

Darsono Seno

AND

Public Prosecutor

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 5 of 2007)

Power, P; Mortimer and Davies, JJ.A.
6th November, 2007.

Attempted rape of 13 year old school girl by family driver. Given position of trust sentence of 9 years after trial was appropriate.

Defendant in person.

Suriana Bte Radin (Deputy Public Prosecutor) for the Public Prosecutor.

Power, P.:

The appellant was convicted of attempted rape contrary to s. 376 read with s. 511 of the Penal Code and of using criminal force with the intent to outrage the modesty of a woman contrary to s. 354 of the Penal Code.

He was found guilty of both offences after trial before Hayati J and was sentenced to 9 years and 12 strokes (the minimum number required by law) on the first charge and to 1 year and 2 strokes on the second charges. The sentences were ordered to be consecutive but the strokes to be non-cumulative.

He now appeals against both convictions and sentences.

The complainant was a 13 year old school girl. The appellant is a 36 year old Indonesian who was employed as a driver by the complainant's parents.

The evidence of the complainant as regards the attempted rape, which I take from the judgment of Hayati J., was *“that on the 14th January 2006, at about 5pm, (she was 13 years old at that time) pursuant to his normal duties, as a driver for Miss X’s family, the defendant was driving Miss X home from a restaurant in Jalan Tutong. Miss X was sitting in the middle portion of the van driven by the defendant. The defendant drove through a road described by Miss X ‘opposite Boustead’ in Beribi. On the way, Miss X fell asleep. She was awoken when she heard the engine of the van switched off and it*

stopped. Miss X started feeling scared. She told the court, she was scared because she was wondering if the defendant was going to do the same thing 'what he did to me in November'. Suddenly the defendant opened the rear door of the van on the left. Still a bit drowsy after her interrupted nap, Miss X saw the defendant pulled his pants down inside the van near where she was sitting. The defendant was wearing jeans and t-shirt at the time. Miss X was wearing her school uniform (baju kurung). The defendant was not wearing any underwear. The defendant pulled her wrist and forced her to hold his penis. She held it for a few seconds then tried to pull her hands away but she could not do so as his hands were too strong. Miss X tried to get away but the defendant lowered her seat and then pulled her to the back passenger seat. According to Miss X things happened so quickly and she can't remember how he managed to pull her to the back seat. He made her lie down on the seat, lifted up her long skirt and pulled down her underwear. She tried to free herself by moving around. Then she felt his finger in her vagina for a few second. She then felt him rubbing his penis onto her vagina. She was sure it was his penis because she said she took a glance at it when he forced her to hold it and she also said that it could not be his finger as it was 'too big'. She tried to hit his shoulders but he was too strong. Suddenly she felt the defendant trying to insert his penis into her vagina. She felt pain and screamed. On hearing her scream, the defendant stopped and put on his pants. She felt something wet like a liquid discharge on her vagina. The defendant wore his jeans and went back to the driver's seat. Then, he drove Miss X home. Miss X wore her underwear. She sat, stunned, at what had just happened in the back of the van. Then she caught hold of her handphone which she carried in the pocket of her school uniform top. She began texting a message via the sms to her mother's handphone". The message said, inter alia, "Ma I found out Datsono is a rapist." The mother went home where she met her daughter and the matter was then reported to the police.

During the course of the investigation the complainant alleged that an incident had occurred two months before the attempted rape in which the appellant while driving her home from school had stopped the vehicle, had kissed her on her neck and cheeks and had then touched her breasts over her uniform. She said that she was shocked and tried to push him away but that he was too strong for her. She said that she had not reported this incident because the family was about to go on holiday to Singapore and her father was very sick.

Support was given to her evidence of the first charge by the evidence of Dr Radha Pandiyan, a specialist gynaecologist, who 6 hours after the incident found a small abrasion on the posterior aspect of the vaginal orifice. She also took a swab from within the complainant's hymen area on which there was sperm which matched the DNA of the appellant.

The appellant gave evidence in which he did not contest that the sperm was his but contended that he had never intended to rape the complainant and had only inserted his finger into her vagina and had stopped when she said it was painful. He explained the semen in the complainant's vaginal area by saying that he had ejaculated and had wiped the semen into her vaginal area. He contended that the complainant had consented to his

actions and had only complained because she was angry that he had spilled semen on her skirt.

As to this incident the judge rejected the appellant's evidence that the complainant had consented to what he did and was satisfied that he had tried to insert his penis into her vagina and that his actions constituted attempted rape.

As to the outraging modesty offence the appellant admitted kissing the complainant's forehead and cheeks and touching her breast but said that she consented to everything he did. The alleged consent was quite contrary to the evidence of the complainant.

The judge was satisfied that there was no consent and accepted her explanation as to why she had made no immediate complaint.

There is nothing that would cast any doubt on the correctness of the judge's findings of fact which were supported by strong credible evidence.

The judge sentenced the appellant to 9 years imprisonment and 12 strokes on the attempted rape charge and to 1 year and 2 strokes on the outraging modesty charge. She ordered that the sentences be consecutive making 10 years, and that the strokes be non-cumulative.

As the judge noted the offences, serious in themselves, were compounded by the appellant's abuse of the position of trust in which he was placed by the parents of the complainant. The sentences while heavy were not ones with which we could properly interfere.

The appeals against both convictions and sentences must be dismissed.

Power, P.

Mortimer, J.A.

Davies, J.A.