Loh Kian Ann *v* Public Prosecutor
[2014] SGHC 105

Case Number : Magistrate's Appeal No 193 of 2013

Decision Date : 30 May 2014

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Ram Goswami (Ram Goswami) for the appellant; Seraphina Fong and Tan Si En (Attorney-General's Chambers) for the respondent.

Parties : Loh Kian Ann — Public Prosecutor

Criminal Law – Offences

30 May 2014 Judgment reserved.

Choo Han Teck J:

1 The appellant was charged with two counts of having commercial sex with a minor under s 376B(1) of the Penal Code (Cap 224, 2008 Rev Ed). Both charges pertained to the same victim. The offences were alleged to have been committed sometime in the second and third weeks of July 2011 respectively. The victim was born on 14 December 1993, and was hence 17 at the time. The appellant was convicted on both charges after a trial before District Judge Kamala Ponnampalam, and sentenced to four months' imprisonment on each charge. Both sentences were ordered to run concurrently. The appellant initially appealed against conviction and sentence, and has been on bail pending appeal since. Before me, he withdrew his appeal against sentence. As such, the only question before me was whether the conviction was sound.

2 Counsel for the appellant, Mr Ram Goswami, mentioned he had 13 "grounds" of appeal in his submissions. These could generally be distilled to four arguments, namely, that the trial judge erred in fact and in law in finding that:

a. the victim was a minor at the time of the offence;

b. the victim correctly identified the appellant;

c. the evidence of the victim was credible; and

d. the appellant was capable of engaging in sexual intercourse at the time of the offence.

Initially, Mr Ram seemed to advance arguments on every available point but, eventually, it became clear that his main argument was his fourth, that the appellant was not able to engage in sexual intercourse at the time of the offence (and therefore, could not possibly have satisfied the requisite element of penetration, as spelt out in s 376B(4)).

3 Before addressing this issue, I will deal briefly with the other points raised. On the first point (age of the victim), Mr Ram seemed to rely on the victim's statement (on the stand) that she had told the appellant, before engaging in sexual intercourse, that she was 20 years old. The extract of the relevant portion of the transcript is as follows:

Q:	Did the accused ask you about your age on either occasion?
Goswami:	Sorry, Your honour, I didn't get that question. Did the accused---
Fong [DPP]:	Ask you about your age on either occasion?
Goswami:	Thank you.
A:	The first time he asked me I told him I'm 20 years old but not on the 2nd occasion.

Mr Ram submitted that this "leaves a grave question mark over her true date of birth and her true age". Also, Mr Ram argued that the victim's (Vietnamese) passport was not good evidence of her date of birth, and that her failure to adduce her birth certificate should be held against her. The victim mentioned, during cross examination, that she was unable to produce her birth certificate as she had misplaced it. The trial judge found that the victim's passport was, in fact, good evidence as to her age. Mr Ram had raised no evidence at trial – or before me – that contradicted her age as stated in the passport. Furthermore, his reliance on the victim's alleged statement to the appellant, that she was 20 years old, seems to be misplaced. At best, it might suggest that the victim had misinformed the appellant. Whether it would leave a "grave question mark" over her true age is a matter for the trial judge to determine. In this case, the trial judge held it did not, and there was nothing before me to show that she was wrong in doing so.

4 On the second and third points, the trial judge made the finding that the victim was credible and that her identification of the appellant was accurate. The trial judge preferred the victim's testimony to the appellant's, the latter of which "lacked cogency and cohesiveness" and contained "deliberate falsehoods" (see *PP v Loh Kian Ann* [2013] SGDC 402 ("*Loh*") at [53] and [58]). The trial judge also found that there were at least three pieces of independent evidence that corroborated the victim's testimony (registration cards at the hotel which evinced that the appellant checked in during the second and third weeks of July 2011, video footage showing the appellant checking in to the hotel with another woman, which indicated that it was not out of character of the appellant to check in to a hotel with a woman, and a portion in the appellant's statement to the police dated 14 September 2011 in which he stated, "[a]round once a month, I will ask the Vietnamese girl to go with me to the hotel for sexual service"). On the whole, the trial judge found that the victim's testimony was both internally and externally consistent (*Loh* at [45]). Despite having had the benefit of a further round of oral and written submissions by the parties, I find that the trial judge would have been in a better position to have made these findings, having witnessed the trial first hand. As such, I see no reason to disturb her findings.

5 I come now to the crucial point on appeal – whether the appellant was, in fact, capable of engaging in sexual intercourse during the second and third weeks of July 2011. The trial judge heard evidence from Dr Peter Lim and Dr Tommy Tan. Dr Lim, a Senior Consultant and Urological Surgeon, first examined the appellant on 14 May 2012. In his report on 2 July 2012, Dr Lim stated that the appellant had "severe ventral chordee due to a contracted fenular band", "testosterone level which was below normal" and "a suboptimal erection". Crucially, Dr Lim stated that – notwithstanding these ailments – it would have been possible for the appellant to have engaged in sexual intercourse (specifically, penetrative sex) at the material time. Dr Tan had examined the appellant on 18 and 25 July 2012, and put up a report on 25 July 2012. He stated that the appellant suffered from "major depressive disorder, single episode", which could lead to a low interest in sex. Dr Tan, like Dr Lim, affirmed that this did not rule out the appellant's ability to participate in sexual intercourse at the material time. The trial judge took these into account (*Loh* at [32] – [34]) and concluded that it was

indeed possible for the appellant to have engaged in sexual intercourse at the material time (*Loh* at [60]).

6 Mr Ram did not seek leave to raise any new evidence before me. His argument was plainly that the trial judge had erred in considering the expert evidence. I am unable to agree. The expert evidence was clear – the appellant was, in fact, capable of engaging in sexual intercourse at the material time. Mr Ram's reliance on a 2005 diagnosis of erectile dysfunction was not helpful because the doctor responsible for the 2005 report, Dr Grace Kwan, was not even called as a witness. The prosecution also pointed out that the appellant had only consulted Dr Lim and Dr Tan in 2012, after investigations had begun. This marked a seven year gap between these recent consultations and his previous alleged consultation (with Dr Grace Kwan). The trial judge considered the evidence of the two doctors (Dr Lim and Dr Tan) in deciding whether their evidence made any difference to the prosecution's case and held that it created no reasonable doubt in her mind.

7 The prosecution reminded the court that the appellant was, at the very least, capable of engaging in sexual intercourse previously, having fathered two sons with his wife. This showed that the appellant's "severe ventral chordee", a condition he faced from birth, did not render sexual intercourse impossible for him throughout his life. Mere evidence of his condition, without more, was insufficient to raise a reasonable doubt as to whether he was able to engage in sexual intercourse at the material time. That was the finding that the trial judge made after evaluating all the medical evidence. With the same evidence before me, I see no reason to fault the trial judge's finding.

8 In short, I find that the trial judge was not wrong in coming to each of her findings, and see no reason to disturb her decision. I have therefore dismissed the appellant's appeal against conviction.