

PG SHAHIRUL HAMADI BIN PG HJ JAYA

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 7 of 2018)**

Before: Mortimer P, Burrell and Seagroatt JJA.

10th May 2018

Headnote: Appeal against convictions and sentence – Kidnapping (Penal Code s.363) and outraging modesty of 11 year old girl (Penal Code s.354) – Appeal against convictions dismissed – Sentences of 18 months and 9 months imprisonment made concurrent - admissibility of evidence of pornographic images on appellant’s mobile phone considered.

Mr Sheikh Noordin bin Sheikh Mohammad for Appellant
DPP Hjh Rozaimah Binti Haji Abd Rahman for Respondent

Cases cited in the Judgment:

PP v Normajali bin Napir (2010) JCBD 144

PP v Ali bin Hj Othman (2004) JCBD 254

Burrell, JA.:

On March 13th 2018 the appellant was convicted after trial by Judge Faisal in the Intermediate Court of two offences, the first of intending to outrage the modesty of an 11 year old girl contrary of s.354 of the Penal Code CAP 22 and the second of attempting to kidnap the same girl on the same occasion, on 29th June 2015, contrary to s.363 of the Penal Code. The young girl was a student at the St. Andrew’s school in Brunei and was at school when these offences were alleged to have been committed.

On April 7 2018 the appellant was sentenced to 9 months imprisonment and one stroke on the first charge and 18 months imprisonment consecutive on the second.

He now appeals against both convictions and sentence.

1. The outraging modesty charge

The act relied on by the prosecution in support of this charge was an act by the appellant of sliding his hand across the chest of Miss X whilst he was descending a staircase in the school when she, with a friend, was ascending it.

The appellant admits the act. His defence was that it was accidental and accordingly he had no intention to outrage Miss X’s modesty. The issue for the judge to decide was, on

the whole of the evidence had the prosecution proved to the required standard that the appellant's act was not accidental and was an act which outraged the modesty of Miss X.

The judge's finding in relation to the evidence of Miss X and her friend (PW2) was as follows:

"I was able to assess their demeanor and answers to questions when they were on the stand. Both gave sworn evidence and I am satisfied, that despite their ages, they are aware of the gravity and solemnity of the occasion of both giving evidence in court and the need to tell only the truth."

It is my conclusion, on this matter that I am able to accept the testimony of both PW2 and Miss X. They both have been consistent in their evidence in court. Looking at their testimony, I have no doubt that they were telling the truth."

He considered and rejected the appellant's claim that it had been accidental. He had the advantage of seeing and hearing the witnesses. He rejected the contention that, in the circumstances of this case, a sliding of the hand across the girl's chest could have been done accidentally and further relied on PW2's evidence who said she had seen a 'smirk' on the appellant's face when he committed the act.

Mr. Sheikh Noordin, on the appellant's behalf raises a number of points which we shall deal with in turn,

- a) The question is posed – "even if the appellant's action were deliberate does such an act amount to an intent to outrage modesty?" The submissions made that "This element of outraging modesty or sexual element is clearly lacking on the 1st charge".

There is no merit in this submission. We need say no more than that the deliberate act of the sliding of one's hand by a 29 year old man across the chest of an 11 year old girl whom he did not know constitutes sufficient evidence to prove the *actus reus* of a s.354 offence.

- b) Complaint is made that the judge did not refer in his written judgment to Miss X's answer in cross-examination that she accepted his apology at the time and that it might have been accidental. What is crucial is that the judge accepted the girl's account as to what had happened. He also accepted that she felt "disgusted" after it had happened. The fact that the girl accepted in evidence a theoretical possibility of accidental conduct does not diminish the judge's rejection of the appellant's claim of accident which amounts to a finding that he was lying about this issue. It is the *appellant's* actual state of mind at the material time which is important, not the victim's opinion about possibilities. To borrow a sentence from a text cited by the respondent in its written submissions "the culpable intention of the accused is the crux of the matter."

We do not regard the judge's failure to refer to this part of the cross-examination as a matter which could render the conviction as being unsafe or unsatisfactory.

- c) It is submitted that the judge was wrong to rely, as an admission, on the appellant's Notice of Warning Statement which was admitted into evidence without challenge. The statements are a written record of interviews which took place on 2nd, 3rd and 7th July 2015. The relevant parts of those interviews are as follows:

2nd July

Q7- Do you know why you are brought to the unit?

A - Yes, I know to be taken statement regarding the charge of outraging modesty a student at St. Andrew.

Q8- Is it true regarding your answer to Q7?

A - True and I did not intentionally, at that time I already apologized to the said student.

3rd July

Q37- Did you try to outrage to modesty of the student.

A - Certainly not

7th July

Q5- Do you agree to the charge that I read (s.354)

A - I agree to the charge that was read only the word "assault" I do not agree because at that time I unintentionally knocked.

Q6- What is your plea towards the charge that I have read.

A - I plead guilty.

The judge said with regard to the statement:

"Their evidence is supported by the Notice of Warning Statement of the defendant (EX.D2). As stated above, in that statement the defendant has admitted to committing the offence of the 1st charge. The defendant did explain that he felt that he had no choice but to give an admission of committing the offence but explained that it was accidental. However the Notice of warning Statement was not challenged by the defence and in fact tendered through the defence. It is my view that despite his explanation, I have no reason not to accept his admission on its face value, that is, that he admitted to outraging the modesty of Miss X by sliding his hand across her chest."

We agree with the criticism that the judge treated the written Notice of Warning as an admission. In fact, the appellant consistently claimed his act of sliding his hand across the girl's chest was an accident. The words "*I plead guilty*" must be read in this context.

However, it is equally clear that the judge regarded this evidence as additional to the girl's evidence. It was not a matter which he weighed in the balance when considering the girls' credibility. His assessment of their reliability as witnesses stands alone. He was the judge of the facts and we do not regard the undue weight he attached to the statements as tainting his assessment of the girls' honesty and the accuracy of their evidence.

- d) The grounds of appeal which relate to the evidence of the CCTV footage and the images found on the appellant's mobile phone are only relevant, in our view, to the second charge to which we now turn.

2. The attempted kidnapping charge.

The judge correctly identified the necessary ingredients of this offence contrary to s.361, 363 and 511 of CAP 22 as follows:

- *Taking or enticing away a minor;*
- *Such minor must be under 16 years of age, if a female;*
- *The taking or enticing must be out of the keeping of the lawful guardian of such minor;*
- *Such taking or enticing must be without the consent of such guardian.*
- *That there was an intention by the Defendant to commit an offence;*
- *The defendant then makes a preparation for committing the said offence;*
- *Thereafter the Defendant attempts to commit the said offence, in that upon completion of the preparation, he then commences to do something with the intention of committing the said offence and which is a step towards the commission of the offence.*

In short, it was alleged that the appellant had attempted to entice Miss X out of the keeping of the lawful guardian.

When considering this charge the judge referred to three pieces of evidence. First, the conversation which took place between the appellant and Miss X after the indecent assault had occurred. Secondly, the CCTV footage from the school's security cameras which showed the appellant talking to Miss X and how he left the scene and thirdly, evidence concerning indecent images which were found to be on the Appellant's mobile phone.

In relation to each of these parts of the evidence Mr Noordin submits that (1) the evidence taken at its highest does not constitute the offence of attempted kidnapping (2) the judge's reliance on the CCTV footage was misplaced and (3) the judge erred in both admitting and giving weight to the evidence concerning the appellant's mobile phone.

We shall deal with these issues in turn..

(1) The conversation

There can be no criticism of the judge's finding that Miss X was a credible and reliable witness. We therefore consider Mr Noordin's first submission based on the following conversation, as found by the judge to have taken place after the appellant had followed her when she ran up the same staircase where she had been assaulted.

App – Please help me go take something I forgot in the car.

Miss X – Why ?

App – Because I need your help.

Miss X – No No No

App – Please Please come with me.

Miss X – To where?

App – To a lonely place where nobody is there.

Miss X – No.

App – Please, please.

Miss X then went into a staff room to get a teacher. As a result PW3 came onto the scene. The subsequent events are caught on the CCTV footage. In short, the appellant saw the teacher, PW3, who had said to him “what are you doing”. He turned and ran towards his car, failing to stop when heeded. He got into his car and drove off.

A criminal attempt begins at the moment when a defendant embarks on the crime proper, as opposed to taking merely preparatory steps towards its commission. Where the line falls between embarking on the offence and mere preparation will depend on the circumstances of the case.

In our judgment the words used by the appellant may fall short of an attempted “taking” out of the lawful guardianship but squarely fall within an attempted “enticing” out of the lawful guardianship and the judge was right to so conclude on the evidence before him. It can be safely determined that it was the appellant’s intention to entice her away for unlawful purposes, he had made positive and unambiguous verbal advances to that end, and it was only Miss X’s refusal which prevented such an event from happening.

(2) The CCTV footage

Mr Noordin’s complaints about the CCTV footage seem to be (i) that it only covers part of the whole event and is therefore incomplete and (ii) that the judge should not have decided that it supported the prosecution witnesses.

We think there is no merit in these complaints.

The judge made no reference to the CCTV when considering the first charge, and rightly so, as the footage begins well after that offence had been committed. His reference to it in relation to the second charge is limited to two points. First, that it confirms Miss X’s account of the appellant following her back up the stairs, which he had originally denied and secondly a general observation that the footage again confirms Miss X’s evidence of him engaging with and talking to her as described by her.

The judge was perfectly entitled to place such weight on the footage as described by him in his written judgment. He merely noted that what was seen on the CCTV was consistent with Miss X’s description of what had occurred and it therefore supported her reliability as a witness.

(3) The Mobile Phone

The appellant’s mobile phone was seized in the course of the investigation. It contained images of a sexual nature which the judge described as being “pornographic in nature”.

When considering the attempted kidnapping case the judge said:

“Evidence of pornographic material in defendant’s phone, by itself it is not enough to be considered as motive for the defendant’s actions. The mere presence of those materials in his phone does not add weight to the prosecution’s case. However, after looking at the entirety of the events, from that of the action of the defendant sliding his hands across the chest of Miss X, to the defendant running away when confronted by PW3 and him speeding off in his vehicle, that evidence seems to add weight to the prosecution’s case against him for the charge of attempted kidnapping of Miss X.”

His reference to *“that evidence”* must be a reference to the phone material and he goes on to say that it *“seems to add weight to the prosecution’s case against him for the charge of attempted kidnapping of Miss X.”*

We are troubled by this observation. The prosecution had applied to adduce this evidence, according to the notes of proceedings, in order to show motive and pursuant to ss 8, 11 and 14 of the Evidence Act CAP 108.

The application was opposed but the judge nonetheless admitted the evidence stating, again according to the notes of evidence, as follows:

“It is in my view, that the evidence that the prosecution sought to adduce before this court, should be allowed as they are relevant to the facts and charges and go as to the defendant’s motive.

They will not be considered as evidence of the defendant’s bad character; as stated by the prosecution the defendant is not charged with possession of child pornography.”

In the written judgment the only reference to his reason for admitting the evidence is as cited above, namely that *“it seems to add weight to the prosecution case on the kidnapping charge.”*

Whilst evidence of motive may be admissible it is not necessary for the prosecution to prove it. In addition s.14 of CAP 108 provides for the admission of evidence showing the existence of any state of mind towards a particular person or any state of bodily feeling when such matters may be relevant or in issue. The section gives 16 examples of when s.14 might apply. None relate to the circumstances in this case.

Nonetheless, even if it was arguable that the evidence in question was admissible pursuant to s.8, 11 or 14 we think the judge fell into error in admitting it. In our judgment its relevance, if any, was too remote from the facts in issue. Its probative value was clearly outweighed by its prejudicial value.

However, the judge’s error on this issue, in the circumstances of this case, does not assist the appellant. The judge said it *“seemed to add weight”* to the prosecution case. He regarded it as additional evidence: Again, it was not evidence which he weighed in the balance when assessing the girls’ credibility, accuracy and reliability. He had said at the outset *“looking at their testimony, I have no doubt they were telling the truth.”* In this

case the inclusion of the irrelevant evidence in question does not render the conviction as being unsafe or satisfactory.

The remainder of Mr Noordin's submissions depend largely on the complaint that insufficient weight was put on the appellant's version of events. This amounts to an invitation to this court to reverse findings which the judge made on matters of credibility. It is only in exceptional circumstances that an appeal court would make such a ruling and this is not such a case.

The appeal against conviction on both charges is dismissed.

Sentence

S.354

There is no doubt that entering school premises, on the pretext of looking for a colleague, and committing an act of outraging modesty on an 11 year pupil at the school is a serious matter.

The judge took in to account the appellants clear record and his work and family background.

He noted the case of *PP v Normajali bin Napir (2010) JCBD 144* and followed the approach of Steven Chong J in that case and we think he was right to do so. 9 months after trial is not a manifestly excessive sentence for this offence.

S.363

The judge noted the facts of the case of *PP v Ali bin Hj Othman (2004) JCBD 254*. He considered the present case to be similar in seriousness and passed a sentence of 18 month imprisonment. Given that this offence was committed on school premises with an intention to drive the girl away from the safety of her school we regard the sentence passed as appropriate in all the circumstances.

Totality

The judge ordered the two sentences to be served consecutively as they were two separate criminal acts. This was not wrong in principle.

Looking at the incident as a whole Miss X was clearly a brave and sensible young lady. She had the presence of mind to give a false name to the appellant when he asked her what her name was and she sought help and refuge in the Teacher's office at the earliest opportunity. She is to be commended. As a result the potential seriousness of the matter was averted. The entire exchange took about 15 minutes and, with totality in mind, maybe regarded as a continuing incident. We are thus minded to make the two sentences concurrent.

Order

1. The appeal against conviction is dismissed.
2. The sentences passed on each charge shall remain but shall be served concurrently making 18 months and one stroke in total.

Mortimer, P.

Burrell, J.A.

Seagroatt, J.A