

Public Prosecutor v Gansean s/o Rengasamy
[2009] SGCA 31

Case Number : Cr App 7/2008, 12/2009, CC 17/2008
Decision Date : 08 July 2009
Tribunal/Court : Court of Appeal
Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s) : Bala Reddy, Leong Wing Tuck and Kan Shuk Weng (Attorney-General's Chambers) for the appellant in CCA No 7 of 2008 and the respondent in CCA No 12 of 2009; Thangavelu (Wong Thomas & Leong) and S K Kumar (S K Kumar & Associates) for the respondent in CCA No 7 of 2008 and the appellant in CCA No 12 of 2009
Parties : Public Prosecutor — Gansean s/o Rengasamy

Criminal Procedure and Sentencing

8 July 2009

Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

1 The respondent, a 46-year-old^[note: 1] Indian male, was charged on 2 November 2007 with the offence of rape under s 376(1) of the Penal Code (Cap 224, 1985 Rev Ed) ("Penal Code"). The complainant, a 15-year-old^[note: 2] Chinese female, was moderately mentally retarded with an IQ of 44. She testified that she had gone to buy titbits at the market place across the road from her home at [address redacted] on 1 November 2007. At about 2.30pm^[note: 3], as she was walking back to her home through the open deck of the ground floor of Block [xxx], the respondent who was inhaling glue near a low brick wall, grabbed her by the arm as she passed him, pulled her up a nearby staircase and then raped her^[note: 4].

2 The respondent denied this charge. He claimed that he was sitting on the low brick wall of Block [xxx] and inhaling glue when the complainant suddenly came up to him and asked for \$10^[note: 5]. According to the respondent, the complainant said that if he gave her \$10, she would do anything for him. Although he told her to go away, she continued to pester him. To avoid her, he proceeded to the staircase and sat at the landing, leading to the second floor of Block [xxx], where he continued to inhale glue. Despite this, the complainant followed him, sat next to him and asked him again for money. He then got up and went to the parapet wall. The complainant again followed him and then stood in front of him. She continued to pester him for money. Irritated by her persistent conduct, he pushed her away with his right arm. Suddenly, he heard a stranger, Loo Kin Liak (PW6) ("Loo"), shout at them. He ran away as he thought that Loo was a police officer wanting to arrest him for glue sniffing.

3 The Prosecution called 18 witnesses to prove its case. These witnesses testified as to what they had seen and as to the physical and medical condition of both the complainant and the respondent after the incident. At the close of the Prosecution's case, the trial judge ("the judge") called for the defence. The respondent entered his defence and gave his account of what had happened (see [2] above). At the end of the trial, the judge found that the Prosecution had proved that the respondent had sexual intercourse with the complainant. However, he was of the view that the evidence was not sufficiently cogent to show that the complainant had not consented to the act

of sexual intercourse. In particular, he noted, *inter alia*, what was in his view, the following unbridgeable gaps in the Prosecution's case, *viz*:

(a) that there was no evidence of spermatozoa on the complainant or on the respondent's clothing or that the complainant was in any distress; and

(b) that there were inconsistencies with the complainant's evidence in relation to her reference to the incorrect floor of the block where the incident took place, a previous similar incident the day before in another block, the lifts in Block [xxx] and her description of the sexual acts.

4 Notwithstanding these "gaps", the judge was satisfied, on the basis of the medical evidence and Loo's evidence, that the respondent had penetrated the complainant vaginally. In relation to the element of consent, the judge, however, found the evidence inadequate. He found the evidence of the complainant "weak and inconclusive" and was also concerned by the lack of sufficient corroborative evidence indicating the absence of consent, *viz*, evidence of physical struggle, physical distress after the event and injuries on the complainant's body. The judge then amended the charge and convicted the respondent of the offence of "carnal connection" with the complainant, pursuant to s 140(1)(i) of the Women's Charter (Cap 353, 1997 Rev Ed) ("Women's Charter"). The respondent was accordingly sentenced to four years' imprisonment with effect from 19 August 2008^[note: 6].

5 The Prosecution appealed against the judge's decision to convict the respondent for the offence of carnal connection under the Women's Charter. Initially, the respondent did not appeal his conviction. At the first hearing before us on 20 May 2009, his counsel indicated that he had already, albeit unsuccessfully, advised the respondent to appeal against his conviction. We adjourned the hearing and advised counsel to speak to the respondent again on whether he wished to appeal his conviction, whereupon the respondent then decided to appeal. We then decided to give the respondent the opportunity to file his appeal out of time. He filed his appeal, and this is our short grounds of judgment on both appeals.

6 We first address the respondent's appeal. In our view there is no merit in this appeal. The following items of evidence prove this beyond reasonable doubt:

(a) the medical evidence of Dr Su Lin Lin (PW15) ("Dr Su") that the complainant (who was until the incident a virgin) had a fresh tear in her hymen that was consistent with penile penetration^[note: 7] and that the complainant also had the following marks on her body ("the marks"), *viz*:

(i) a 1.5cm linear red mark anteriorly near the lower end of the complainant's right shoulder;

(ii) a 2 x 2cm area of bruise anteriorly near the complainant's left elbow; and

(iii) six red lines on the complainant's right flank.

(b) the evidence of Loo, an independent witness, who testified that he saw the respondent, who was face-to-face with the complainant, embracing her *and* doing a backward and forward "pumping movement"^[note: 8].

The only person who could have inflicted these marks on the complainant and caused the complainant's hymenal tear could only have been the respondent and no one else. Loo's evidence was

corroborative as to how this had happened. He had seen the respondent embracing and “pumping” the complainant who was trying to push the respondent away. It was limply suggested to Dr Su that the hymenal tear could have been caused digitally, but this was clearly not the respondent’s defence and was not seriously pursued thereafter by the respondent’s counsel.

7 As to the Prosecution’s appeal, the crux of its case was that the complainant did not consent to the penile penetration of her vagina by the respondent. We have read the transcript of the complainant’s evidence-in-chief and under cross-examination very carefully, and are satisfied beyond any reasonable doubt that the complainant did not consent to the respondent’s sexual assault on her. The only issue that had apparently troubled the judge was really whether or not, because of her low IQ, the complainant understood that what the respondent did to her was the act of sexual intercourse. In our view, it was because the judge could not make up his mind on this issue that he found that the Prosecution had not discharged the burden of proving the absence of consent on the complainant’s part. In our view, the complainant’s evidence in this respect was not only quite graphic but also consistent as to how the respondent had assaulted her sexually. She was able to describe the acts of the respondent quite intelligibly although she might not have been clear as to how many times the respondent had tried to penetrate her.

8 The complainant’s account was also consistent with Loo’s testimony that he saw the respondent in the course of a “pumping action” when the respondent was holding the complainant in his arms and she was trying to use her hands to push him away^[note: 9]. That the respondent was holding onto the complainant tightly is also confirmed by the marks found on her body at the time of the incident (see ^[6] above). The fact that the complainant was also sexually assaulted was also supported by her dishevelled physical state and appearance shortly after the incident. Khairunnisa binte Mohamad Ishak (PW13) (“Khairunnisa”), a police officer who arrived at the scene shortly after the incident and who was the first to interview the complainant, testified that the complainant’s hair and clothes were untidy^[note: 10] and that she:

- (a) was all sweaty^[note: 11];
- (b) was in a “very traumatised condition”^[note: 12];
- (c) was talking so fast that she could not understand her^[note: 13]; and
- (d) kept on saying “He touched me, he touched me”^[note: 14].

Vicnaysen s/o Vilasamy (PW3), another police officer who arrived shortly after Khairunnisa, also confirmed that the complainant “was a bit dazed” and “seemed a bit lost”^[note: 15]. The respondent did not challenge this evidence, and the court below did not given sufficient, if any, consideration to the physical state of the complainant as a corroborative fact.

9 We have mentioned earlier that the respondent’s defence was a bare denial of the charge (see ^[2] above). His evidence was that he was inhaling glue when the complainant approached him and pestered him for \$10. This evidence was not credible as the complainant’s father had testified that she disliked talking and interacting with strangers^[note: 16]. But even if the complainant did approach the respondent first, he had no credible explanation for the pumping action in the light of the fresh tear in her hymen.

10 In our view, the judge fell into grave error in concluding that the Prosecution had not shown that sexual intercourse had taken place without the complainant's consent and that the corroborative evidence was "weak and inconclusive". The absence of spermatozoa in this case was immaterial given that "sexual intercourse" under s 375 of the Penal Code is established once it is proven that the respondent had penetrated the complainant's vagina with his penis. Given the finding that the respondent had sexual intercourse with the complainant, the above facts, contrary to the judge's view, all point compellingly to the conclusion that sexual intercourse had indeed occurred without the complainant's consent: see [7]–[8] above. Three independent witnesses had seen the complainant struggling while she was being restrained by the respondent. Further there was no suggestion, let alone evidence, that the complainant was a promiscuous girl, or someone who would be involved in paid sex. We therefore find it impossible to believe that the complainant, in spite of her low IQ, would have accosted a total stranger and consented to do anything for him for \$10 as the respondent had alleged.

11 For the foregoing reasons, we are satisfied that the twin elements of rape under s 375 of the Penal Code are satisfied beyond a reasonable doubt. Accordingly, we *allow* the Prosecution's appeal and *dismiss* the respondent's appeal. We hereby set aside the conviction of the respondent of the carnal connection charge under s 140(1)(i) of the Women's Charter and convict the respondent on the charge of rape under s 376(1) of the Penal Code. We adjourn the matter for sentencing on a date to be fixed. In the meantime, the Prosecution may wish to consider obtaining a victim impact report for this purpose. If the Prosecution decides to do so, a copy should be forwarded to counsel for respondent for consideration, and to the court at the sentencing hearing.

[note: 1] Date of birth: 14 April 1961. When he was arrested on 1 November 2007, he was 46 years old.

[note: 2] Date of birth: [xxx] 1992

[note: 3] See Notes of Evidence, Day 4, pp 24 at Lines 19 – 33 and pp 25 at Lines 1 – 2 [Vol I, Record of Proceedings]

[note: 4] See Notes of Evidence, Day 4, pp 25 at Lines 3 – 31 [Vol I, Record of Proceedings]

[note: 5] See Notes of Evidence, Day 6, pp 7 at Lines 10 – 19 [Vol I, Record of Proceedings]

[note: 6] See Notes of Evidence, Day 10, pp 14 at Lines 3 – 5 [Vol I, Record of Proceedings]

[note: 7] See Notes of Evidence, Day 3, pp 71 at Lines 1 – 9 [Vol I, Record of Proceedings]

[note: 8] See Notes of Evidence, Day 1, pp 31 at Lines 15 – 32 and Day 1, pp 32 at Lines 1 – 4 [Vol I, Record of Proceedings]

[note: 9] See Notes of Evidence, Day 1, pp 31 at Lines 4 – 8 [Vol I, Record of Proceedings]

[note: 10] See Notes of Evidence, Day 2, pp 63 at Lines 16 – 17 [Vol I, Record of Proceedings]

[note: 11] See Notes of Evidence, Day 2, pp 63 at Line 17 [Vol I, Record of Proceedings]

[note: 12] See Notes of Evidence, Day 2, pp 63 at Line 18 [Vol I, Record of Proceedings]

[\[note: 13\]](#) See Notes of Evidence, Day 2, pp 63 at Line 19 [Vol I, Record of Proceedings]

[\[note: 14\]](#) See NVol I, Record of Proceedings]

[\[note: 15\]](#) See Notes of Evidence, Day 3, pp 17 at Line 9 [Vol I, Record of Proceedings]

[\[note: 16\]](#) See Notes of Evidence, Day 4, pp 6 at Lines 26 – 32 and Day 4, pp7 at Line 1 [Vol I, Record of Proceedings]

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