Code).

The judge sentenced him to 3 years imprisonment on each of the carnal knowledge offences and one year and 3 strokes for the outraging modesty. Those sentences to run consecutively making 7 years and 3 strokes in all.

The 1st offence took place in about 2005 and the last in 2012.

He is represented by Mr Sheikh Noordin and he appeals against both the convictions and the total sentence.

The Background

The main witness for the prosecution was the boy himself then aged 13. He lived in a house belonging to his stepfather's parents. He described being sodomised by the appellant in the house from the age of 5 until he was 12 years old. He also described how in June 2012 the appellant came into his bedroom disturbed his clothing and sucked his penis.

It was after this offence that the matters came to light. The boy described how he was angry with his mother for not locking his bedroom door so the next day he complained to her about offence of outraging his modesty and also about the sodomy going back to the time when he was 5 years old.

The boy was medically examined but the results were inconclusive.

After his arrest the appellant made several statements to the police. In the 1st he fully admitted his guilt of all 3 offences but denied them in later statements. He challenged the admissibility of the confessions on the basis that he was unwell and that he was offered inducements. The judge held a voir dire in which he also saw a statement taken on video. A number of witnesses gave evidence for the prosecution and the appellant gave evidence on his own behalf. The judge ruled the statements admissible.

The judge also had the evidence from a clinical psychologist. This witness described the boy's account to her relating to the offences charged and also gave her opinion in a report which was produced in evidence. Her conclusion in the report is:

Hazim reported that he had been sodomised by his uncle when he was 5 years old till he was 10 years old. He recently "disturbed" him again by sucking on Hazim's genital.... He was able to recall the incident openly and had nothing to gain from making up stories about being "disturbed" by the uncle. Furthermore, a child of his age would not be making up such stories unless he himself was exposed to the incident.

In assessing the evidence the judge took this into account. He said that the child psychologist's assessment of the boy "strongly suggests that he is telling the truth". Also that "based on her IQ assessment of PW1 (the boy) she is certain that based on his level of understanding that the complainant is telling the truth."

Apart from this the judge summarised the whole of the evidence with some care. He was impressed by the boy's evidence and found it both credible and reliable. He noted in particular his anger that his mother had left the door unlocked so as to allow the appellant access to his bedroom for the outraging of modesty charge. He noted the consistency in the boy's account as well as taking into account some discrepancies and cross examination concerning the number of times he had been sodomised over the years. Further, he found that the boy's account was corroborated by the complaint to his mother and by the

appellant's confession to the police (see section 157 of the Evidence Act Cap.108). Strictly the complaint was corroboration for only the last 2 charges.

Consequently the judge convicted of all 3 charges.

The Appeal

Mr Sheikh Noordin takes four main points:

1. That in accepting the boy's evidence the judge relied strongly upon the inadmissible evidence of the clinical psychologist. This, he submits, was a material irregularity which renders the convictions unsafe.
2. That the judge made erroneous findings on evidence which he treated as corroboration.
3. That the judge having held a voir dire wrongfully admitted and relied upon the appellant's confession statements made to the police.
4. The judge failed to give sufficient weight to the discrepancies in the boy's evidence.

We can deal shortly with the last 3 of these submissions.

In considering the boy's evidence it was not necessary for the judge to find that it was corroborated (see section 134 A of the Evidence Act) but exercising care the judge found that it was corroborated as we have said above.

As for the voir dire the judge had a number of witnesses and made his ruling upon the evidence he saw and heard. There is no basis upon which this court can disturb that finding.

As for the few discrepancies in the boy's evidence the judge carefully dealt with them and made his decision with them in mind.

The Clinical Psychologist

In contrast, Mr Sheikh Noordin submits that the evidence of the child psychologist that she was certain based on the child's level of understanding that he was telling the truth is inadmissible. As we have said on several occasions in relation to the same psychologist giving similar evidence in a number of child molestation cases such evidence usurps the function of the judge in deciding the reliability and credibility of a witness and for that reason is inadmissible. See *Zainal Abidin Jahad V PP (CA No 24 of 2016)* and the cases cited in the judgment.

The judge wrongly relied upon this evidence saying that the clinical psychologist assessment of the boy "strongly suggests that he is telling the truth".

This is a material irregularity and would normally render the conviction unsafe but in effect we are invited by the DPP to consider the proviso in section 415 (2) of the Criminal Procedure Code:

415 (2). The Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred.

A careful reading of the judge's detailed examination of the evidence demonstrates that even in the absence of the clinical psychologist's evidence he would have been driven to find that all 3 charges had been proved beyond reasonable doubt.

Having heard the boy and having analysed his evidence with great care he found that it was corroborated by the appellant's confession to the police as well as by his complaint to his mother. He also considered the cross-examination of the boy and dealt with the few discrepancies as well as the consistencies. He then ruled:

"Having heard PW1's ... Evidence, I am in no doubt he was telling the truth and find him to be a credible witness. I have no hesitation in accepting that he was sodomised on 2 occasions as well as sexually outraged by the defendant."

Without hesitation we find that notwithstanding that the point raised in the appeal concerning the inadmissible evidence of the clinical psychologist might be decided in favour of the appellant, no miscarriage of justice has actually occurred.

For these reasons we dismiss the appeal against conviction.

The Appeal against Sentence

In sentencing the appellant to the total of 7 years imprisonment and 3 strokes the judge took into account the appellant's age, the fact that he had lost his employment, his previous clear record and the considerable delay in bringing these proceedings to a close. The trial started in January 2014 and concluded in September 2017. The appellant's then counsel took responsibility for about a year of this for delay in providing his final submissions but the court must also take responsibility for not insisting upon timetables being adhered to.

Also in sentencing the judge took into account the clinical psychologist's evidence about the severe effect of the offences upon the victim. Mr Sheikh Noordin contends that it was not open to the judge to take this into account. When it comes to sentence however the judge is perfectly entitled to consider the effect on the victim and we reject such criticism.

Considering the very serious nature of the offences, originally against a boy of 5 years, and that this sentence was imposed after trial, we are of the opinion that the total sentence imposed was proper and certainly not manifestly excessive.

The appeal against sentence is refused.

Order

The appeals against both conviction and sentence are dismissed.

Mortimer, P.

Burrell, J.A.

Seagroatt, J.A