

Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik
[2006] SGHC 191

Case Number : CC 23/2006
Decision Date : 27 October 2006
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Christopher Ong Siu Jiu and Crystal Ong (Deputy Public Prosecutors) for the Prosecution; Udeh Kumar s/o Sethuraju (S K Kumar & Associates) for the accused
Parties : Public Prosecutor — Mohammed Liton Mohammed Syeed Mallik

Criminal Procedure and Sentencing – Offences – Accused charged for rape and various other related offences – Accused and complainant having consensual sexual relations regularly before date of alleged offence – Accused and complainant advancing diametrically opposed versions of events – Whether testimony of accused or of victim to be believed – Whether each offence proved beyond reasonable doubt

27 October 2006

Judgment reserved.

Choo Han Teck J:

1 The accused is a 29-year-old Bangladeshi national named Mohammed Liton Mohammed Syeed Mallik. He has had eight years of schooling in Bangladesh and can speak simple English. He first came to Singapore on 15 February 2004 and worked as a cleaner. Sometime in May 2005, the accused started work as a cleaner at the Bedok branch of Giant Hypermarket ("Giant").

2 The complainant is 31 years old. She is currently a housewife, but she previously worked at Giant. She has three children, currently aged nine, six and two. Her husband testified as a Prosecution witness at trial.

3 The accused faced a total of eight charges:

(a) The first charge is for aggravated rape under s 376(2)(b) of the Penal Code (Cap 224, 1985 Rev Ed).

(b) The second charge is for criminal intimidation (in pointing a knife at the complainant with the intention to cause alarm to her) under s 506 of the Penal Code.

(c) The third charge is for committing carnal intercourse against the order of nature (sodomy, in this instance) under s 377 of the Penal Code.

(d) The fourth charge is for insulting the complainant's modesty under s 509 of the Penal Code by taking four nude photographs of the complainant.

(e) The fifth charge is for criminal intimidation (in threatening to distribute nude photographs of the complainant) under s 506 of the Penal Code.

(g) The sixth charge is for rape under s 376(1) of the Penal Code.

(h) The seventh charge is for committing carnal intercourse against the order of nature (sodomy, in this instance) under s 377 of the Penal Code.

(i) The eighth charge is for theft (of the complainant's identity card, bank card, and a pair of gold-coloured earrings) under s 379 of the Penal Code.

It was alleged that all the offences took place on the afternoon of 23 December 2005 at the accused's flat at 174B Joo Chiat Place ("the flat").

The complainant's version of events that occurred before the day of the alleged incidents

4 The accused and complainant were colleagues at Giant and became acquainted in May or June 2005. They chatted while working and eventually exchanged text messages and had conversations on the telephone. Sometime in June 2005, the accused and the complainant went to Mustafa Centre together. Whilst there, the accused suggested checking into a hotel as he was not feeling well. The complainant guessed that the accused wanted to have sexual intercourse with her and proceeded to the hotel nonetheless, and there had sexual intercourse with him. After this incident, they went to the same hotel almost every week to have sexual intercourse. They usually did so after the complainant finished work at Giant.

5 In August 2005, the complainant initiated divorce proceedings against her husband. She testified that she had done so because her husband did not have a proper job and was avoiding his responsibility as breadwinner of the family. The accused and the complainant made plans to marry once her divorce had been finalised. According to the complainant, her relationship with the accused had nothing to do with her decision to divorce her husband. When asked under cross-examination whether she was in love with her husband, her answer was "I don't know" and "I'm still struggling to go through what I'm going through right now".

6 In October 2005, the accused's work permit in Singapore expired. He returned to Bangladesh on the evening of 12 October 2005. Both the accused and the complainant confirmed that on the morning of 12 October 2005, before the accused flew back to Bangladesh, the complainant had visited him at the flat and they had sexual intercourse there. According to the complainant, that was the last time that they had sexual intercourse (although the accused testified that they had sexual intercourse again on 6 December 2005: see [14] below). While the accused was in Bangladesh, he and the complainant kept in touch regularly by phone and text messages.

7 The complainant could not return to Bangladesh with the accused on 12 October 2005 because her divorce proceedings were still ongoing. In particular, she and her husband had a counselling session on 14 November 2005 relating to the divorce proceedings that she had to attend. Before the accused left for Bangladesh, he purchased a return air ticket for the complainant so that she could join him there. The complainant had also applied for the requisite Bangladeshi visa so that she could travel to the country. The departure date, as stated on the air ticket, was 18 November 2005, and the return date was 25 November 2005.

8 In the event, the complainant never made the trip. The complainant testified that she had told her mother of her intention to travel to Bangladesh to meet a friend. Her mother did not like the idea and threatened to prevent the complainant from ever seeing her children again if she went. The complainant told the accused about this, and he tried in vain to make her resolute about going to Bangladesh.

9 About the same time, on 14 November 2005, the complainant attended the counselling

session with her husband. During this session, the complainant's husband pleaded with her to give him a second chance. She agreed to do so, and resolved from that point on to put an end to her relationship with the accused. The complainant made a long-distance call to the accused to tell him of her decision. According to her, the accused was angry and told her that she should not change her mind about marrying him.

10 Despite the complainant's resolution to end the relationship with the accused, she still helped him to get a visa to return to Singapore. This was to fulfil the promise that she had made to him before he left for Bangladesh. Consequently, the accused returned to Singapore on 12 December 2005. The complainant arrived at Changi Airport at 6.00am to pick him up, and then dropped him off at the hotel at which they used to have sexual intercourse, and after that, she went to work, arriving at Giant at 8.10am. During the period from 12 December 2005 to 23 December 2005, the accused visited the work place of the complainant almost every day, mostly during her lunch time. The complainant testified that she was not happy that he did so because she did not want her colleagues to know that he was visiting her. The accused also followed the complainant home after work. According to the complainant, the accused was pestering her because he wanted her to cancel the Bangladeshi visa that she had applied for. The accused was of the view that he would be penalised if the complainant did not do so. However, the complainant did not have her passport with her because her mother had hidden it. The complainant also testified that the accused wanted her to sign some documents that would enable him to get employment in Singapore.

11 The complainant confirmed that on the occasions that the accused visited her at Giant during her lunch time, they would go to a nearby block of flats to chat. They hugged and kissed during these sessions, but did not have sex. However, the complainant testified that there was one occasion where they went to a park near Bedok bus interchange during which she masturbated the accused. The complainant stated that she had only done so because the accused had insisted. The complainant also testified that the accused had at some point shown her a large sum of money, which he obtained by selling off his plantation in Bangladesh, but she maintained that she did not know what the money was for and had assumed that it was for the accused to support himself while he looked for a job.

12 The complainant also testified that on 14 or 15 December 2005, she went with the accused to a neighbourhood police post to ask whether a police report needed to be made in order for a new passport to be made. The police officer informed them that a police report did not need to be made, and instead gave the complainant an application form to fill in. The complainant then submitted the form to the Immigration Checkpoint Authority ("ICA"). A few days after the form was submitted (the accused testified that this incident occurred on 20 December 2005, but the complainant could not remember the exact date), the complainant and the accused went to the ICA in order to collect the complainant's new passport. While there, the complainant was informed that she needed to pay a sum of \$100 because she had not made a police report. She had only expected to pay \$50 for the new passport. As a result, the complainant did not collect her new passport, instead, the accused quarrelled with her over the incident, which ended with a scuffle at the Lavender MRT station.

13 The complainant testified that the accused had contacted her on 22 December 2005 to ask her to go to the flat to meet the accused's prospective employer in order to sign some forms. The complainant said that she would try to make the trip during her lunch hour, but in the end, she was unable to do so on that day and went the next day instead.

The accused's version of events that occurred before the day of the alleged incidents

14 The accused's version of events leading up to 23 December 2005 differed from the

complainant's account in some respects. The most essential difference in their respective testimonies was that while the complainant stated that she had ended their relationship while the accused still in Bangladesh and that he had returned to Singapore on 6 December 2005 only to find work, the accused testified that their relationship was still ongoing when he returned to Singapore. According to the accused, he had returned to Singapore on 6 December 2005 because the complainant had asked him to come back to marry her. She also asked him to bring money for the marriage, upon which he sold his cultivatable land in Bangladesh in exchange for \$5000. The complainant picked him up from the airport on 6 December 2005 and then went with him to their regular hotel. He and the complainant had consensual sexual intercourse there before she left the hotel to go to work. The accused stated that this was the only time they had sexual intercourse between 6 December and 22 December 2005 because the complainant did not have time to spare and her mother was always controlling her.

15 The accused also testified that upon his return to Singapore after 6 December 2005, he stayed at the flat, and sometimes at his boss's office at Boon Lay. The original plan of the accused and the complainant was for her to introduce him to her mother, and for him to stay at her mother's flat. However, upon his arrival, the complainant informed him that she had difficulties doing so because her divorce proceedings had not been finalised. Between 6 and 23 December 2005, the complainant and the accused met almost everyday, except on her off days when she was not at work. The complainant never told the accused not to look for her in Giant. The accused also testified that when he and the complainant went to the park near Bedok interchange sometime around 19 December 2005, the complainant was happy, and she had masturbated and performed fellatio on him.

16 According to the accused, the complainant called him on the evening of 22 December 2005 to inform him that she would go to the flat the next day to fill up visa forms and have sexual intercourse with him. The accused had not informed the complainant that his potential employer was going to be at the flat and that she should therefore come over to fill in a form.

The complainant's version of events on 23 December 2005

17 On 23 December 2005, the complainant left for the flat at around 1.00pm, and arrived at around 1.40pm. As she assumed that she could finish whatever it was that had to be done at the flat within her lunch break, she had not informed any of her colleagues that she would not be back at work on time. On that day, the complainant was wearing a brown blouse with a polo T-shirt from Giant ("the Giant T-shirt") over it. She was wearing a black jacket over the Giant T-shirt. She was also wearing a pair of pants, socks and shoes.

18 The accused met her at the ground floor of the apartment block in which the flat was located. When she asked the accused where his potential employer was, he pointed towards the flat. The complainant then followed the accused up the stairs. When they arrived at the flat, the accused informed the complainant that his potential employer could not wait for the complainant and had left. The complainant sat on the floor and started filling in the forms that the accused had produced. As the complainant was in a hurry, she tried to fill in the forms as quickly as possible. The accused was not satisfied with her signature and became angry. This led to a quarrel between them. At around this point, the accused took the complainant's mobile phone and wallet (containing her identity card and bank card) and threw it aside.

19 The accused then pulled out a knife, and said "You think I Bangla man, I come empty hand?" The complainant was scared, and went towards the main door of the flat upon filling up the forms. The accused ran after and grabbed the complainant, pushed her back into the room and forced her to sit on the floor. At some point during this altercation, the complainant tried to take the knife, but was

unable to do so. The accused then decided to tie the complainant's hands behind her back with a piece of red cloth, and then used another piece of cloth to gag her. After tying up the complainant, the accused asked the complainant to lie on her back and proceeded to remove her pants, shoes and socks. He then raped her, while telling her that he wanted to ejaculate within her so that she would become pregnant and her husband would reject her. However, the complainant managed to move her leg so that the accused ejaculated on her stomach instead. At around this time, the accused told her that "today ..., you and I finish" and asked her to chant an Arabic phrase that is usually used where someone has passed away. The complainant was frightened as she believed that the accused wanted to kill her. The accused also tried to kiss the complainant at some point during the rape, but was unable to do so as the complainant was gagged. He thus removed the gag, and she let him kiss her. The complainant then heard the accused saying "backside". He turned her around and sodomised her. According to the complainant, the accused and her had never had anal sex before, although he had requested it. The complainant stated that she felt a sharp pain and the sodomy continued for about a minute. The accused ejaculated on the complainant's body, upon which he used a piece of tissue to wipe off his semen and her anus. The complainant observed that there was blood on the tissue.

20 Having raped and sodomised the complainant, the accused then took a knife to make a cut in her brown blouse, which he accessed from the top of the Giant T-shirt. He then tore open the brown blouse but there was no damage to the Giant T-shirt. He also made cuts in the complainant's bra. The accused removed the cloth that was being used to tie up the complainant's hands and he then removed all her clothes in order to take pictures of her with the camera in his mobile telephone. The accused told the complainant that he wanted to take photographs of her so that he could show the photographs to all the Malay men at the complainant's work place.

21 Although the complainant's hands were free, she was still scared, and complied when the accused made her lie down and put his hands on her throat so that she could not talk. The accused raped the complainant a second time, and then sodomised her once again. At some point, the accused asked the complainant why the sex was not as good as usual. The complainant testified that her answer to him was, "maybe it's because I was scared and [you are] angry". The complainant also revealed for the first time in cross-examination that she had had consensual sex with the accused after the two incidents of rape and the two incidents of sodomy. She had done so because she thought that if she gave him sexual intercourse willingly, he would let her go. He also pulled her hair to indicate that he wanted her to perform fellatio on him, which she did.

22 Following the episodes of rape and sodomy, the accused watched a pornographic video on the television, and then took the complainant's gold earring studs from her. He told the complainant that if his sister, who lived in Bangladesh, could not use gold, she too could not use gold. The accused also told her that she could not think of going back to work. At around this time, the complainant began to feel nauseous. The accused went to the kitchen in the flat to prepare some food, which he tried to feed the complainant. The complainant could not eat, and spat the food out. The accused then asked her if she wanted to make a telephone call to anybody because he was going to kill her. When the complainant turned on her mobile phone, she received calls and text messages from her colleagues, including a message from one P P Jayaprabu a/l Palakastin ("Jayaprabu"). The accused asked the complainant to inform Jayaprabu that she would not be returning to work. The complainant sent the following text message in the Malay language instead:

Tolong aku jaya. Suruh tukang sapu panggil sembilan sembilan dtg umah tukang sapu. Aku kene culik. Tolon.

According to the complainant, "Tolong aku jaya" could be translated into "Help me, Jaya", while "suruh tukang sapu" meant "the cleaner to call police to come to the cleaner's house." "Aku kene

culik" meant "I was taken hostage", while the last word "*Tolon*" meant "help". Jayaprabu confirmed in court that he had received this text message, which has also been retrieved from his mobile phone. Forensic examination revealed that Jayaprabu had received the message at 6.05pm on 23 December 2005. The complainant testified that Jayaprabu had sent her a text message to confirm that she had been referring to the cleaner's house. Jayaprabu confirmed in court that he had sent a text message to the complainant with the following Malay text:

Panggil 77 to panggil polis kepada 77 house

This can be translated into "call 77 to call police to 77 house". The victim replied with the word "ye", which Jayaprabu understood to mean "yes".

23 The accused saw the text message sent by Jayaprabu, and realised that the complainant had called for help. He asked her to get dressed, telling her that he wanted to take her to Boon Lay. She complied, putting on her panties, black jacket and pants. Although the complainant had her mobile phone with her, she could not find her wallet and gold earring studs. The accused threw the torn blouse and bra into the rubbish bin in the kitchen, and he had the complainant's Giant T-shirt in his hand. They left the flat together. The complainant had the impression that this was at about 4.00 or 5.00pm, as it was already getting darker. Upon reaching the ground level, the complainant ran away from the accused and sought help from passers by. The passers by offered to bring her to the nearest police station, but she chose to wait for Jayaprabu instead. By this time, the accused had fled. Subsequently, the complainant's colleagues arrived, as did the police. The complainant was then taken to a hospital for a medical check-up.

24 While the complainant was being interviewed by the police, the accused contacted the complainant to tell her not to cancel his visa so that he could return to Bangladesh. The complainant told the accused that she needed her identity card and bank card. She informed the investigation officer, Amos Tang ("IO Tang"), who then instructed the complainant to arrange a meeting with the accused on the pretext of getting her identity card and bank card back from the accused. This meeting was arranged to take place on 25 December 2005 at Mustafa Centre. On the morning of 25 December 2005, before the meeting at Mustafa Centre, the complainant had received several text messages from the accused asking for forgiveness and pleading with the complainant not to go to the police. Later on the same day, the accused was arrested when he arrived at the appointed place and time.

The accused's version of events on 23 December 2005

25 According to the accused, when the complainant arrived at the flat on 23 December 2005, she gave the accused her identity card, bank card and her earrings. He kept these items in his wallet. The complainant was feeling very hot inside the flat and therefore took off her jacket and Giant T-shirt. She placed these articles of clothing on the bed. She then sat cross-legged on the floor, and the accused took out the visa application forms from his bag and gave them to her. At that time, the complainant had her mobile phone with her, but it was switched off. While the complainant was filling up the application forms, the pair had an argument. The accused asked the complainant if she was really going to Bangladesh with him. He wanted to make sure that she would make the trip this time. Upon hearing this, the complainant slapped the accused on his face, and told him that she had not cheated or lied to him. It was her mother who had taken her passport away. The accused then told her:

You don't know my problem because last time, you know my problem, now you don't know problem because your heart inside rubbish jam already.

The complainant replied that it was the accused who did not understand her problems, and that his heart was also full of "rubbish jam". She said that he should wash his heart. She then grabbed a knife which was nearby and wanted to cut the shirt that he was wearing. The accused did not allow her to do so, and snatched the knife away from her hand. The accused then cut open the complainant's brown blouse so that she could wash her heart. He made the cut from top to bottom, and accidentally cut her bra in the process.

26 According to the accused, the complainant then tried to take the knife from him. He resisted by grabbing her hands with his, and then tying her hands behind her back. When the complainant agreed that she would not take the knife, the accused untied her. After this incident, the complainant watched some television. She told the accused that "I got to go home early. It is late. So please come and have our intercourse." The accused and the complainant then had sexual intercourse on the carpeted floor, with him on top, and he ejaculated on her belly, as had been their practice. The complainant complained that the carpet surface was very rough. The accused laid a towel on the floor and the pair had sexual intercourse two further times that afternoon. The complainant also performed fellatio on the accused. The accused testified that the entire sexual encounter lasted about two hours.

27 The complainant then wanted to leave the flat, and put on her jacket, pants, socks and shoes. She threw the cut blouse and bra into the rubbish bin in the kitchen of the flat and carried the Giant T-shirt in her hand. The accused and the complainant left the flat together. When they reached the ground floor, the complainant told the accused that she had to leave quickly. The accused thus left the complainant and hailed a taxi from the nearby coffee shop as he wanted to go to Mustafa Centre. That evening, the complainant lodged her report to the police. The accused testified that on 25 December 2005, he went to meet the complainant at Mustafa Centre because the complainant wanted her identity card, bank card and earrings to be returned to her. He was arrested there. He also testified in cross-examination that he had been informed by his friend on the night of 23 December 2005 that the complainant had made a police report against him and that the police had gone to the flat.

28 Other than the complainant and the accused, the only other material witness was Jayaprabu, who worked as a cashier at Giant and was the complainant's colleague. Other than the evidence from Jayaprabu already noted above, Jayaprabu also testified that upon receiving the complainant's text message asking for help, he went to his store manager, Tan Wee Boon, to discuss the matter. Jayaprabu, Tan Wee Boon and two other colleagues then took a taxi to the flat. Jayaprabu testified that the complainant was crying and looked very lost.

The trial within a trial

29 The accused gave two investigative statements under s 121 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) to the police. The first ("P73") was recorded from the accused on 25 December 2005 at approximately 3.45pm at Police Cantonment Complex. The admissibility of P73 was challenged by the accused. The accused claimed that the statement was involuntary as it had been made under threat of physical harm. According to the accused, he had been roughly treated by IO Tang and Station Inspector Govindharajoo Ramalingam ("SI Govindharajoo") at the time of his arrest on 25 December 2005 at 11.15am. SI Govindharajoo told the accused on the way to the flat that "You are going to go to jail, you are going to go to jail." Whilst at the flat, IO Tang told him to shut up and verbally abused him. The accused testified that he was then brought to Police Cantonment Complex, whereupon IO Tang conducted a pre-statement interview for about 15 to 20 minutes. During this interview, the accused was physically assaulted and verbally threatened by SI Govindharajoo (in the presence of IO Tang), who held the accused's neck, pushed him to the corner

of the room and kneed him.

30 The accused was taken to Alexander Hospital for a pre-statement medical check-up before returning to Police Cantonment Complex at around 3.25pm. Both IO Tang and the accused confirmed that the accused had been offered food, which he either declined to eat or barely ate because he had no appetite. The recording of P73 began at around 3.45pm, nearly four hours after the accused was first arrested. It was carried out by IO Tang and one Mdm Nandani Devi d/o Durga Singh ("Mdm Nandani"), who was the interpreter for the accused. The accused testified that by the time of the taking of the statement, he was already in fear because of the treatment that he had received. IO Tang told the accused that he had to agree with everything that he and Mdm Nandani said. They would beat him again if he deserved it. IO Tang also pushed the accused against a cupboard, held him by the neck and kneed him in the stomach. Mdm Nandani was asked to leave the room while this assault occurred. When Mdm Nandani returned, IO Tang showed her the nude photographs of the complainant that were contained in the accused's handphone, upon which Mdm Nandani started scolding the accused and slapping him on the shoulders. IO Tang also threatened to "inject [the accused] to die" if he did not confess. The accused stated that he was very scared and was crying. At around this time, the accused broke down and told IO Tang that "Whatever you are telling me, just I sign for it". The accused testified that this was the reason that he had signed P73. The recording ended at 7.40pm, nearly four hours after it had begun.

31 The accused was brought for a post-statement medical check-up, where he complained about having rashes and some pain in his right foot. The accused testified that he had not told the doctors who had conducted the pre and post-statement medical check-ups of the assaults as he did not know whether he could disclose what had happened and there were police officers present at the time. On 10 May 2006, while the accused was in remand, he made a complaint to the High Commission for the People's Republic of Bangladesh ("the High Commission") regarding acts of assault by IO Tang and Mdm Nandani that had occurred during the recording of P73. A representative from the High Commission interviewed him and then wrote to the prison authorities on 24 May 2006. Neither the Prosecution nor defence counsel tendered copies of the letter from the High Commission to the court, although it was clear from the Prosecution's submissions that they did have a copy of this letter. Defence counsel relied on this correspondence as being corroborative of the accused's claim that he had been assaulted and threatened during the recording of P73.

32 In a *voir dire*, the burden of proof lies on the Prosecution to prove beyond a reasonable doubt that the statement was voluntarily given: *Koh Aik Siew v PP* [1993] 2 SLR 599. At the end of the *voir dire* in the present case, I was not satisfied that the Prosecution had proved beyond reasonable doubt that the statement was a voluntary one. I came to this decision based on the overall circumstances, and in particular, the long hours before and during the recording of the statement, the failure to introduce the letter from the accused to the High Commission and its reply to the police. The burden was on the Prosecution to satisfy the court of the voluntary nature of the statement, and, therefore, it fell on the Prosecution to produce the relevant documents and evidence in its possession. My decision to exclude the statement was, of course, not a finding of fact of misconduct on the part of any police officer or the interpreter.

33 Reverting to the main trial, it was obvious that the evidence in this case in respect of the charges of sexual assault depended largely on the evidence of the two main protagonists, the complainant and the accused. The evidence concerning the taking of nude photographs of the complainant and the theft of her cards and earrings had been physically proven, and the evidence of that was substantially independent evidence. Four nude photographs of the complainant were extracted from the mobile telephone of the accused, and at trial he admitted to taking those photographs. Similarly, the accused was arrested and found to have in his possession at the time of

his arrest, the two cards of the complainant as well as her earrings. The question of intention in relation to those charges, however, remained to be considered. But this being an unusual case, I shall first make some general findings.

34 The unusual aspect of this case is that the complainant and the accused were lovers not long before the offences were alleged against the accused. For the avoidance of doubt, I should state that they were lovers in the full sense of that term, and not merely two persons who were in love – they were consummated lovers who had sexual intercourse with each other on a regular basis. The only disagreement was in regard to how often they had sexual intercourse, and not as to the existence of a pattern of regularity. The complainant said that they had sexual relations once a week whereas the accused said that it was two or three times a week. However, the numbers in this case were not all that important; it was the fact of a regular practice between two persons seemingly deep in love at the time. I think that this would be a fair conclusion because both of them admitted in court that they had contemplated marrying each other. The complainant had also prepared to visit the accused in Bangladesh in November 2005. But love outside conventions, it seems, has its obstacles. In this case, a local Malay girl went out of convention to love a Bangladeshi foreigner and, further, she fell in love with him when she was already married to someone else. We were not told what sort of relationship the complainant was having with her husband at the time save that at one point, at least, it was not strong enough to keep the complainant from falling in love with the accused, causing her marriage to head for divorce. It had its moment of redemption when the complainant and her husband agreed to reconciliation, ironically, four days before the complainant was meant to meet the accused in Bangladesh. A not insignificant twist was added at trial when the complainant hesitated in proclaiming a happy reconciliation. Instead, she voiced doubt. This change at trial was not insignificant for reasons to which I shall shortly revert. In addition to the reconciliation between the complainant and her husband, the complainant's mother, too, was against the illicit relationship that she suspected the complainant was carrying on with the accused. She went to the extent of hiding the complainant's passport and the air tickets sent to her by the accused.

35 From the point of view of the complainant, the romance between the accused and her was over by 23 December 2005. The accused did not quite think so. They might have disagreed as to the characterisation of that fight, but from a disinterested third party's perspective, the circumstances of the couple that day had the features of a lovers' quarrel. In such quarrels even when one (or even both) of them had declared the relationship as having ended, he or she (or both of them) may still have lingering feelings for the other that may not have entirely vanished. Although that is not a matter of concern to the court, it serves as a reminder that finding facts under such circumstances is a difficult and complicated exercise. One of the ironies of a falling out between lovers is that their memories of the past relationship become encrusted with a warped interpretation. The circumstances of the complainant and the accused seemed to me a classic example of this phenomenon, and their testimonies in court fortified my views as such. The fine mixture of exaggeration and truth, honesty and deceit made it difficult to determine what had been proved and what had not.

36 However, from the testimonies, and given the small measure of corroboration in the cautioned statements of the accused, I am satisfied that, in so far as the sexual offences were concerned, the Prosecution has proved that the accused had raped the complainant and also sodomised her. There were two charges of rape because the Prosecution's case was based on two close but separate incidents of penetration during the afternoon of 23 December 2005. One of the two charges was based on s 376(2) of the Penal Code and was a charge for aggravated rape because of the allegation that the complainant was threatened with harm and thereby caused to suffer fear. There were also two charges of sodomy under s 377 of the Penal Code. In the thick of the respective testimonies, I am only convinced that there was one instance of rape and one instance of sodomy. I am not

convinced that there were two separate penetrations on each of those charges, and I therefore give the benefit of the doubt to the accused. In respect of the two rape charges, I am not sufficiently persuaded that the complainant was put in fear in the course of the sexual act, and, accordingly, I am of the view that the offence committed was one of rape under s 376(1). I would add that it was not easy to discern with precision the order of events in the accused's room that afternoon, and on that basis, I would lean in favour of the version given by the accused. What I was able to ascertain beyond reasonable doubt was that when the sexual intercourse took place, she was not a willing party. I am satisfied that her initial reluctance firmed into refusal, and that is the critical ingredient in the offence of rape, all else relates to sentence instead. It may be that the accused thought, although he had not said as much, that the complainant's reluctance weakened into consent, but on the question of consent, or rather, the lack of it, I have no doubt. In so far as the sodomy charge was concerned, consent is not a defence.

37 In respect of the charge of criminal intimidation through the use of the knife, I am not fully convinced that a knife was used for the purposes as alleged or that it had the effect as alleged or intended. The only fear that I was able to ascertain from the evidence was that of the force of the accused's anger that day. The evidence showed that the complainant and the accused had previously fought (over the incident of the payment of fees for the complainant's passport renewal) but that was largely the sort of anger and frustration from a lovers' quarrel and for which it is difficult to apportion blame. The anger of the accused on 23 December 2005 erupted under different circumstances. It was more unilateral in that by that time, so far as the complainant was concerned, the romantic relationship between the accused and her was over. She thus expected him to behave differently, but, of course, given their history, that might be easier said than done. This is not an exoneration of the accused's conduct but merely an expression of how people can react when they are emotionally troubled. The rights and wrongs of their consequential actions are a separate matter.

38 In respect of the fourth charge of outraging modesty in the taking of nude photographs of the complainant, the evidence was beyond doubt. Indeed, the accused admitted that he had taken her photographs although his defence was one of consent. In an offence of this nature – taking nude photographs (outraging modesty is a wide description) – if consent is put forward as a defence, there must be clear consent. I had thus to determine whether the complainant consented. In my view, she did not. I should add that in accepting her evidence on this point, I noted too that her unhappy expression on the photographs was not that of a willing model. I had also taken into account and noted that in at least one of the photographs the complainant made little attempt to avoid the shot or to cover herself. The next question, which related to the fifth charge of criminal intimidation in threatening to distribute the photographs, was whether there was sufficient evidence that the accused had threatened to publish the photographs to the complainant's husband, so that he would divorce her, and to her friends at work. The only evidence of this was the testimony of the complainant. I am not sufficiently satisfied that this charge was proved beyond reasonable doubt. The evidence from both parties was sparse. The accused had maintained that he had taken nude photographs of the complainant twice before with her consent. The issue of whether he had threatened to use the present set of photographs was not pressed sufficiently and I thus find it unsafe to convict him on the fifth charge.

39 Finally, there is the charge for theft. The items consisted of the complainant's identity card and bank card, and a pair of earrings. They were not items of any great value, with the exception of the bank card, but it was not known how much the complainant had in that account or whether the accused knew her personal identification and user identification numbers to withdraw money with that card. It was not disputed that the accused immediately agreed to return the items to the complainant when she asked for them. The complainant testified that when she asked for them she had not told him that she had gone to the police. The accused's evidence was that the complainant left the items

in the room and forgot to take them when she left. Theft is an offence committed with the intention of depriving the owner of the property. I do not think that that intention was satisfactorily proved in this case. The accused might have been liable for trespass, conversion or detainment under the law of tort, but that was not in issue before this court.

40 Finally, I should mention the evidence obtained directly from the testimony of the complainant herself regarding her voluntary sexual acts with the accused a few days before 23 December 2005 (masturbation), as well as on 23 December itself (fellatio and coitus) after all the acts constituting the offences had been committed. In respect of the former, she explained that she performed them to avoid having to have coitus, and in the case of the latter, so that he might release her. In one sense, if that was interpreted as duress, it would have vitiated any consent, but her own evidence and attitude at the time and during trial was not clearly or firmly one of duress. This made the assessment of the facts all the more difficult. Hence, I was only convinced that there was one instance of coitus and one instance of sodomy that that complainant had withheld her consent to on 23 December 2005 itself. The circumstances of that may also be relevant for mitigation but I shall consider that after I hear counsel.

41 Consequently, for the reasons above, I find the accused guilty of the fourth, sixth and seventh charges and convict him accordingly. I discharge and acquit him of the first, second, third, fifth, and eighth charges.

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