

BETWEEN

Joseph Cheok Van Seng

Appellant

AND

Public Prosecutor

Respondent

(High Court of Brunei Darussalam)
(Criminal Appeal No. 7 of 2018)

Before Commissioner James Findlay in Court

Dates of hearing: 21 and 30 July 2018

Date of delivering Judgment in court: 2 August 2018

Mr Rozaiman Abdul Rahman and Ms Veronica K Rajakanu for the appellant.
DPP Jauinah Bte Hj Kula for the Public Prosecutor.

Case cited in the Judgment:

Public Prosecutor v Tang Kin Seng [1997] 1 SLR 47

JUDGMENT

Findlay, J.C.:

The appellant was charged with an offence under Chapter 22 in that, on 5 February 2014, he squeezed the right buttock of the complainant outraging her modesty. He was convicted by the Magistrate on 14 March 2018 and sentenced to 1 year's imprisonment. He now appeals against this conviction.

In a careful judgment, the Magistrate considered all the evidence and concluded that the appellant should be convicted. Counsel for the appellant conceded in written submissions that the Magistrate took the right approach in that she analysed "the evidence for the prosecution and for the defence and [decided] that the complainant's evidence [was] so reliable that a conviction based solely on it is not unsafe." *Public Prosecutor v Tang Kin Seng* [1997] 1 SLR 47. But, counsel argues, the Magistrate erred in her approach.

Counsel for the appellant seek to show that the Magistrate erred by arguing that there were difficulties in accepting the complainant's evidence. These same arguments, or most of them, were addressed to the Magistrate and she found that they did not detract from the complainant's credibility. I have considered

these arguments and I agree with the Magistrate. No case presented to a court is ever perfect. One expects minor inconsistencies and discrepancies. This does not lead to a conclusion that the case is not credible. I have read again the Magistrate's judgment and I cannot find any misdirection or faulty reasoning in it. Before I can interfere with a conviction based on the credibility of the witnesses, I must find that the Magistrate went wrong in deciding the matter. I cannot do that here. As counsel have conceded, she adopted the correct approach and I believe she applied that approach correctly.

The Magistrate was supported in her conclusion by the very unsatisfactory nature of the appellant's defence.

The appellant says that he was working on a book and he was ordered to give it to Mr Zunaidi. This book was on a pen drive. Of course, the easiest way for the appellant to give this book to Mr Zunaidi was to email it to him and he gives no sensible explanation for failing to do this.

The appellant went to Mr Zunaidi's office, but he was not there nor was his assistant. He did not look for the secretary, although he "felt" people's presence. He said he did not deal with secretaries. So, the next person he looked for was the complainant because, he says, she was "close" to our group and "always hang around with senior people". He trusted her to pass on the pen drive. He sat down and asked her to copy the file and return the pen drive to him. Thereafter, he spent a considerable length of time with the complainant; one and half hours, according to the complainant, three-quarters of an hour according to the appellant. Overall, the reasonable inference must be that the appellant wanted to spend time with the complainant. He says he knelt down next to the complainant to show her the file on the pen drive. When she had finished the file, she ejected the pen drive and he took it from her. They both stood up. He felt dizzy and lost his balance. He fell to his knees and might have knocked her. After he recovered, the complainant was "a bit upset". He said he was sorry. He did not, as one might expect if his behaviour was innocent, return the next day to see if the complainant was recovered from her upset.

Although his evidence changes in this regard, he says that when questioned by the police, he told them it was an accident. This is not recorded in his statement to the police. Counsel for the appellant attempted to have the appellant's statement to the police excluded, unsuccessfully. Before me, on 21 July, Mr Rozaiman again made a half-hearted attempt to have me exclude the statement, without success.

It is easy to understand why counsel for the appellant wanted the police statement excluded. This is because nowhere in that statement does the

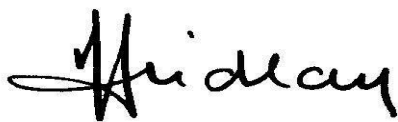
appellant put forward the explanation that he now relied upon in court. Where an accused person has the opportunity of explaining alleged criminal conduct during the investigation, but fails to do so and then makes that explanation in court for the first time, the court is entitled to draw an adverse inference from that conduct.

On the other hand, there was really no point in having the statement excluded because what the prosecution required was contained the appellant's own evidence.

Under cross-examination, although seeming to suggest that his dizzy feeling was due to drugs, he said in evidence that he took the drugs only at night. Although this was not put to the complainant, the appellant said he asked the complainant to check the file for grammatical errors. He said that he was there for so long because he "had to explain things", although the complainant had no involvement in the document. This he said although he says the purpose of his visit was to get the complainant to send the file to Zunaidi and this was urgent. He repeated that he told the police that it was an accident, although he later retracts from this, saying that the police did not ask him to explain. He agreed that he only advanced his version of happened for the first time in court.

I am not in the least bit surprised that the Magistrate found that the appellant's evidence was not believable.

In the result, there is no basis at for interfering with the Magistrate's decision and the appeal is dismissed.



DATO SERI LAILA JASA JAMES KERR FINDLAY
Judicial Commissioner