

Sgt 3983 Haji Nora'afbillah Bin Ahmad@Ja'afar

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 37 of 2020)**

Steven Chong, CJ
27 February 2021

Criminal law – Using criminal force intending to outrage modesty – Appeal against conviction and sentence – Appellate court will not disturb findings of fact unless they are plainly wrong or clearly reached against the weight of the evidence – Admissibility of CCTV footage – Sentence not excessive – s.354 of the Penal Code.

Sharah Abdul Hamid@Sharon Yeo (M/S Hale Zainidi Ong) for the Appellant.
DPP Nurul Fitri Binti Kiprawi for the Public Prosecutor/Respondent.

Cases cited:

Public Prosecutor v Normajili Bin Napir [2010] 2 JCBD 144
Harpal Singh v Public Prosecutor [2015] 2 JCBD 116
Shahban Alam v Public Prosecutor [Criminal Appeal No. 4 of 2020]
Jumat Bin Hassan v Public Prosecutor [1994] JCBD 345

Steven Chong, CJ:

Introduction

On 5 November 2020 in the Magistrate's Court the appellant was convicted after a trial of using criminal force intending to outrage the modesty of a woman ("Mrs X") contrary to section 354 of the Penal Code.

Magistrate Kamaliah Fadhilah Binti Hj Ibrahim sentenced the appellant to one year's imprisonment and one stroke of corporal punishment.

This is an appeal against conviction and sentence.

Prosecution case

The case for the prosecution comprised three key strands of evidence: (a) the testimony of Mrs X; (b) CCTV footage; and (c) admissions by the appellant.

Mrs X's testimony

On the morning of 19 July 2019 Mrs X was at the freezer section of the Kedai Runcit Labisah (*"the shop"*) looking at the frozen chickens on display when the appellant approached her from behind and *"pressed"* himself on her and the degree of force was such that she moved forward slightly.

Specifically, Mrs X said she felt the appellant's erect penis on her backside in the middle as he *"pressed"* his body on hers. Mrs X looked at the appellant and said, *"What are you doing?"* The appellant said, *"Sorry, Sorry"*, and walked away hurriedly.

Mrs X was disgusted with what the appellant had done to her and she immediately sent a text to her husband (*"the husband"*) on WhatsApp informing him that someone had *"pressed"* himself on her. The husband told Mrs X to take a photograph of the culprit but she did not as she was scared and her hands were shaking. Mrs X went to the cashier to find out if the CCTV camera in the shop was operating and was advised to return in the afternoon.

Outside the shop in the car park Mrs X spotted the appellant in his car. The appellant upon seeing Mrs X quickly reversed his car and drove off.

Arriving home, Mrs X told her sister about the incident before going to the police station to make a report.

CCTV footage

The police obtained CCTV footage from the shop which showed (a) Mrs X standing and facing the front of the freezer; (b) the appellant about to walk pass Mrs X along the aisle when he suddenly turned and stepped immediately behind her bringing the front of his body towards the back of Mrs X's body before walking away quickly; and (c) Mrs X brushing her hand on her backside after the appellant had left her.

Appellant's admissions

The appellant challenged the admissibility of the four written statements he gave in the course of police investigations into the complaint of Mrs X on the ground they were involuntary.

After holding a *voire dire*, the Magistrate was satisfied that all four statements were voluntary and admitted them in evidence.

First statement

The appellant said he “*accidentally touched*” the backside of Mrs X. He had apologized to Mrs X but she was angry and he walked away from her.

Second statement

The appellant admitted he bumped against Mrs X’s backside “*deliberately*” because the aisle was narrow and “*he took the opportunity to rub his penis*” on her backside.

He knew his action was wrong.

Given the opportunity to meet Mrs X, he would apologise to her.

He hoped Mrs X would forgive him and the incident could be “*settled*” because he was worried about his job and wife and children who were dependent on him.

Third statement

The appellant again admitted he had “*deliberately rubbed his penis*” on Mrs X’s backside.

He “*appealed*” for an opportunity to apologise to Mrs X and hoped she would forgive him and “*withdraw*” her report against him.

Fourth statement

The appellant denied he outraged the modesty of Mrs X.

He said that the “*aisle was narrow causing me to rub my genitals*” on Mrs X’s backside and he immediately apologized to her.

Defence case

The appellant has served in the Royal Brunei Police Force since 1998 and is a Sergeant in the Special Operations Unit. His wife and six children are dependent on him.

On that morning, after having breakfast with his wife and three of his children, the appellant went to the shop to buy “*Indomee*” while his family remained outside.

Concerning the allegation of Mrs X against him, the appellant said he only realized her presence when he was in front of the freezer. He did not “*pay much attention*” to Mrs X and “*only wanted to see the price of the chicken*” and “*unintentionally*” walked “*close*” to her.

As the appellant “*did not mean to get close*” to Mrs X he apologized to her.

Under cross-examination the appellant at first contested there was body contact between him and Mrs X. However, towards the close of cross-examination the appellant conceded he may have “*unintentionally*” bumped into Mrs X with his key or another item kept in his pocket.

Decision of the Magistrate

In respect of Mrs X, the Magistrate found her to be a credible witness and accepted her evidence that at the material time and place the appellant did “*press*” his body on hers and she felt his penis on her backside.

The Magistrate was satisfied the testimony of Mrs X on these crucial issues was corroborated by her contemporaneous complaint to the husband using WhatsApp; the CCTV footage of the incident; and the admissions by the appellant in his police statements.

Turning to the appellant’s evidence the Magistrate did not find him to be a truthful witness and rejected his testimony that there was no body contact between him and Mrs X and if there was contact it was unintentional and possibly with his key or another item kept in his pocket.

The Magistrate concluded that the appellant by his act of pressing his penis on Mrs X’s backside had used criminal force intending to outrage her modesty as charged and convicted him accordingly.

As to sentence the Magistrate, having referred to precedent cases (*Public Prosecutor v Normajili Bin Napir* [2010] 2 JCBD 144; *Harpal Singh v Public Prosecutor* [2015] 2 JCBD 116; and *Shahban Alam v Public Prosecutor* [Criminal Appeal No. 4 of 2020]), observed that the sentences for offences of this nature ranged between 6 months and one year’s imprisonment.

Grounds of appeal

Broadly, the grounds of appeal against conviction are threefold:

- (a) the Magistrate was wrong to find Mrs X a credible witness and to disregard the appellant’s evidence;
 - (b) the Magistrate was wrong to find that the appellant’s police statements were voluntary;
- and

(c) the Magistrate was wrong to admit the CCTV footage of the incident.

Against sentence the contention is that it is manifestly excessive.

Discussion

Grounds (a) and (b) of the appeal can conveniently be dealt with together since they essentially concern the Magistrate's findings regarding the credibility and reliability of the prosecution witnesses and of the appellant.

It is trite law that an appellate court will not disturb findings of fact unless they are plainly wrong or clearly reached against the weight of the evidence bearing in mind the trial court had the opportunity of observing the witnesses to assess their veracity and reliability.

As the Magistrate saw and heard Mrs X testify in the trial she was entitled to find she was a truthful witness and to accept her evidence that the appellant had "*pressed*" his penis on her backside.

Likewise, the Magistrate saw and heard the appellant testify in the trial and she was entitled to find that he was not a witness of truth and to reject his evidence that there was no body contact between him and Mrs X and there may have been an unintentional bump against her with his key or another object kept in his pocket.

Similarly, having seen and heard the prosecution witnesses and the appellant testify in the *voire dire* on the admissibility of his four police statements, the Magistrate was entitled to accept the evidence of the former and reject the evidence of the latter and find these statements voluntary.

This brings me to Ground (c) of the appeal and the argument is that the CCTV footage falls within the definition of "*output*" under section 2 of the Computer Misuse Act ("*CMA*") and it should not have been admitted in evidence without a certificate pursuant to section 16 which provides as follows:

"(1) In any proceedings where it is desired to admit output in evidence in accordance with section 15, a certificate -

(a) identifying the output and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that output as may be appropriate for the purpose of showing that the output was produced by a computer;

(c) dealing with any of the matters mentioned in section 15(1); and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the computer at all relevant times,

shall be admitted in those proceedings as evidence of anything stated in the certificate."

The argument is misconceived for two reasons. First, section 16(1) must be read together with section 15(1) which provides:

"Notwithstanding sections 35A and 35B of the Evidence Act (Chapter 108), in any proceedings under this Act . . . "

Reading sections 15(1) and 16(1) together, it is clear that these provisions apply to proceedings under the CMA only.

Second, section 16(1) must also be read together with section 16(4) which provides:

"Notwithstanding subsections (1) and (2), a court may require oral evidence to be given of anything which evidence could be given by a certificate under that subsection."

Reading sections 16(1) and 16(4) together, it is clear that oral evidence instead of a certificate may be given of any computer output.

The admissibility of the CCTV footage was never challenged in the trial. There was no dispute about the authenticity, integrity and accuracy of the CCTV footage. The Magistrate rightly admitted and relied upon the CCTV footage as corroborative evidence of Mrs X's testimony in convicting the appellant.

Mrs X's testimony, the CCTV footage and the appellant's admissions in his police statements cumulatively provided overwhelming evidence this was not an accidental bump by the appellant against Mrs X's backside but a deliberate sexual act forced upon an unsuspecting victim.

On sentence the argument of the appellant is that it is manifestly excessive *"for a first time offender who did not even use his hands to touch the buttocks of the complainant"* and the incident was *"less than a second"* and he was *"fully clothed"*.

I disagree.

As was observed by Roberts, CJ in *Jumat Bin Hassan v Public Prosecutor* [1994] JCB 345, in our society, *"any kind of outraging modesty must necessarily be taken as a serious one"*.

This was a disgusting sexual act by the appellant forced on a woman going about doing her grocery shopping. The court must send a strong message that this kind of behaviour will not be tolerated.

Notwithstanding the appellant's clear record the sentence is not excessive still less manifestly so.

Conclusion

For the reasons given the appeal against conviction and sentence is dismissed.

DATO SERI PADUKA STEVEN CHONG
Chief Justice