ZAINAL ABIDIN BIN JAHAD

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 24 of 2016)

Before: Mortimer P, Leonard and Burrell JJ A.
24th November 2016

Headnote: *Criminal – evidence – admissibility – whether evidence of psychologist admissible to show witness telling the truth.*

Held: Following R v Raymond Robinson [1994] 98 Criminal Appeal R 370, that evidence by a psychologist is not admissible to show that the evidenced of a witness of fact is reliable

Mr. Hj Mohamad Rozaiman bin Dato Haji Abdul Rahman (Messrs. Rozaiman Abdul Rahman Advocates and Solicitors) for Appellant
DPP Shamsuddin Hj Kamaluddin for Respondent

Cases cited in the judgment

R v Raymond Robinson [1994] 98 Criminal Appeal R 370
Stephen H v The Queen [2014] EWCA Criminal 1555
in *R v Richard W [2003] EWCA. Crim 3490*

Leonard, JA.:

The appellant was convicted after trial of 3 offences under section 377 of the Penal Code, of having carnal intercourse against the order of nature with two boys aged 12 and 13 and one offence under section 354 of the Penal code of outraging the modesty of one of them. He was acquitted of a further five similar charges. He was sentenced to a total of 9 years imprisonment. No whipping was ordered due to the appellant's age.

The appellant was sentenced on 15th October 2016 and filed a notice of appeal against both conviction and sentence on 24th October 2016.

The perfected grounds of appeal against conviction raise eleven grounds but as will be seen below it will be decided on a point of law, namely whether certain evidence was wrongly admitted and relied upon by the trial judge.

At the outset of the hearing of the appeal this court raised a discrete point not specifically addressed in either the grounds of appeal or in the respondent's written reply. The hearing was adjourned for one day to give the parties an opportunity to consider the matter.

The issue

As part of the prosecution's case a clinical psychologist Alinah binti Tamin (PW11) was called to give evidence. She had interviewed both victims, aged 12 and 13, on 11th June 2012, 8 days after the alleged crimes had been committed. The judge, Pg DP Hjh Rostaina J.C. in her written judgment summarised PW11's evidence, in so far as it is relevant to this issue, as follows; with regard to Boy A "she found a young man like him would not be able to make up such stories if he himself had not been subject to it" and with regard to Boy B "that a boy of his age would not make up such story unless he had been exposed to such incident himself."

These observations can only carry one interpretation namely that in the witness's (PW11's) expert opinion the boys were telling the truth. The opinion was directly related to the boys' credibility.

Towards the end of the judgment the judge, referring to the witness PW11's evidence says this:

> "*I accept her evidence that both boys would not be able to make up stories unless they had experienced it themselves. I find it is consistent with the facts that Boy A and Boy B were telling the truth.*"

It is clear that the judge placed reliance on PW11's opinion that the boys were telling the truth when coming to her own conclusion about the boys' credibility.

In his further written submission Mr Rozaiman, who appeared on behalf of the appellant submitted that PW11's opinion about the boys' credibility was inadmissible evidence. We agree. It should not have been adduced. Moreover, it is difficult to understand the purpose in calling PW11 as part of the prosecution case at all. After conviction her expertise would undoubtedly be of assistance to the court on the matter of sentence when evaluating the psychological effect of the incidents on the boys. However it is difficult to imagine what admissible evidence she could give which might help to prove any particular ingredient of the offences charged.

R v Raymond Robinson [1994] 98 Criminal Appeal R 370 was a case involving the alleged rape of a 15 year old girl who was mentally retarded. The court allowed the appeal against conviction because the evidence of an educational psychiatrist had been wrongly admitted where its effect was to enhance the reliability of the complainant's evidence. Lord Taylor CJ, giving the judgment of the Court of Appeal said at p 374

> "*In our view, the Crown cannot call a witness of fact and then, without more, call a psychologist or psychiatrist to give reasons why the jury should regard that witness as reliable.*"

More recently in *Stephen H v The Queen [2014] EWCA Criminal 1555* it was observed that:

> "*The critical issue which the jury had to resolve in the light of all the evidence was not only the credibility of X but also her reliability. It was, however, the responsibility of the jurors to undertake that task and not that of either of the treating doctors or the defence expert. The different diagnoses which were expressed were the result of their evaluation of the complaint and, equally, it was for the jury to determine, first, whether X was deliberately lying in her account (which was never an issue for the doctors at all) and, secondly, whether what she was saying was reliable: to that end, it was necessary*

for the jury properly to understand the nature of her illness and treatment along with the symptoms which she exhibited over the years. This decision, again, was not for the doctors to make."

The fundamental principle involved in such cases was succinctly expressed by Judge LJ in *R v Richard W [2003] EWCA. Crim 3490* at para 23 that

"*the evidence would usurp the function of the jury in deciding the credibility of witnesses and no more*"

That is the reason why in the present case the evidence should not have been adduced.

The question must then be asked, did the judge place any reliance on the inadmissible evidence? Plainly she did. We are persuaded that the admission of and reliance on the inadmissible evidence amounts to a material irregularity which renders the conviction unsafe and unsatisfactory. The convictions will be quashed. By virtue of section 420 (1) of the Criminal Procedure Ordinance we may order the appellant to be retried if it appears to us that the interests of justice so require. Having heard counsel's submissions on this question we have concluded that it is in the interest of justice to order a retrial. The appeal is allowed. The convictions are quashed and it is ordered that there be a retrial before a different judge.

Having directed that there be a retrial we consider it inappropriate to consider the evidence in the case further or to rule on the remaining grounds of appeal.

Before leaving this case we have to say that we commend the judge for the great care that she took in conducting the trial and in drafting her comprehensive judgment. It is regrettable that neither advocate before her thought to raise the question of admissibility so that she might hear argument on the point and make a ruling.

Mortimer, P.

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