

Shahban Alam

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 4 of 2020)**

Steven Chong, CJ
13 August 2020

Criminal law – Outraging modesty – Unsworn evidence – Corroboration – Sentence.

Hj Mohammad Daud Bin Hj Ismail (M/S Daud Ismail and Company) for the Appellant.
DPP Nurul Fitri Bin Kiprawi for the Public Prosecutor/Respondent.

Cases cited:

The King v Baskerville [1916] 2 KB 658
Pram Nair v Public Prosecutor [2017] 2 SLR 1015
Public Prosecutor v UI [2008] 4 SLR(R) 500
Public Prosecutor v Abdul Rahim Bin Ahmad and Others [1988] JCBD 197
Public Prosecutor v Jahidin Bin Adi and another [1999] 2 JCBD II
R v Ingham (3 October 1974)(Court of Appeal (Crim Div), UK)

Steven Chong, CJ:

Introduction

This is an appeal against conviction and sentence by the appellant who was convicted by Magistrate Kamaliah Fadhilah Binti Haji Ibrahim after a trial in the Magistrate’s Court on 21 January 2020 on a charge of outraging modesty contrary to section 354 of the Penal Code and sentenced to one year of imprisonment and 2 strokes.

The appeal raises an important question on the law of evidence. Can the unsworn evidence of the complainant be corroborated by her complaint after the fact or must the corroborative evidence be independent evidence under the rule outlined in *The King v Baskerville* [1916] 2 KB 658?

Undisputed facts

On the evening of 3 January 2019 the complainant who was 5 years old at the time was brought by her mother ("*the mother*") and grandmother ("*the grandmother*") to Elmaya Tailoring ("*the tailor shop*") to have her school uniform altered. The appellant who was an employee of the tailor shop attended to the complainant.

Complainant's evidence

The case for the prosecution rested principally on the unsworn evidence of the complainant who was aged 6 when she gave her account of what transpired after the appellant took her measurements. The salient parts of the complainant's evidence were that after the appellant had taken the measurements of her waist and the length of her skirt he suddenly touched her "*nonok*" (private part) over her pants three times with his right hand. The appellant also pulled her hand to touch his private part over his trousers.

In demonstrating the touching of her private part by the appellant the complainant showed a "*rubbing*" motion and said she felt disgusted with his uncut and sharp fingernails.

Neither the mother nor the grandmother saw the touching incident as they were deep in conversation.

After leaving the tailor shop, in the car, the complainant told the mother and the grandmother what the appellant had done to her and that she wanted to wash her hands with a "*sponge*".

Evidence of the mother and the grandmother

Both these witnesses gave testimony corroborating the complaint's evidence in essential details and in particular that the appellant had touched her private part and forced her to touch his private part and her insistence on washing her hands with a "*sponge*".

According to the mother, while inside the tailor shop, she had noticed that the appellant did not record the measurements he took of the complainant and he appeared to be "*uneasy*" and was "*always turning around looking towards the back and front*" and when she asked him what was wrong he did not answer.

The mother recounted that there was a discussion between her and the appellant about the cost of the alterations. She agreed to a charge of \$5 after the appellant declined to accept her proposal to pay \$3. However, when she asked for a receipt to be issued for payment he told her to wait "*five minutes*" for his colleague to return to repeat the measurements of the complainant and issue a receipt. She decided to leave as she felt her time had been wasted.

Appellant's evidence

The appellant is a 32 year old Indian national and he is a married man with two young children. In his testimony the appellant categorically denied molesting the complainant in the manner alleged by her as he did in his ordinary and section 117(3) statements recorded by the police.

It was the appellant's impression that when the mother left the tailor shop she was "*not happy*" with him for charging her \$5 instead of \$3 for the alterations. She was also "*not happy*" when he did not accede to her request for completion of the alterations on the next day and he had suggested to her to go to another tailor. She stormed out of the tailor shop in a huff hurling abuse at him.

On the following day the mother's brother visited the tailor shop and confronted the appellant accusing him of molesting the complainant. The appellant protested his innocence and was willing to go to the mosque on the next day to "*swear before the Al-Quran*". However, the mother's brother did not return to the tailor shop.

Decision below

The Magistrate concluded as follows:

- (i) The complainant was a truthful and reliable witness.
- (ii) The complainant gave consistent evidence that the appellant had touched her private part and he had pulled her hand to touch his private part.
- (iii) The complainant's evidence that after the incident she told her mother she wanted to wash her hands with a "*sponge*" was readily identifiable with the immaturity of a 5 year old girl and had the ring of truth.
- (iv) The complainant's complaint of the molestation by the appellant to the mother and the grandmother immediately after the event provided corroboration of her evidence that she was molested by him as she described.
- (v) The mother and the grandmother were truthful and reliable witnesses.
- (vi) The inconsistencies in the evidence of these three witnesses did not affect the veracity and reliability of their evidence on the material issues.

- (vii) The appellant was not a credible witness and his denial of the molestation and suggestion that the mother was angry and abusive simply because of a disagreement over the completion date of the alterations beggared belief.
- (viii) The prosecution had proven beyond reasonable doubt the guilt of the appellant on the charge.
- (ix) The gravity of the offence warranted a sentence of one year of imprisonment and 2 strokes.

Grounds of appeal

Broadly, the grounds of appeal are as follows:

- (i) The crux of the contention against conviction is that the Magistrate failed to consider the defence *“adequately or sufficiently to the prejudice or disadvantage”* of the appellant. Specifically, the Magistrate failed to consider that (a) the appellant’s denial of the molestation could be the truth; (b) the appellant was willing to *“swear before the Al-Quran”*; and (c) the appellant’s denial of the molestation in his ordinary and section 117(3) statements was consistent with his innocence.
- (ii) The complainant’s credibility was questionable because (a) of her *“inconsistent”* evidence *“throughout the case”* such as whether the molestation involved *“actual touching”* or *“merely touching over the pants”* or whether the appellant wore a pink shirt or a white shirt; (b) it was impossible for the appellant to have molested the complainant when the mother and the grandmother were in *“close proximity”* to her; and (c) the mother had left the tailor shop angry with the appellant.
- (iii) The Magistrate erred in law in convicting the appellant solely on the unsworn evidence of the complainant without independent corroborative evidence.
- (iv) The sentence is unjust and excessive: The Magistrate in sentencing the appellant failed to consider (a) his clear record; (b) the impact of the sentence on his family in India who are dependent on him; and (c) the offence was committed *“on the spur of the moment”*.

Role of appellate court

In an appeal against conviction the role of an appellate court is not to reassess the evidence in the same way a trial judge would. An appellate court is restricted to considering:

- (a) whether the Magistrate's assessment of witness credibility is plainly wrong or against the weight of the evidence;
- (b) whether the Magistrate's verdict is wrong in law; and
- (c) whether the Magistrate's decision is inconsistent with the material evidence on record: *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015.

As to an appeal against sentence it is well established that an appellate court will not ordinarily intervene unless satisfied:

- (a) the Magistrate erred on the factual basis for sentencing;
- (b) the Magistrate failed to give adequate weight to relevant factors placed before the court;
- (c) the sentence was either manifestly excessive or manifestly inadequate; or
- (d) the sentence was wrong in principle: *Public Prosecutor v UI* [2008] 4 SLR(R) 500.

Applying the principles

In relation to the conviction I will firstly deal with the appellant's submission that the Magistrate was wrong to convict on the uncorroborated unsworn evidence of the complainant. The following provisions in the Evidence are apposite to this issue.

First, section 133A which provides:

- "(1) Where, in any proceedings against any person for any offence, any child called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.
- (2) Where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him."

Next, section 157 which provides:

“In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, of before any authority legally competent to investigate the fact, may be proved.”

Applying section 133A the appellant cannot be convicted of the offence unless the unsworn evidence of the complainant is corroborated.

The corroborative evidence need not be independent evidence as expounded in *The King v Baskerville* (supra) before the accused can be convicted of the offence.

A recent complaint by the victim of a sexual offence is corroborative of her evidence in accordance with section 157: see *Public Prosecutor v Abdul Rahim Bin Ahmad and Others* [1988] JCBD 197.

The complaint of the complainant to the mother and the grandmother about the molestation by the appellant immediately after leaving the tailor shop met the requirement of corroborative evidence specified under section 157 as it was a “*former statement*” made by the witness “*at or about the time when the fact took place*”. The Magistrate rightly considered this complaint provided corroboration of the complainant’s evidence she was molested by the appellant in the manner described by her.

Nevertheless, the Magistrate was fully alive to the fact that the prosecution case ultimately rested on the unsworn evidence of the complainant. It was a question of which of the two accounts was to be believed, the complainant’s or the appellant’s.

The Magistrate, having undertaken a rigorous assessment of the evidence of the complainant, the mother, the grandmother and the appellant, was entitled to find that these three prosecution witnesses gave truthful and reliable evidence and the appellant’s evidence was not credible. The Magistrate found no evidence that the complainant misperceived or misapprehended the appellant’s acts in the tailor shop; or she was prone to fantasizing or telling lies; or had a motive for making a false allegation.

Turning to the sentence the appellant argued that the outrage of modesty in *Public Prosecutor v Jahidin Bin Adi and another* [1999] 2 JCBD II was “*more severe*” compared to his offence and yet the defendant there was sentenced to only 3 months’ imprisonment and 2 strokes.

The facts in *Jahidin Bin Adi* were that the defendant had gone on “*top of the victim (aged 28) and started groping her whole body*”. Hayati, J in passing sentence considered as mitigating factors the “*hardship*” to the family of the defendant because of the likelihood of the loss of employment as a result of the conviction and the offence was committed “*on the spur of the moment*”.

Each case must be decided on its own facts when it comes to sentence. This was a brazen sexual assault on a young girl of 5 and a deterrent sentence was warranted. I think the appellant is fortunate that the Public Prosecutor did not cross-appeal for a longer sentence.

I should add that it is often the case that the imprisonment of an offender will cause hardship to his family but it cannot be one of the factors which can affect what would otherwise be the right sentence: see *R v Ingham* (3 October 1974)(Court of Appeal (Crim Div), UK), per Lord Widgery CJ.

Conclusion

For the foregoing reasons I dismiss the appeal against conviction and sentence.

DATO SERI PADUKA STEVEN CHONG

Chief Justice