Public Prosecutor v XT
[2008] SGHC 130

Case Number : CC 17/2008

Decision Date : 12 August 2008

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Leong Wing Tuck and Wendy Yap Peng Hoon (Deputy Public Prosecutor) for the prosecution; S Gogulakannan (Kannan SG) for the accused.

Parties : Public Prosecutor — XT

Criminal Law – Offences – Rape – Elements of rape – Whether evidence establishing that accused committed rape

Criminal Law – Offences – Whether evidence establishing that accused had committed an offence under Section 140(1)(i) Women's Charter [Cap.353, 1997 Rev Ed]

12 August 2008

Choo Han Teck J:

1 The accused, a 47 year old man who worked at the airport, was charged with rape under s 376(1) of the Penal Code (Cap 224, 1985 Rev Ed) as a result of a complaint by the 15-year old complainant. The offence was alleged to have taken place on 1 November 2007 about 2pm at a staircase landing of Block xxx Yung Sheng Road. The complainant lived with her parents, an elder sister aged 22, and an elder brother aged 18, on the 14th floor of that block. Her father is a driver and her mother is a cleaner. Since she stopped schooling before she had completed primary four, she was home alone most of the time although her parents leased out part of their flat to tenants. Her father testified that he gives her $10 to buy food for herself and her brother on the days that he was home. On 1 November 2007, however, other than her parents' tenant, she was alone at home.

2 The charge stated the time of the offence to be about 2pm. The complainant testified that it was at 2.30pm that she went to buy titbits at the market place across the road. She said that after she bought the titbits and was walking through the open deck of the ground floor of her block of flats, she noticed that the accused was sniffing glue near a low brick wall. The accused then grabbed her by the arm as she passed him. She ran to a lift and he pulled her out of the lift and up the staircase shown in photograph P4. She testified that when they were at the staircase landing, the accused pulled her shirt up and sucked her nipples. He also pulled her shorts and panties down and rubbed his penis on her genitals, and inserted it into her vagina as well as anus. She said that the accused also inserted his finger into her vagina. On further questioning by the learned DPP Mr Leong, the complainant said that when the accused unzipped his pants and took out his penis, she ran to the shopping centre (established at trial to be the one across the road where she had gone to buy titbits earlier). She said that it was at the staircase landing that she saw a man, later identified to be Mr Loo Kin Liak, one of three men who had detained the accused and called the police. She said that at that time she only saw Mr Loo and not the other two, established at trial to be Mr Shersha Mohamed and Mr Ng Beng.

3 The accused testified that he often stays with his sister whose flat was nearby. He said that he had gone to the market place across Block xxx on the morning of 1 November 2007 and bought

some glue which he used for inhaling later that day. He was sitting on the low brick wall shown in P4 when the complainant came up to him and asked him for money. According to him, she said that if he gave her $10 she would do anything for him. He told her to go away, but she continued to pester him. He then went to the staircase and sat at the landing (leading to the second floor) where he continued to inhale glue. The complainant went to sit next to him and asked him again for money. He got up and went to the parapet wall looking over it. He said that the complainant also got up and stood in front of him. She had her back to the pipe shown in P4. She asked him again for money and he pushed her away with his right arm. He said that that was the point when he saw Mr Loo, whom he thought was a police officer, so he ran upstairs to the third floor. When he saw that there were no police vehicles, he decided to go back down the same staircase where he was confronted by Mr Loo, Mr Shersha, and Mr Ng Beng. He ran and the three men gave chase. He was tripped, and fell on the lawn a short distance from the block. The men tied his hands, first with a shirt, and then a plastic strap and waited for the police. Sgt Hong Tee Ching and W/Sgt Khairunnisa Mohamad arrived at Block xxx at about 2.45pm, and their team leader SSI Vicnaysen arrived a few minutes later.

4 In a rape trial the evidence of the complainant is vital because generally, it provides direct evidence of penetration, absence of consent, and the identification of the accused. Although scientific evidence may be highly probative of some important aspects (for example, semen stains identifying the accused), such evidence is corroborative (for example, semen stain from the accused is irrelevant if the complainant had consented to the sexual intercourse) only, and the extent of its significance depends on the individual case. Where, as in this case, the complainant is young and has low intelligence, one has to be sure that she was competent to testify. In this case, Dr Cai Yiming, a psychiatrist in the Child Guidance Clinic, examined the complainant and testified that she was assessed to have an intelligence quotient (IQ) of 44 which, according to Dr Cai, indicated that the complainant was at the "moderately mentally retarded range of intelligence". Dr Cai, however, testified that she was competent to give evidence. Dr Su Lin Lin, the gynaecologist who examined the complainant, reported that she was "calm and appeared coherent in telling the incident" although she was frightened of the pelvic examination.

5 The complainant's evidence was given through a Chinese interpreter in court. She did not appear anxious and seemed to have no difficulty testifying or understanding the interpreter. She occasionally smiled at the social workers who took turns to accompany her to court. Her evidence was coherent but not cogent. It was not explained why she had brought W/Sgt Khairunnisa Mohamad to the 12th floor and told her that that was where the accused had committed the offence; nor did she explain why she referred to the 12th floor of Block yyy in her statement to Dr Su, and told her that that was where a similar incident had taken place the day before concerning the accused and her. When asked by the DPP, she denied that she had mentioned anything about the 12th floor or Block yyy to the doctor. Her assertion in court that the accused attacked her when she went into the lift was contradicted by her previous statement to the police that she did not use the lifts because one of them was under repair and the other was fully occupied by two men and a bicycle. Under cross-examination, the complainant retracted her evidence in court saying that it was wrong. Her previous evidence was not without problems because the defence produced evidence from the town council in charge of the lifts to show that none of the lifts had broken down that day or was under any repair.

6 The complainant's description of the sexual acts performed on her was also suspect because they were not consistent with what she had told the police and Dr Su. W/Sgt Khairunnisa's recorded entry in the log sheet of the police patrol team at 2.56 pm of 1 November 2007 read:

> W/Sgt Nisa interviewed said victim, [complainant], and was informed by [complainant] that she

was touched by [accused]. W/Sgt Nisa then asked [complainant] which part of the body she was touched and she said 'down there' placing her hand on her private part. She also said that she was slapped and kicked by [the accused].

W/Sgt Khairunnisa's account of her interview with the complainant suggested that the complainant was unable to articulate the sexual act and W/Sgt Khairunnisa had to demonstrate the act of sexual intercourse symbolically using her hands. Yet she also testified that the complainant told her that the accused had put his "bird-bird into her backside". She did not explain how the complainant could articulate sodomy but not vaginal intercourse. There was also no medical evidence of any anal intercourse. The complainant also told Dr Su that the accused had pushed her onto the ground, but in court she testified that she was standing up at the material time. She also denied in court that she had told Dr Su that the accused had kissed her. Dr Su had noted in her report that the complainant told her she was kissed. Dr Cai noted that the complainant told him that the accused had inserted his penis into her vagina and anus, but he did not record any allegation of kissing, sucking of nipples, or fellatio. Dr Su noted some bruises (1.5cm linear red mark anteriorly near the lower end of the right shoulder, 2x2 cm area of bruise anteriorly near her left elbow and 6 red lines at her right flank, which the complainant claimed were scratch marks caused by the accused). There was no record of the slapping or kicking that the complainant had earlier told the police. The complainant testified that the accused was wearing a brown shirt and black pants, with no belt. The evidence produced by the prosecution showed that the accused wore a blue shirt and a brown pair of pants with a belt.

7 There are some other unsatisfactory aspects of the prosecution's case. There was no evidence of any spermatozoa found on the complainant, and if there had been such varied sexual activity as the complainant claimed, it would be relevant to produce evidence of seminal stains on the clothing of the accused, particularly on his underpants. The DPP submitted that the accused was not wearing his underpants at the time of the offence. The accused person's version was that he was asked to surrender his underpants when he was first taken to the lockup because they told him that it was needed for testing of DNA. No evidence from the prosecution was called to refute the accused person's version. It would seem strange that the accused would have kept his underpants in his pocket that day as the DPP had suggested.

8 The main independent witness, Mr Loo testified that he saw the accused standing face to face with the complainant. The pants of the accused were "loosened" and he was doing a "pumping" action, which Mr Loo explained to mean that he saw the accused moving his buttocks forward and backwards against the complainant. He did not say in court that he saw that the accused was naked from the waist down. There was a discrepancy in his evidence insofar as Sgt Hong had testified that Mr Loo had told him shortly after he had arrived at the scene on 1 November 2007, that the accused was half naked from the waist down. His record in the log sheet stated that the accused and complainant were naked from the waist down. He was reminded under cross-examination that he had testified at the preliminary inquiry that the accused still had his pants on. Mr Loo told the police patrol that he first spotted the accused hugging the complainant at 2 pm. He then went to the next block to ask Mr Shersha and Mr Ng Beng for assistance. According to his evidence, the trio consisting of Mr Loo, Mr Shersha, and Mr Ng Beng reached the staircase where the accused and the complainant were, about 30 minutes later. The complainant said under cross-examination that she had shouted "Help". She said this first in English, and when the question was repeated, she answered in Mandarin. This part of her testimony was one of those that I found to be unconvincing, but I will evaluate her evidence in its totality.

9 Mr Shersha testified in court that when he arrived at the staircase, he saw the accused holding the complainant's waist. At that point, he heard Mr Loo shout "Oi!" and the accused looked up at them, did something which Mr Shersha said seemed like the act of zipping up his pants, and then ran.

Under cross-examination, he admitted that he had given a different account in the preliminary inquiry. There, with the assistance of the investigating officer, he had demonstrated how the accused was grabbing the complainant, from behind, around the waist with both his arms. He explained that he was confused by the questions and did not understand. He testified that what he told this court was the true version. Mr Ng Beng testified that after the accused had run away, the complainant followed the three men down the stairs. Mr Ng asked her what happened and she replied in Mandarin, "He played me." There was no evidence from any of the men that the complainant was in any distress. The only evidence of the complainant's state of mind at the time was the evidence of the police officer SSI Vicnaysen who said that when he saw the complainant she looked "a bit dazed" and that she "seemed a bit lost".

10 The accused elected to give evidence when his defence was called. His case, as I have briefly set out above, was a total denial of any sexual intercourse with the complainant. He testified that he was at the void deck sniffing glue that he had bought earlier that morning. He said that the complainant approached him and asked for $10 and in return, she would do anything he wanted. He told her that he had no money and asked her to go away, but she continued to pester him. The statement recorded from him by the Investigating Officer, Stn Insp Tho, on 6 November 2007, was consistent with his testimony in court. The learned DPP however, urged me not to believe the accused, and he drew my attention to the contradictions elsewhere in his evidence. Notably, that the accused claimed to have thrown away the glue when he was chased by Mr Loo and his friends when Sgt Hong testified that he found the two tubes of glue in his pocket.

11 The accused said that he ran because he thought he was being pursued by the police because he was a glue sniffer, and he further testified that he threw the two tubes of glue away when he was being chased. Sgt Hong, however, testified that when he arrested the accused, he found the two tubes of glue in the trouser pocket of the accused, and the plastic bag with the yellow substance was found on the ground next to the accused. It was recorded in the police patrol log sheet that the accused was found at that time to be "slurred in speech and appeared to be high on drugs".

12 Lawyers frequently remind the courts that witnesses are often unable to give a consistent account of their evidence. Sometimes it would be said that the discrepancies and omissions only make the witness more credible, but that is said only to emphasize that errors and omissions are part of life, and further, that we must presume that a witness who had planned to lie would not have planned to contradict himself. Are we to say that the witness who stands out for his inconsistency is more reliable than the one who is consistent? It is truly impossible to lay down strict rules without contradiction, for if errors and omissions are part of life, the careful liar too, may slip as might the careless but honest witness, and a liar may occasionally tell the truth as may the honest man sometimes lie. The clarity of the witness' perception of the event as well as the clarity of his recollection can significantly determine the court's finding of fact. In the present case, the offence of rape requires the prosecution to prove the fact of penetration by the accused on the complainant without the latter's consent. The testimony of the complainant is the primary evidence of consent. If she is found to be a reliable witness, the court is entitled to find as a fact that the sexual act was non-consensual. There are many instances in which other evidence might corroborate the absence of consent. Torn clothing, evidence from other witnesses of struggle, or of screaming, and perhaps, physical injuries indicating an attempt to repel the assailant. All such evidence must be considered against the testimony of the accused and the evidence from other sources that support or contradict him.

13 The evidence of the five most important witnesses in this case, the complainant, the accused, Mr Loo, Mr Shersha, and Mr Ng Beng had not been consistent, and parts of which were inexplicable and, without explanation, seemed strange. For example, Mr Shersha's account (in the preliminary

inquiry) that the accused had hugged the complainant from behind, created a substantially different impression of what had taken place from the accounts of the complainant and Mr Loo. Mr Shersha said that he gave that evidence because he was confused by counsel's question. Far from clarifying the incongruity, that explanation deepened the mystery. How did counsel confuse him to the extent that he gave a very explicit account of what he saw, emphasized by a demonstration in court? Why the complainant referred to the 12th floor when asked where the offence took place was not explained. She referred to the 12th floor of Block xxx and subsequently to the 12th floor of Block yyy. Curious minds will have a few theories as to why she did so, and curiosity is undeniably a very important quality for a fact-finder to possess. It must not lead to any conclusion based on speculation, that major specie of unjustified belief. That leads to the next aspect of fact finding in a criminal trial, namely, how much evidence does the prosecution need to prove before it satisfies the legal burden of proof beyond reasonable doubt? Conversely, what is required by the defence to raise a reasonable doubt? The strength of the evidence for both sides is only as strong as its tension with its weakness. Some parts of a witness's testimony may be credible and strong and others weak and implausible. Sometimes the parts affect the whole and sometimes they do not.

14 The danger of reductionism is ever present whenever we are faced with complex terms, hence, to say that "reasonable doubt" means no more than what a reasonable man would regard as doubtful does not help expand one's understanding of the term. Instead, it would imply that an objective standard is required, and that, in turn, raises contrasting problems. First, philosophers and jurists have written volumes about objectivity and still do not have a consensus as to what it means to be objective, a situation which the more cynical observer would say, indicates that therefore, nothing is objective. At the same time, it does seem just as harsh to declare that facts are established according to individual fancies, and may thus, vary from judge to judge. Hence, a strong argument may be made that this should not be the case when one is dealing with "facts", as opposed to matters of discretion. If the court will find objectivity, it must accomplish a difficult (some say impossible) exercise in psychology - stepping outside its own bias and prejudice, and thereby overcoming the twin obstacles of dogmatism and arrogance. The judge must not have dogs in the hunt. He has to steer between gullibility and obstinate cynicism, and be mindful of general truths and yet not lose sight of the evidence in the case at hand. In human affairs, we cannot expect absolute certainty as we might in mathematics. Ultimately, a finding of fact may only be reached with an intuitive judgment as to what the evidence amounted to. The court will, if it can, minimise its reliance on intuition, which is not a palpable gauge, and rely, where it can, on stark facts. That depends on the evidence.

15 Reminding myself thus, I am satisfied that the prosecution had proved its case that the accused had sexual intercourse with the complainant. Although the complainant was generally a poor witness in that her evidence was inconsistent in several respects from the combination of the medical evidence and the evidence of Mr Loo, I am satisfied that the accused had penetrated her vaginally. Rape, however, is committed only when there was an absence of consent. Consent is a positive act of the will, which in turn, implies consciousness. It is possible that a girl of 15 with a low IQ may not have the requisite will to give consent, but it is not a general rule of medicine or science that asserts this as a fact. Each instance must be proved sufficiently to enable a court to infer absence of consent. It is this aspect that I find the evidence to be inadequate. It is no fault of counsel for they can only adduce what there was to adduce. Dr Cai's evidence did not assert that the complainant was incapable of giving consent and I do not think that there was sufficient evidence to persuade me to infer that she was incapable of giving such consent. The most direct evidence of consent would have been from the complainant herself. In this respect, her evidence was weak and inconclusive. Furthermore, corroborative evidence, such as evidence of physical struggle implying refusal of consent, physical distress after the event and injuries on her body, indicating that force might have

been used, were sparse and insufficient to persuade me that the lack of consent element had been proved. It should be noted that according to Mr Loo's evidence, the incident might have taken up to thirty minutes. It was in daylight and a very public place. In forming my opinion on the evidence of the complainant, I satisfied myself that she was capable of giving rational and cogent testimony. Though of a low IQ and poorly educated, she was capable of expressing herself rationally. Her testimony, although inconsistent, was clear. She was also independent and took care of herself when her parents were at work. Why her evidence was contradictory is unclear, one might make a variety of guesses, but that would be speculation and is inappropriate. The finding of facts that I have made only meant that the evidence was insufficient to discharge the burden of proof required, and not that the complainant had in fact given consent - the complainant was not on trial and no adverse inferences or aspersions should be drawn or made as the case may be in regard to her character. However, as the complainant was under 16 years of age at the time, consent though relevant in a charge of rape, is not relevant in a charge under s 140(1)(i) of the Women's Charter, (Cap 353, 1997 Rev Ed). Section 140(1)(i) provides as follows:

> Any person who –
>
> …
>
> (i) has carnal connection with any girl below the age of 16 years except by way of marriage;
>
> …
>
> shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding five years and shall also be liable to a fine not exceeding $10,000.

16 For the reasons above, I find that the charge of rape against the accused had not been made out, and I acquit and discharge him of that charge. I find that on the facts as I have found, an offence under s 140(1)(i) of the Women's Charter had been proved, and I therefore find the accused guilty of an offence under that section and convict him accordingly.