BRAHIM BIN HAJI KASSIM

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 2 of 2018)

Before: Mortimer P, Burrell and Seagroatt JJ A.
8th May 2018

Headnote*: Appeal against conviction and sentence – s.363 Penal code CAP 22 kidnapping a 10 year old girl – s.354 Penal Code CAP 22 outraging modesty of same girl – sentenced to 4 years and 3 years imprisonment respectively – appeal against s.354 offence upheld – corroboration pursuant to s.133A Evidence Act CAP 108 required – part of clinical psychologist's evidence concerning credibility and reliability of witness inadmissible – conviction and sentence quashed – Appeal against s.363 conviction dismissed – sentence reduced from 4 years to 9 months due to the absence of the outraging modesty element.*

Mr Hj Mohamad Rozaiman Bin Dato Haji Abdul Rahman (Messrs. Rozaiman Abdul Rahman Advocates and Solicitor) for Appellant
DPP Hjh Rozaimah Binti Hj Abd Rahman for Respondent

Cases cited in the Judgment:

AO F v Public Prosecutor [2012] 3SLR 34
Zainal Abidin Jahad v Public Prosecutor (CA No 24 of 2016)
Public Prosecutor v Ali bin Hj Othman (Criminal Trial number 39 of 2004)

Mortimer P:

On 13th February 2018 HH Judge Norismayanti convicted the appellant after trial of one offence of kidnapping a 10 year old girl contrary to section 368 of the Penal Code and a further offence of outraging her modesty contrary to section 354 of the Code.

On 8th March 2018 the judge sentenced the appellant to 4 years imprisonment on the kidnapping and 3 years for the molestation. The sentences were concurrent making 4 years imprisonment in all.

The appellant appeals against both the convictions and the sentences.

Outline of Facts Found by the Judge

Between about 6:30am and 7:30am on 14th May 2016 the appellant drove his car to a school in Belait at which the girl was a pupil. He was delivering soft drinks to the school. When he left the school the girl was in the passenger seat of his car and he drove her out of the school grounds and out of the lawful guardianship of the assistant headmistress. He took the girl to a nearby shop to which he was delivering rice. At some stage either in the car or in a toilet he disturbed the girl's upper clothing and sucked her breasts. Having delivered the rice he drove the girl back to the school entrance and she walked back into the school.

The Appeal against Conviction for Kidnapping

The relevant provisions in the Brunei Penal Code are sections 361 and 363 which provide:

> "**Kidnapping from lawful guardianship**
>
> **361.** Whoever takes or entices any minor under 14 years of age if a male, or under 16 years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.
>
> **Punishment for kidnapping**
>
> **363.** Whoever kidnaps any person from Brunei Darussalam or from lawful guardianship shall be punished with imprisonment for a term which may extend to 10 years and shall also be liable to fine."

The Kidnapping

The appellant was charged only under Section 363 above which is the section that specifies the punishment for kidnapping. It would be more appropriate to charge the offence under both the above sections. However no point has been taken on this and kidnapping is defined under section 361. It was clearly charged as taking or enticing the girl out of the lawful keeping of the lawful guardian.

At trial the prosecution submitted and the judge accepted that proof of 'intent' in an offence under section 363 was unnecessary. If this amounts to a submission that the offence is 'absolute' it is wrong. There is a presumption that a statutory provision does not establish an absolute offence save in the most clear and express language and there is none here. In order to establish guilt the prosecution must prove that the accused not only took or enticed a minor out of the keeping of the lawful guardian without consent but that he intended so to do.

It is not necessary to prove the defendant's ultimate purpose or intention in the kidnapping. This must have been the DPP's submission accepted by the judge and is correct.

It spite of the submissions of Mr Rozaiman to the contrary, on intent the facts proved and admitted by the appellant speak for themselves. He was well aware that the girl was in the school grounds, he knew that during that time she was under the authority and the guardianship of the head mistress or her assistant and in driving the girl in his car out of the school grounds he must have intended to take her '*out of the keeping of the lawful guardian*'.

The appellant's contention that the girl chose to get into his car and when asked was reluctant to get out of it and was unaware of the law does not help him. The case against him is clear and was proved beyond any reasonable doubt.

His appeal against his conviction for kidnapping fails.

The Appeal against Conviction for Outraging Modesty

The judge faced a much more difficult task when hearing the evidence and deciding whether the offence of outraging modesty had been proved beyond reasonable doubt.

The 10 year old girl is a high special needs student who is mentally retarded. The clinical psychologist gave admissible evidence that she tried an IQ test on the girl but she could not understand even the basic requirement of those tests which require the minimum understanding of a child of only 6 years and 2 months.

The judge heard the girl and decided that she had sufficient understanding to be aware of the duty of telling the truth and allowed her to give unsworn evidence.

Having heard her evidence the judge was satisfied that she the appellant had taken her in his car and either in the car or in a toilet had disturbed her upper clothing and sucked her breasts. A reading of her evidence shows the girl's sad lack of understanding of some relatively simple questions.

The Judgment

Having summarised the evidence for both the prosecution and the defence the judge made a number of findings.

So far as the remaining prosecution witnesses were concerned she found them to be credible and believable. She found their evidence had not been successfully challenged by the defendant and therefore accepted their evidence as a whole.

Turning to the girl's evidence. The judge found her to be credible and continued;

> *"I am of the opinion that a witness determined to be mentally retarded, developmentally challenged with an impaired IQ does not automatically exclude him/her from giving credible evidence. The court is to particularly look into the assessment of the witness's expert medical and psychological report and make a determination thereon. I accept that during her court testimony, PW 11 had difficulties in answering questions and her answers were in short sentences. But I am satisfied that PW 11 understood what is good and bad and it the difference between the truth and a lie."*

In considering the girl's evidence she found two Singaporean district court cases to be helpful in her assessment of PW11's reliability and credibility. She said it was important to determine whether PW11 understood what she was being questioned about and whether her evidence was coherent and credible. She was also guided by *AO F v Public Prosecutor [2012] 3SLR 34* where it was held;

> "*It is trite law that where no other evidence is available, a complainant's testimony can constitute proof beyond reasonable doubt – but only when it is so unusually convincing as to overcome any doubts that might arise from the lack of corroboration."*

In further consideration of the girls evidence the judge said she also relied on the evidence of PW 12 (the clinical psychologist) who stated that the girl would not be able to make up such stories if she herself had not been exposed to it.

The judge was relying upon a passage in the report of the clinical psychologist which she had quoted earlier in her judgment. It reads:

> *"Although she (*the girl*) didn't fully comprehend what the man had done to her, she knew the act was wrong and immediately report it to her parent of what had happened. She would not be able to make up stories about being sexually disturbed if she herself had not been exposed to it."*

For these reasons among others the judge convicted the appellant of outraging modesty.

Mr Rozaiman, for the appellant, takes 2 main points:

1. That under section 133A of the Evidence Act, chapter 108 it was not open to the judge to convict the appellant on the uncorroborated unsworn evidence of a child and the judge failed to find that the girl's evidence was corroborated, and

2. That in reaching her conclusion the judge relied upon inadmissible evidence of the clinical psychologist PW12 to the effect that the girl would not be able to make up stories about being sexually disturbed if she herself had not been exposed to it.

Corroboration

Section 133A provides:

(1) Where, in any proceedings against any person for any offence, any child called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if in the opinion of the court he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

(2) Where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

DPP Hjh Rozaimah, for the respondent, submits that there is no duty on the judge to find the girl's evidence to be corroborated before she can convict because of the provisions of section 134 A of the act which provides:

Any requirement whereby after trial it is obligatory for the court to give a warning about convicting the accused on the uncorroborated evidence of a person merely because that person is – (a) an alleged accomplice of the accused; or (b) where the offence charges of sexual offence, the person in respect of whom it is alleged to have been committed, is hereby abrogated.

With respect this submission of the DPP is a misunderstanding of section 133A and is quite wrong.

Corroboration is required and in its absence the accused was not liable to be convicted. In her judgment the judge had in mind the question of corroboration as can be seen from the passage she cited from the Singaporean Court of Appeal. Even though she considered the evidence of the complaint to the mother on 14th May, which was capable of being corroborative, she did not accept it as such. There were possible reasons. First because when the girl returned to school she was immediately asked whether the appellant had touched her and whether the appellant had disturbed her clothes and she answered no to each of those questions. Second, although the girl complained to her mother on 14th May the matter was not reported to the police until the 21st May.

The Clinical Psychologist

The evidence given by the clinical psychiatrist that the girl would not be able to make up stories about being sexually disturbed if she had not been exposed to it can only carry one interpretation, that the girl is credible and is to be relied upon. Such evidence usurps the function of the judge in deciding the reliability and credibility of the witness and for that reason is inadmissible.

Similar evidence in the trial of 2 young boys to the effect that neither of them would be able to make up such story unless he had been exposed to such an incident was given by the same clinical psychologist and held to be inadmissible by this court in *Zainal Abidin Jahad v Public Prosecutor CA No 24 of 2016.* See also the cases cited in that decision.

The judge unquestionably relied upon this inadmissible evidence in reaching her conclusion.

Conclusion

It was not open to the judge in law to convict the appellant of outraging modesty on the unsworn evidence of the girl (section 133A of the Evidence Act) in the absence of a finding that it was corroborated by some other material evidence in support implicating him. Nor was it open in law for the judge to rely upon the inadmissible evidence of the clinical psychiatrist in support of her finding the girl was credible and her evidence reliable.

For these reasons the conviction of outraging modesty is unsafe and must be quashed.

The Appeal against Sentence

Mr Rozaiman contends that 4 years imprisonment after trial for the offence of kidnapping is manifestly excessive and cites the decision of Hayati, J in *Public Prosecutor v Ali bin Hj Othman (Criminal Trial number 39 of 2004)* in which a sentence of 3 years imprisonment reduced to 2 years for plea in the kidnapping of a 5 years old child in a car the defendant drove away. He later molested the child and abandoned both her and the car.

Of all offences, kidnapping must be one that varies most in its gravity, and sentence depends upon its particular facts. In the instant case once the outraging modesty has gone the nature of the kidnapping is radically changed. Whereas removing a child from guardianship must always be a serious act this instance must now be much less serious than many others. The girl may have been reluctant to leave the car, he took her to the shop and returned her without a great delay and he later returned, apologised, and said he was unaware of having done anything wrong.

In all the circumstances we are of the opinion that 9 months imprisonment after trial is the appropriate sentence and to that extent we allow the appeal against sentence.

Orders

1. The appeal against the appellant's conviction for kidnapping under section 363 of the Penal Code is dismissed.

2. The appeal against the appellant's conviction for outraging modesty under section 354 of the Penal Code is allowed and the conviction quashed.

3. The appeal against the sentence of 4 years imprisonment for the kidnapping offence is allowed and reduced to 9 months imprisonment.

Mortimer, P.

Burrell, J.A. **Seagroatt, J.A**