HAJI MOHAMMAD AZRIN BIN HJ AHMAD

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 19 of 2018)

Before: Burrell P, Seagroatt and Lunn JJ A.
30th April 2019

Headnote: Sexual abuse of young girls at a primary school; unsworn evidence of complainants; inadmissible evidence of reports by psychologist and social worker introduced by defence counsel; experts not called to give evidence; contents wrongly adduced by improper leading questions put to appellant by defence counsel at trial; alleged inconsistencies not proved: concurrent sentences on conviction of 6 years and 3 strokes approved.

Mr Sheikh Noordin bin Sheikh Mohammad (Messrs Sheikh Noordin Mohammad & Associates) for Appellant
DPP Siti Nurjauinah@Karmila binti Haji Kula for Respondent

Seagroatt, JA.:

This is an appeal against conviction and sentence for offences, three in number, of outraging the modesty of three young girls whilst the appellant was in a position of trust as a Science teacher at the Sekolah Rendah Dato Jamil in Kampong Setia, contrary to section 354B of the Penal Code. The trial was conducted before Intermediate Court Judge Masni between the 1st August 2017 and 23rd January 2018 with adjournments intervening. The judge found all three allegations proved and gave judgment on the 8th December 2018, and, on the 11th December 2018, he was sentenced on each charge to concurrent terms of 6 years and 3 strokes. The offences took place in 2014.

The appellant was a science teacher at the school concerned and the three young girls were respectively 11, 10 and 10 years of age and were pupils at this primary level school. They all gave unsworn evidence at the trial and were cross-examined on behalf of the appellant.

The first charge relates to an allegation that the appellant asked the young girl Miss X, to stay in the classroom after he had dismissed the other students. He was alleged to have brought the girl to the rear of his table, lowered her skirt and underpants and then measured the front of her waist with a tape. Then he took an A4 sheet of paper placed it over her vaginal region and with a marker pen traced the outline of her vagina in a V form. He repositioned her clothing and told her to take a break and collect her homework. She felt uncomfortable after this experience and confided in a school friend a few days later. It was relayed to a teacher.

The defence case in relation to this young complainant was essentially that her evidence was inconsistent on the year in which the offence was alleged to have taken place and that, in effect, it did not take place at all. The appellant alleged that the young girl was not well disposed towards him and that she was a trouble-maker but he was not supported by any evidence.

The second charge concerned a 10 year old girl Miss Y, again in a science class, who was asked by the appellant to stay behind in the classroom whilst the other pupils were dismissed. She was asked to come forward to the front of the classroom as he wanted to play a game with her involving body parts. He took a tape measure and measured her from waist to ankle. Shortly after he lowered her skirt and underpants and measured her vaginal region from top to bottom. She was scared when he touched her vagina.

She too was challenged on what were alleged to be inconsistencies in her evidence.

The third charge concerned a young girl pupil Miss Z who was also 10 years of age. She too was asked to stay behind in the classroom after the rest of the pupils had been dismissed following a science lesson. Although two of her friends waited for her outside the laboratory the appellant went outside and asked them to leave. Inside the classroom she was asked to draw body parts, later called to his desk then asked to take off her sports pants. He then measured her legs and asked her to remove her underwear and sit on her chair. He then inserted his finger in her vagina many times. She felt scared. He then asked her to stand up next to the chair and bend over. When she did so he held her buttocks as he stood behind her. He told her to pull up her clothes and go to her next class. When she arrived there her maths teacher was angry because she was late. After that class the incident with the appellant was reported to a teacher.

The cross-examination of her was essentially limited to efforts to show inconsistency between her evidence in court and what she may have told a Psychologist and a Social Worker but such differences if they existed – neither person was called to give evidence- were not of any apparent consequence.

These young complainants were giving evidence about events that had taken place 3 to 4 years earlier. Variations in recall were to be expected but all were significantly consistent in their description of the technique employed by the appellant in making sure each was alone with him and were submitted to criminal physical interference.

The defence advanced in all three incidents was that they did not occur, the girls were fabricating their stories and were unreliable. He assumed that they were motivated against him because he had disciplined them in the past. There was certainly one incident in 2013 when he caused one or more of the girls to demonstrate what is termed the "peeing" incident when one of the girls had accidentally wet her pants. His form of discipline by asking them to re-enact the incident in the class disclosed a bizarre and highly questionable approach to a matter with which he should not have been involved. However it is not relevant to the three charges he faced as the judge indicated.

The judge fairly and fully evaluated the evidence and correctly applied the law , the defence raised no argument concerning the fact of the three complainants all giving unsworn evidence. The judge had seen and heard all three and took fully into account

the defence's contention that they were all unreliable and inconsistent. She decided that that they were neither. It is clear that they were consistent in their description of the technique or "modus operandi" applied by the appellant and the judge highlighted this telling aspect in her detailed review of the evidence.

The appellant's arguments before us in support of the grounds of appeal are tenuous to say the least. The defence was that these allegations were untrue. The appellant did not, in any respect in relation to the complainants, do what they described. He did not contrive to be alone with them. The term "bare denial" used by the judge simply means that his defence rejected any of the allegations against him. They simply did not happen. The use of the term "bare denial" in no way connotes a failure to consider the merits of the defence. This argument simply has no substance. It is semantic.

The second, put simply, is that there were fundamental inconsistencies in the evidence of all three young girls. This trial took place four years after the events complained of. It would be astonishing if there were not some variations in the original statements and oral evidence at trial. The point about the dates is not worthy of detailed rebuttal. Miss X was not quite 12 years old at the time. At the time of the trial, she was over 15 years old. She was questioned about what she may or may not have said to a clinical psychologist and social worker. None of the differences, if they were such, had any bearing on her credibility.

The appellant's counsel at trial tried to adduce in evidence reports from a psychologist and social worker which had been properly released by the prosecution to the defendant's solicitors. The prosecution had very sensibly not intended to call either the psychologist or the social worker. The evidence would not have been admissible. As a consequence the prosecution objected to the reports being put in by the defence, as evidence and it was correct to do so.

Nonetheless the judge allowed their admission and they were given an exhibit number. The judge was in error. They were not admissible without the makers of the reports being called to give evidence and being subject to cross-examination.

Despite the submissions of the DPP that the evidence from the reports was not admissible, the judge proceeded to consider the alleged inconsistencies between the testimony of the complainants and what was attributed to them in the reports. It was regrettable that the judge allowed the evidence to be led in the first place and then set out in detail what were said to be the inconsistencies arising from the flawed evidence.

On the basis of their erroneous admission Miss X, Miss Y and Miss Z were questioned by Mr. Sheikh Noordin about something they allegedly said to the psychologist and social worker, so as to try and undermine their evidence and credibility on the basis that they were inconsistent in their stories. The fact that the so-called inconsistencies were inconsequential, trivial and wholly insupportable is of no moment. It should not have been done. In due course the defendant's counsel, through improper leading questions, put to the defendant himself what was contained in the reports which were suggested to be important inconsistencies in the complainants' evidence, compounding the judge's error. This was impermissible in the conduct of the defence.

No doubt the defence counsel wanted to avoid calling the psychologist and social worker. Had he done so he would have enabled the prosecution to cross-examine these

witnesses with a view to adducing evidence which demonstrated the complainants' consistency and credibility and strengthened the prosecution case – if it needed any strengthening.

In respect of Miss Y's evidence he takes three points of her evidence. Firstly and regrettably he did not reflect the full text. He omitted the words "whilst bending down". These were material. In any event they are bad points. There is no valid criticism of the judge's assessment of her as a witness. The fact that she expressed her conclusion as to the credibility of Miss Y, and in particular that her evidence was consistent with the evidence of a school colleague who was not a complainant, before she went on to deal with the defence case as to inconsistency, is quite irrelevant. The sequence in which she set out her various considerations is of no significance. She cannot be faulted in her findings.

The point taken by counsel for the appellant about what Miss Y did or did not tell the psychologist and/or social worker is not valid for the reasons already given. There is no basis for elevating these matters to the level alleged by him.

Finally in relation to Miss Z, the third complainant, the argument advanced is trivial and of no consequence. What are alleged to be discrepancies are merely unimportant minutiae to be found in any witness' evidence after a lapse of time.

It is equally clear that the judge had no doubt that the girls were telling the truth. The "modus operandi" of the appellant, the striking similarity of the experience to which he subjected them, and the overwhelming consistency and similarity of the events they described would have led and in fact did lead to the inevitable conclusion that they were witnesses of truth.

Sentencing

The judge set out the mitigation advanced by the appellant's counsel in full. This underlined the 4 year delay between the commission of the offences and the date of sentence, his inevitable loss of employment, and the consequent economic hardship to his family. He was previously of good character.

There were of course significant aggravating factors. He was unarguably in a position of trust which he abused on these occasions. He clearly planned the situation whereby he could be alone with these girls and render them compliant. They were particularly young in years. The fact that he denied the offences meant that the young girls had to give evidence, be cross-examined and face allegations that they were lying because they were ill-disposed towards him.

The maximum sentence for a section 354B offence is 10 years and whipping. The minimum sentence is 3 years and whipping. The judge decided that concurrent sentences of 6 years and 3 strokes on each count were appropriate, making a total of 6 years and 3 strokes. She stated that a deterrent sentence was imperative. She was right to do so. There is no merit in this appeal.

We considered carefully the delay aspect. A gap of 4 years is far too long, even though the appellant was not in custody. The police were slow in forwarding the case to the Public Prosecutor who in turn did not act expeditiously. In cases such as these involving

young children it is not acceptable that such a delay should occur in the proceedings. However, we are satisfied that in the circumstances of this case it should not affect the sentences imposed.

Order

The appeals against convictions and sentence are dismissed.

Burrell, P.

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