Public Prosecutor

AND

Muhd Rosanan Bin Abdullah Samak

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 1 of 2008)

Power, P.; Mortimer and Chong JJ.A.
10th May, 2008.

DPP Miss Farhana and DPP Miss Suhana for Appellant.
Mr. Sheikh Noordin (M/S Sheikh Noordin Mohammad) for Respondent.

Case cited in the Judgment:
Haw Tua Tau v PP [1981] 2 MLJ 49

Mortimer, J A.:

1. This is a Public Prosecutor's appeal against an acquittal brought under Section 438A of the Penal Code. The Respondent was acquitted by Hayati J. at the close of the prosecution case on 10 December 2007 on the grounds that there was no case to answer. The Respondent was charged with two offences, one of attempted rape alleged to have been committed on 26 April 2006 and one of rape on 29 April 2006.

2. The Complainant (Miss X) is a 19 year old Indonesian maid who had been employed by the Respondent in his home since about February 2006. The evidence given at Trial consisted of Miss X; her brother who was also working in Brunei; the agent in Brunei who had arranged her employment; the female investigating police officer of the Abuse Unit; and the doctor who examined Miss X on the same day as the alleged rape. Also before the Court were two exculpatory statements made by the Respondent to the police in which he contended that each incident was consensual.

3. The evidence before her was fully and accurately summarised in Hayati J.'s ruling. We have also had the advantage of reading the notes of evidence of the Trial.

4. DPP Suhana, appears with DPP Farhanah, for the Public Prosecutor. She contends that the Judge applied the wrong principles of law at the close of the prosecution case and that had she applied the correct principles she would have ruled that there was a "prima facie" case which should have been allowed to continue.

5. In particular the DPP contends that the Judge failed to comply with Section 177(1) of the Criminal Procedure Code CAP7. This provides:

> "177.(1) If upon taking all the evidence referred to in Section 176 and making such examination (if any) of the accused under Section 220 as the Court considers necessary it finds that no case against the accused has been made out which, if un-rebutted, would warrant his conviction, the Court may, subject to the provisions of Section 186, record an order of acquittal."

6. Sections 220 and 186 are not relevant to the issues in this appeal.

7. The DPP urges this case in spite of the Judge's statement in her ruling that she is exercising the power conferred by Section 177 and following the guidance of the Privy Counsel on the approach to the Section to be found in *Haw Tua Tau v PP* [1981] 2 MLJ 49, on a similar provision to Section 177 in the Malaysian Code.

8. The Judge set out her approach to the submission at the outset. Having referred to Section 177 she summarised it as follows:

> "In dealing with this submission I have been guided by *Haw Tua Tau v PP* [1981] 2 MLJ 49 in which the Privy Counsel set out the general duty of a Judge at the conclusion of the Prosecution case. That is to consider whether at the close of the Prosecution case there is some evidence with which if he were to accept it as accurate, would establish each essential element in the alleged offence. If he has not so found, he should not call the accused to enter upon his defence."

9. She returns to the same case in the last paragraph of her ruling:

> "Bearing in mind the standard of a prima facie case formulated in the *Haw Tua Tau* case, I do not find at this stage a prima facie case on both the charges and I therefore feel obliged to rule that there is no case for the Defendant to answer and acquit and discharge the Defendant of both charges without calling him for his defence."

10. Of course, this Court cannot evaluate the evidence. Only the Judge who has seen and heard the witnesses can do that. We can however see in black and white the evidence given by the witnesses and we can note the inconsistencies in statements, the inconsistency or consistency between what has been said and the undisputed facts and we may consider consistent and inconsistent behaviour.

11. There are therefore two questions for this Court to consider:

    (i). Whether the Judge accurately summarised the principles of law which it was her duty to apply on a submission of "no case" at the end of the Prosecution case, and

    (ii). If so, whether she applied those principles to the evidence.

12. The Judge does not set out the full nature of her general duty under Section 177 and the guidance in *Haw's* case. Insofar as it goes her summary is both correct but succinct. When a Judge of her experience indicates that she is following the guidance in a well known case this Court is entitled to assume that she applies those principles unless the contrary is demonstrated in her ruling.

13. We turn briefly to Section 177 and *Haw's* case. Although it may be thought to be somewhat unrealistic, a Judge sitting alone whose duty is to both direct himself as to the law and then find the facts must, on a submission of "no case to answer", initially rule as if he were sitting with a jury tasked to find the facts. In *Haw's* case at 51 the Privy Counsel put it in this way:

> "In their Lordship's view the same principle applies to criminal trials where the combined roles of decider of law and decider of fact are vested in a single Judge (or in two Judges trying capital cases). At the conclusion of the Prosecution's case what has to be decided remains a question of law only. As decider of law, the Judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and only then, is he justified in finding "that no case against the accused has been made out which if un-rebutted would warrant his conviction", within the meaning of Section 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the Prosecution's witnesses until the defence has tended such evidence, if any, by the accused or other witnesses as it may want to call and Counsel on both sides have addressed to the Judge such arguments and comments on the evidence as they may wish to advance."

14. Section 188(1) in this respect is the same as Section 177 in our law.

15. It follows that on a submission of "no case to answer" a Judge sitting alone is required to undertake first an evaluation of the evidence to determine whether a "prima facie" case on each element of the offence has been shown. If not he acquits. If he rules against the submission he must call upon the accused to present his defence. If the accused chooses not to give evidence the Judge must then undertake a second evaluation of the evidence on a different basis to determine whether the same evidence which has demonstrated a prima facie case establishes the case against the accused beyond all reasonable doubt.

16. Finally, the test in Section 177 is that there is no evidence "which, if un-rebutted, would warrant his conviction…" not, "would *result* in his conviction." This is reflected in the Privy Counsel's advice that "the Judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each element in the alleged offence". This is a question of law and in the jury context the question is whether there is evidence upon which it would be open to the jury to act.

17. It follows that if some evidence is given upon an essential element in the offence only if it is "inherently incredible" or put another way would not warrant a conviction it is open to the judge to rule that no prima facie case has been made out. It is important to note that this does not in any way place any burden upon an accused. Often there is evidence showing a prima facie case which may not, on its own, be sufficient to establish a case beyond reasonable doubt.

18. We turn now to the second issue. Did the Judge actually apply the principles which she set out.

19. In her ruling the Judge rightly focused her attention upon the essential issue, consent. Miss X undoubtedly said at all times that she did not consent to either incident. The Judge had to decide whether that evidence would, if un-rebutted, warrant convictions or put another way whether it was or was not inherently incredible.

20. Nowhere in her ruling does she say in terms that the prosecution evidence would, if unrebutted, not warrant a conviction, nor does she at any time specifically find that the complainant's evidence was 'inherently incredible'. Indeed there are passages in which she seems to be simply evaluating Miss X's evidence on the basis whether she found her evidence credible. For example she uses these words:

> "When deciding whether or not I could accept her evidence as credible, I considered various matters which might lead me to doubt her veracity and credibility. Having seen and heard Miss X and having considered the facts and circumstances in this case, this is certainly not a case where I would act on her evidence alone."

21. This is at the conclusion of her consideration and finding that Miss X's allegations were uncorroborated. A consideration which is not relevant to her enquiry. If Miss X's evidence is 'inherently incredible' there would be no evidence to corroborate.

22. In the penultimate paragraph of her ruling the Judge again uses words which are relied upon by the public prosecutor as demonstrating that the Judge was not applying the correct test. The words are:

> "I am left with considerable doubt as to the issue of consent which is the sole issue in this Trial".

23. Undoubtedly, as submitted by the DPP, these words and the earlier passage to which we have adverted could indicate that the judge was in fact considering in some detail whether without further evidence she was able to find the case proved beyond reasonable doubt. If so this was premature. A consideration only to be undertaken at the conclusion having heard defence evidence, if any.

24. On the other hand, Mr Sheikh Noordin who appears for the Respondent, contends that an examination of the whole ruling indicates not only that it was open to the judge to rule that there was no case, but that on the issue of consent, it was open to the judge to find that the evidence was inherently incredible; it was evidence upon which it was not open in law for either judge or jury to convict. The judge's words which could indicate an application of the wrong test, he says, were used in the course of her detailed demolition of Miss X's evidence on the issue of consent. In brief the Judge points out that Miss X's evidence of lack of consent and forceful intercourse or attempt is inconsistent with almost all the other evidence and her behaviour after the first incident. She took no steps to leave the flat, or to complain to neighbours or domestic workers in adjoining flats. She took no steps to avoid the Respondent. She even failed to complain to the

Respondent's ex-wife who came to the flat shortly after the second incident and her reasons for not complaining where themselves inconsistent.

25. Finally, Mr Noordin points to the judge doubting Miss X's allegation of the use of force as it was unsupported by any medical evidence even though the medical examination was carried out on the same day as the second incident. Her evidence of losing her virginity together with the trauma and distress associated with it was, on one view, shown by the medical evidence to be quite false.

26. The final paragraph of the Judge's ruling to which we have already referred is heavily relied upon by Mr Noordin and is a passage which requires serious examination. Having evaluated Miss X's evidence on the question of consent she ruled "bearing in mind the standard of a prima facie case formulated in the *Haw Tua Tau* case, I do not find at this stage a prima facie case on both the charges…"

27. The Judge's references to corroboration are inconsistent with a finding that there is no evidence to corroborate, but even if this is overlooked her whole examination of the evidence indicates that she is in reality deciding whether the evidence is sufficient to justify a finding of guilt on the criminal standard. What is more the words to which we have referred which she uses during her ruling are inconsistent with words of Sec.711 and the guidance in *Haw's case.* Inadvertently she strayed from applying the test whether the evidence, if unrebutted, would *warrant* a conviction (the first stage) to a consideration of whether the evidence would *result* in a conviction (the second stage). The second stage is not appropriate until the end of the trial whether or not the accused gives evidence.

28. Of course, it is not our task, nor are we able, to evaluate the evidence given in front of the judge. Had she applied, or continued to apply, the correct test we are unable to say whether she would have reached the same conclusion.

29. For these reasons we conclude that the judge did not apply the correct test and we allow the appeal.

30. The DPP asked for the case to be remitted to the judge to continue the trial and the respondent agreed. We therefore ordered that the case be remitted to the judge for the trial to continue. Having since considered our powers we doubt whether we are able to make such an order. We have therefore asked the parties to address us further on our powers under Chapter XLIVA of the Criminal Procedure Code.

31. It is accepted by both parties that we have no power under the CPC to order that the trial should continue in front of the same judge. Having allowed the appeal normally the acquittal must be quashed under section 438D(3) CPC and a retrial ordered under section 438H. However, we only order a retrial if the interests of justice so require.

32. We have also heard the parties on whether or not it is just to order a retrial in all the circumstances. We note the following. First, the judge's ruling. We are unable to say what her ruling would have been had she applied the correct test. But, as it was she ruled that the evidence was not sufficient to found a conviction on the criminal standard. Had this trial continued an

acquittal was likely. Secondly, this case has been hanging over the defendant's head since February 2006 and no proper estimate can be made when, or even whether, a retrial will take place. The complainant has now returned to Indonesia and it is unknown whether she will return. Thirdly, the defendant has been suspended from his employment and will remain suspended until after any retrial. Finally, with all this in mind DPP Farhana is reluctant to press for a retrial.

33. In these circumstances we do not think it is in the interests of justice to order a retrial. We therefore quash the acquittal and we do not order a retrial.