

Sivalingam Suresh v Public Prosecutor
[2000] SGHC 139

Case Number : MA 19/2000

Decision Date : 12 July 2000

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Kesavan Nair (MPD Nair & Co) for the appellant; Jennifer Marie and Tai Wei Shyong (Deputy Public Prosecutor) for the respondent

Parties : Sivalingam Suresh — Public Prosecutor

Criminal Law – Offences – Use of criminal force with intent to outrage modesty – Whether offence proved beyond reasonable doubt – s 354A(1) Penal Code (Cap 224, 1985 Rev Ed)

Criminal Procedure and Sentencing – Appeal against conviction – Appeal against findings of fact

Evidence – Weight of evidence – Sexual offence – Conviction on victim's evidence alone – Victim's evidence unusually compelling

: The appellant was convicted of the following charge in the district court:

You, Sivalingam Suresh, Male/32 yrs (NRIC No: S1758963F) (DOB: 30 November 1966) are charged that you, on 6 August 1998, at or about 10am, at Blk 319 Ang Mo Kio Ave 1 [num]11-1503, did use criminal force to one Mokbul Md Sharaf Ali Shiekh, Male/26 yrs, intending to outrage the modesty of the said person, to wit, by holding a knife in your right hand and pointing it at his lower abdomen and using your left hand to unzip his trousers and to touch the groin of the said person, and in order to commit this offence, you voluntarily caused fear of instant hurt to the said Mokbul Md Sharaf Ali Sheikh, and you have thereby committed an offence punishable under s 354A(1) of the Penal Code (Cap 224).

The appellant was sentenced to 30 months` imprisonment and four strokes of the cane. He appealed against his conviction. I heard his appeal and dismissed it. These were my reasons.

The facts

The victim, Mokbul Md Sharaf, was a Bangladeshi cleaner employed by Boley Contract Company Pte Ltd. On 6 August 1998, at about 10am, the victim was sweeping the corridor on the 11th floor of Blk 319 Ang Mo Kio when the appellant called and gestured the victim towards the appellant`s flat, [num]11-1503. The victim moved over, thinking that the appellant wanted him to clean that part of the corridor. Instead the appellant gestured for the victim to enter the flat. When the victim refused, the appellant grabbed the victim`s hand, pulled him in, and closed the metal gate and wooden door.

Inside the flat, the appellant forced the victim to sit down on the sofa in the living room by pulling his hand. The appellant then played a video tape which was screened on the television in front of the sofa. After 10 to 12 seconds of watching the tape, the victim realised that it was a pornographic video. He screamed and tried to leave. The appellant prevented him from doing so by taking a knife from the table in front of the sofa with his right hand and pointing it at the victim`s lower abdomen. With his left hand, the appellant unzipped the victim`s trousers and used that hand to stroke the victim`s private parts over his underwear.

After 10 to 12 seconds of stroking, the victim overcame his fear and rushed towards the door. He tried opening the door but had difficulty doing so. The appellant then moved towards the door and opened it. The victim rushed out of the flat and down to the rubbish centre at Blk 305 to inform his supervisor. The victim had only worked in Singapore for about two and a half months before the incident, having arrived in May 1998, and did not speak English. The supervisor paged for another Bangladeshi worker, Najir, to interpret. After Najir's translation, the supervisor called his boss to inform him of the incident. The boss came down to the rubbish centre and brought all of them to the Neighbourhood Police Post. The boss told the police officer on duty, Sergeant Tan Choon Guan ('Sgt Tan'), what transpired and a police report was made.

The party was told to return to the void deck to meet Staff Sergeant Lee On Keat ('S/Sgt Lee'). After meeting up, they went to the appellant's flat. When the appellant opened the door and saw S/Sgt Lee, he immediately closed the door. A minute or two later, he opened the door. S/Sgt Lee spoke with the appellant. The appellant denied the incident. S/Sgt Lee then asked the victim, Najir, the supervisor and the boss to proceed to Ang Mo Kio Police Station. While they were on their way, they noticed a videotape lying on the ground floor directly below the kitchen window of the appellant's flat. The police subsequently came to remove the videotape. The cartridge of the tape was damaged when found. The videotape was sent to the Films and Publications Department to be placed in a new cartridge and to be viewed. The tape was confirmed by the Board of Film Censors to contain an obscene film. When the police raided the appellant's flat at around 8.30pm on the day of the incident, they recovered a knife which the victim identified as being similar to the one used by the appellant.

The defence

The defence was a denial of the incident. The victim's complaint was attributed as an action carried out in revenge by the victim for being barked at by the appellant's dogs outside the appellant's flat. The appellant's case was that, while returning to his flat with his two dogs, his female dog barked at the victim when they walked past him. The victim tried to chase the dog away with a dustpan, and also tried kicking the dog. The victim claimed that the dog bit him and shouted abuses at the appellant. When the appellant carried his dogs into the flat the victim stood outside and continued to shout at him. As the dogs were barking, the appellant carried them to his bedroom. At this time, the victim entered the living room. In the ensuing argument, the appellant pushed the victim out of the flat.

Decision of the trial judge

The trial judge found that the prosecution's case was proved beyond reasonable doubt and convicted the appellant.

The appeal

The appeal was initially against conviction and sentence. The appellant subsequently applied for leave to withdraw the appeal against sentence and I granted it. The appeal was therefore only against conviction. At the trial the appellant's defence was essentially that the victim was lying. His ground of appeal was essentially that the trial judge was wrong to believe him.

In respect of appeals against findings of fact, it has been held by the Court of Appeal in **Lim Ah Poh v PP [1992] 1 SLR 713** that an appellate court will not disturb findings of fact unless they are clearly reached against the weight of the evidence, and that, in examining the evidence, an appellate court has to bear in mind that it has neither seen nor heard the witnesses. This being a case involving a sexual offence, a further principle was borne in mind, that it is dangerous to convict on the words of the complainant alone unless the evidence is unusually compelling; see **Tang Kin Seng v PP [1997] 1 SLR 46**.

The appellant sought to disturb the trial judge's findings of fact by raising several inconsistencies in the victim's evidence. For example, much was made of the fact that the victim admitted under cross-examination that he was forced to drink beer but could not remember whether it was before or after the alleged molest, nor whether it was in canned or bottled form. However, neither the exact timing of the beer incident nor the type of beer container, was material to the victim's evidence or to the prosecution's case that a sexual offence was committed.

In a similar vein, the appellant tried to argue that the victim's inability to positively identify the knife was detrimental to the prosecution's case. However, the pointing of the knife only occurred for a short period of time, of about 10 to 12 seconds. During this brief period, the victim's mind could easily, and was more likely to, have been preoccupied with the appellant's actions of unzipping him and touching him on his private parts.

Much is also made of the fact that there was no mention of molest in the FIR. The text of the FIR read:

Complt infd that he was assaulted by someone and the subject had also threaten him with a knife not to call for police.

This really was an inconsequential quibble. The fact that the word 'assault' was used was understandable when the context of the recording of the FIR was taken into consideration. It was the evidence of duty officer Sgt Tan that at the Neighbourhood Police Post, the victim made gestures of pulling, dragging and of a knife being pointed to his abdomen. No translation was made by Najir and it was the victim's boss who helped to explain what had happened. Sgt Tan then phoned the Division Operations Room ('DOR') to inform them that 'a Town Council cleaner was abused by a male Indian worker and the subject threatened him with a knife not to call the police'. The word 'abused' was subsequently recorded as 'assaulted' in the FIR by the DOR.

Importantly, it was undisputed that, when the victim first told Najir of the incident at the rubbish centre, he said that he had been molested. There was also no dispute that Najir told the supervisor and the boss that the victim said that he had been molested and that this was their understanding. Neither was there any dispute that, when S/Sgt Lee met up with the party at the void deck, he was told that there was a molest. Moreover, what was recorded in the FIR was consistent with the overall story of the victim.

The appellant also argued that it was unrealistic and unbelievable that the victim made no attempt to run when he was pulled into the flat and made to sit on the sofa. He argued that the victim would not have needed to have watched the pornographic videotape before realising that something objectionable was going on. However, the victim's explanation was a believable one, that, although he did not want to enter the flat or sit down, he did not scream or hold on to the gate because he did not know at that point of time what the appellant's intention was. The appellant's intention only became apparent when the pornographic videotape was screened. The trial judge also noted that the

victim was of a diminutive build, of about five feet in height and 50 to 55 kilograms in weight, in contrast to the appellant's 'intimidating and bulky frame', and that the appellant could have easily pulled the victim in and forced him to sit down.

Neither was it unrealistic that the victim did not attempt to run when being pulled into the house, but did do so while a knife was being pointed at him. As the victim explained, he did not fully resist when being pulled into the house because he did not know at that time what was going on. It was very plausible that, when the appellant started moving his left hand over the victim's private parts, the horror from what was going on and the fear of what might follow spurred him to try to escape, even in the face of a knife.

In addition, the ability of the victim to escape from the appellant when the knife was being pointed at him was consistent with the victim's story that the appellant let him out of the house when the victim fumbled at the door. The appellant in turn argued that there was no reason for the appellant to let the victim out of the house. However, the appellant's intention was molest, not indefinite restraint, and it was very plausible that he would let the victim out after molesting him.

The thrust of the matter was that what the appellant claimed to be vital gaps in the victim's evidence were in truth immaterial, and what the appellant claimed to be unrealistic behaviour in the victim's story was in fact highly believable, plausible and consistent.

The weight of the evidence was heavily in the prosecution's favour. A contemporaneous complaint was made to the supervisor, Najir, the boss and then the police. It has been said in *Tang Kin Seng* that there is no reason why a complainant's distress cannot be a weighty piece of evidence in the right circumstances, provided that the danger of feigned distress is kept in mind; see ***Tang Kin Seng v PP [1997] 1 SLR 46*** at 67.

In the present case, there were several factors in firm support of the victim's complaint. The victim's story was congruent and believable. While the pornographic videotape was not positively identified as belonging to the appellant, the fact that such a video tape was found directly below the kitchen window of the appellant's flat at that time was consistent with the victim's story that he was made to watch a pornographic videotape. The appellant's actions in closing the wooden door immediately upon seeing Sgt Tan and opening it a minute or two later was highly suggestive that he did so to get rid of incriminating evidence, such as the desperate act of tossing the videotape out of his flat. On the whole, the victim's evidence was unusually compelling and satisfied ***Tang Kin Seng***.

Conclusion

For the reasons given above, the appeal was dismissed.

Outcome:

Appeal dismissed.