

DSP Ramzi Hayatina bin Dato Haji Ibrahim

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 11 of 2021)
&
(Criminal Appeal No. 15 of 2021)**

Haji Abdullah Soefri, JC
21st March 2022

Criminal Law – Section 354 of Penal Code – Pleaded not guilty – Convicted and sentenced to 18 months and 1 stroke of whipping – appeal against conviction – court would not disturb the finding of facts unless plainly wrong in law or clearly reached against the weight of evidence – appeal against conviction dismissed – appeal against sentence by prosecution – sentence imposed by Magistrate above than sentence in cases that were cited in the prosecution submission – dismissed – sentence lenient but not manifestly lenient – not to be taken court have approved sentence of 18 months and 1 stroke of whipping for section 354 of Penal Code

Cases referred to:

Public Prosecutor v Mohd Taufik bin Abu Bakar (2019) SGHC 90

Haji Nora'afbillah bin Ahmad @ Ja'afar v Public Prosecutor (High Court Criminal Appeal No. 37 of 2020)

Pg Tuah bin Pg Hj Kula v Public Prosecutor (High Court Criminal Appeal No. 5 of 1993)

Harpal Singh v Public Prosecutor (High Court Criminal Appeal No. 28 of 2015)

Kunasekaran s/o Kalimuthu Somasundara v Public Prosecutor (2018) 4 SLR 580

Haji Rozaiman Abdul Rahman for the Defendant.
DPP Suriana Radin for the Public Prosecutor.

JUDGMENT

Haji Abdullah Soefri, JC:

This is an appeal against conviction by the Defendant (Appellant) and also an appeal against the sentence by the Prosecution imposed by the Magistrate on the 9th of June 2021 on his conviction and on 15th of June 2021 on his sentence.

The Defendant was found guilty and convicted to a charge under Section 354 of the Penal Code. The charge is as follows:

“That you, on the 14th of September 2019, sometime between 1113am and 1115am, at the vicinity of the staircase in the International Airport Police in Berakas, Brunei Darussalam, did use criminal force to one Miss X, to wit, you smacked and grabbed her left buttocks twice and groped her genital area twice, intending thereby to outrage, or knowing it to be likely that you will thereby outrage the modesty of the said Miss X, and you have thereby committed an offence punishable under Section 354 Penal Code, Chapter 22.”

The Magistrate on 15th June 2021 imposed an imprisonment sentence of 18 months and 1 stroke of whipping to take effect from 9th of June 2021 and dismissed the Defendant’s application for stay of execution.

Appeal Against Conviction

The Appellant submits that the Magistrate has failed to apply the test of ‘*mens rea*’ to satisfy every ingredient of the charge preferred against the Appellant and accept the Defence of the Appellant.

The Appellant counsel further submits that *“to prove that the Appellant had sufficient knowledge for the purpose of the charge, it must be shown that the Appellant committed his acts on the victim whilst knowing it to be likely that he will thereby outrage the modesty of that person. In assessing the knowledge of the accused in the commission of the act, the objective circumstances on the accused state of mind must be viewed deliberately.”*

The Appellant submitted that *“the Magistrate has failed to rightfully accept the defence of a ‘special relationship’ with the victim”* and *“this failure has caused the learned trial Magistrate to not be able to discover that the Appellant had taken active steps to downplay his superiority and that the parties had a relationship that belied the formal superior – subordinate relationship they otherwise shared.”*

The Appellant further submitted;

“The victim’s further acquiescence to the Appellant’s intrusive acts had to be assessed in determining whether the Appellant had knowledge that his acts would likely outrage the victim’s modesty. In light of this context, the victim’s lack of objection over an extended period of time to the Appellant’s highly intrusive acts cannot be said to lead to an inference that the Appellant knew that his acts would likely outrage the victim’s modesty.”

The Appellant cited the case of **Public Prosecutor v Mohd Taufik bin Abu Bakar (2019) SGHC 90:**

“The law mandates that the Appellant must have had knowledge that his acts would likely outrage his victim’s modesty. This was a vital requirement, and failure to prove this was fatal to some of the convictions against the appellant.”

The Appellant submitted that the learned Trial Magistrate has failed to scrutinize the victim’s evidence and for complaint.

The Appellant submitted that *“it is contended that the learned Trial Magistrate had caused a miscarriage of justice when she disregarded PW6’s evidence, which distinctly shows that the Appellant has never committed the alleged offence as the victim was able to halt and obstruct the Appellant from committing such acts. To this it is erroneous to convict the Appellant for an act that he has never committed.”*

The Appellant counsel informed to this Court that;

“We submit, if the relationship exists and submit that it exists, what the Appellant did to the victim, he would not have the knowledge that it will outrage the victim’s modesty since they have special relationship and the Appellant counsel agreed that his client did it but he did not have the knowledge that it will outrage her modesty because of the special relationship.”

The Appellant’s defence was a bare denial. Paragraph 67 of the Magistrate’s judgment:

“It is his evidence in court, he claimed that when he and his victim were at top of the stairs, he thanked the victim for finishing the job tasked to her and jokingly swing his right-side hip towards the victim’s left-side hip, but he was unsure if his hip had made contact with hers. The Defendant claimed that the victim had giggled and said “welcome” to him and they had continued to walk down the stairs.”

The Appellant counsel before this Court agreed that his client did it but he did not have knowledge that it will outrage her modesty because of the special relationship.

I agree with the Prosecution that the Senior Magistrate did correctly address the issues of *mens rea* and it is evident in paragraph 13 of her judgment where she states as follows:

“Therefore, to succeed on the offence under section 354 of the Penal Code, the Prosecutor must therefore prove beyond reasonable doubt that:

a) The defendant used criminal force against the victim without her consent;

b) The defendant knew that he would likely outrage the modesty of the victim by his action.”

I also agree with the Prosecution that ‘special relationship’ will not come into play in determining whether the Appellant had the necessary knowledge that what he did was likely to outrage the modesty of the victim.

Now that the Appellant stance has changed to that he did it but did not have the knowledge.

I agree with the Prosecution submission that the Senior Magistrate in her judgment in paragraph 38 to paragraph 43 had accepted the evidence of PW2 that the Appellant had committed such acts alleged in the charge and this is consistent with what the Appellant stance is now.

The Senior Magistrate in paragraph 74 of her judgment, finds that the Appellant had intentionally used criminal force on the victim by smacking and grabbing her left buttocks twice and groped her genital area twice and he had done so knowing it likely to outrage the victim’s modesty.

I am satisfied that the Senior Magistrate had correctly identified what the *mens rea* is, and she had also properly applied the test.

The Senior Magistrate is entitled to find that the Appellant was not a witness of truth and reject his evidence and gave her reasons in paragraph 70 of her judgment.

As to the other ground of appeal, it is clear that the Senior Magistrate did consider the submissions as evident in her judgment in paragraph 49 to 50 and with the facts before her, she rejected the Appellant’s argument on the motive and gave her reasons in her findings of the facts.

It is trite law that an appellate court would not disturb the finding of facts unless they are plainly wrong or clearly reached against the weight of the evidence bearing in mind that the trial court had the opportunity of observing the witnesses to assess their veracity and reliability. (***Sgt 3983 Haji Nora’afbillah bin Ahmad @ Ja’afar v Public Prosecutor [High Court Criminal Appeal No. 37 of 2020]***)

For the reasons that I have aforesaid, I do not find that the Senior Magistrate has erred in her findings and conviction of the Appellant (Defendant). I hereby dismiss the Defendant’s (Appellant’s) appeal against conviction.

Appeal Against Sentence

Prosecution appeal against the sentence of 18 months’ imprisonment and 1 stroke imposed by the Senior Magistrate on the Defendant on the ground that it is manifestly inadequate considering the facts of the case.

The Prosecution submitted that the starting point should be within the range of 2 years 6 months and that 1 stroke is on the lenient side.

The Prosecution highlighted the following cases:

1. ***Pg Tuah bin Pg Hj Kula v Public Prosecutor*** (High Court Criminal Appeal No. 5 of 1993)
2. ***Harpal Singh v Public Prosecutor*** (High Court Criminal Appeal No. 28 of 2015)
3. ***Hamdani bin Hj Muhin v Public Prosecutor***
4. ***Haji Nora'afbillah bin Ahmad @ Jaa'far v Public Prosecutor*** (High Court Criminal Appeal No. 37 of 2020)

In all the cases that are cited above, the sentences that were imposed are in the range of 6 months to 1 year and whipping in the range between 1 to 2 strokes.

Prosecution also highlighted a Singapore case of ***Kunasekaran s/o Kalimuthu Somasundara v Public Prosecutor*** where this case sets out the sentencing framework for the offence of outrage of modesty under section 354 of Singapore Penal Code.

Prosecution in paragraph 7 of her submission on sentencing highlighted that the Senior Magistrate has rightly taken the aggravating factors in this case.

No doubt that offences of outrage modesty by a person of trust and abused his position is a very serious offence.

The Senior Magistrate has imposed a sentence that is above than the cases that were cited in the Prosecution submission.

The sentence of 18 months and 1 stroke imposed by the Senior Magistrate is lenient but not manifestly lenient in the circumstances of this case.

For these reasons, I dismiss the Public Prosecution's appeal and it should not be taken that I have approved of a sentence of 18 months and 1 stroke of whipping for section 354 of Penal Code offence in the circumstances surrounding the case.

Haji Abdullah Soefri bin POKSM Haji Abidin
Judicial Commissioner