Public Prosecutor v MY
[2006] SGHC 89

Case Number : CC 16/2006

Decision Date : 26 May 2006

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Christopher Ong and Crystal Ong (Deputy Public Prosecutors) for the public prosecutor; Accused in person

Parties : Public Prosecutor — MY

Criminal Law – Offences – Sexual offences – Accused charged with attempted rape of niece – Whether charge of attempted rape made out – Whether charge should be amended to outrage of modesty – Sections 354 and 376(2) Penal Code (Cap 224, 1985 Rev Ed)

Evidence – Witnesses – Corroboration – Child witness – Whether corroboration required

26 May 2006 *Judgment reserved.*

Choo Han Teck J:

1 The accused is the 51-year-old uncle of the nine-year-old complainant; he is the elder brother of the complainant's father. The unmarried accused lived with the complainant and her family, consisting of her unemployed father, her mother who works as an auxiliary police officer with CISCO, her ten-year-old sister, and a younger brother. The accused was employed as a cleaner at the material time.

2 The complainant's mother lodged a police report against the accused on 15 August 2005, and after a brief preliminary investigation, the police arrested the accused on 17 August 2005. He was initially charged for doing various acts with the intention of outraging the complainant's modesty. The charges were for offences under s 354 of the Penal Code (Cap 224, 1985 Rev Ed). The dates of the offences were not specific in that they stated only the month or approximate month (May or June; June or July). The first charge stated that the accused inserted his finger into the complainant's vagina. The second stated that he put his "penis on her vagina and masturbating". The third was for rubbing her breasts and touching her vulva. After the case was referred to the Public Prosecutor, the second charge was amended to one of attempted rape under s 376(2) of the Penal Code.

3 The accused was not represented by counsel. After the charges were read to him at trial, the accused stated that he was admitting the first and third charges, but was claiming trial in respect of the second charge. The first and third charges were stood down to the end of the Prosecution's evidence in respect of the second charge. The Prosecution then read out a statement of facts in respect of the first and third charges. The accused admitted the facts. The Prosecution then closed its case and I called upon the accused to enter his defence on all three charges. He elected to testify in respect only of the second charge. He had no other witness.

4 I shall review the relevant evidence of the Prosecution before reverting to what the accused had to say in his defence. The investigating officer, Station Inspector Norliza Basirun of Jurong Police Divisional Headquarters, produced the first information report of the complainant's mother made on 15 August 2005. The report gave the date of the incident as 6 June 2005 between 11.00am and 6.00pm. The offence complained of was stated as:

On the said date, my daughter was molested by my brother-in-law namely [MY].

The investigating officer explained that the case was immediately transferred to the Serious Sexual Crime Branch ("SSCB") when the complainant mentioned that the accused had put his private part into her private part. The precise words were not clear from the evidence, but based on that information, the accused was taken into custody of the SSCB. The complainant was sent for a medical examination at the KK Women and Children's Hospital. Dr Kelly Loi, who examined the complainant, testified in court and produced the report she made of the examination. The report is important and I set out the content in its entirety.

MEDICAL REPORT ON [THE COMPLAINANT]

…

The above is a 9 year old primary school student. She was seen at the Women's 24-hr clinic on 16 August 2005 at 1 pm. Her history was obtained through the help of interpreter, I/O Suzana Sajari.

She reported through the interpreter that after her paternal uncle (the assailant) was released from jail, he stayed with her family and began molesting her in June 2005, touching her chest, breasts and genitalia. One afternoon in July, when no one else was in the house, her uncle made her lie on the sofa and remove her shorts, after which he unzipped his trousers, lay on top of her and inserted his penis into her vagina. She experienced some pain but had no vaginal bleeding. She noticed her uncle ejaculated.

On examination, the patient looked appropriate for her age (Tanner Stage 1). There was no evidence of any injuries. On vulval/vaginal inspection, the hymen was intact with no hymenal tears. External vaginal and urethral swabs were taken for routine investigations and results were negative for gram negative diplococci, spermatozoa and N. Gonorrhoea.

She has been referred to the Medical Social Worker.

5 The SSCB sent the case back to the Jurong Police Division because, in the light of the medical report that the complainant's hymen was intact, the SSCB did not classify the offence as rape. In court, Dr Loi testified that the hymen was a soft tissue and would have torn if a finger had been inserted into the vagina. She testified that the intact hymen meant that there was no penetration. She also said that that did not mean that no attempt was made. That part of the evidence seemed obvious, but whether there was an attempt or not is precisely the issue for the court's determination.

6 The complainant's evidence was that the accused "put his private part on my private part". When asked by the Deputy Public Prosecutor ("DPP"), she said that when he did that, she felt pain "like something poking inside my private part". When asked what was poking her she said that she could not remember. The accused did not deny that he had ejaculated on the complainant, who testified that shortly after that her brother returned from school and rang the doorbell. The accused then told the complainant to wash off the semen. Based on the complainant's evidence above, the Prosecution submitted that the accused had therefore attempted to rape the complainant.

7 The accused gave the following account of the incident in his defence. He said that on the day in question, he was watching television with the complainant. The complainant's parents had left

the flat to take their elder daughter to hospital. After a while, the accused started tickling the complainant and touched her thigh. He became aroused and felt like ejaculating. So he made her lie on the sofa and he put his penis against her vulva and rubbed against it until he ejaculated. He denied attempting to rape the complainant. In answer to the DPP, he said that he could easily have raped her if he had wanted to since there was nobody at home. The only apparent reason why the accused was not charged with rape was that the prosecution evidence showed that there was no penetration by the male organ into the female complainant's vagina. Penetration is a requisite element of the offence of rape. Without penetration, the accused would be guilty of attempted rape if it were proved that he had attempted to penetrate. It is also obvious that the attempt to penetrate must have been made with the intention to penetrate. This point might have been obscured in the circumstances of this case.

8 The accused had not wavered from his stand that he never raped nor had intended to rape the complainant. I had given him much latitude in his cross-examination of the complainant, mindful that I ought to minimise any trauma child witnesses might undergo in such circumstances, but I had also to bear in mind that the paramount purpose of a trial is to establish the facts and resolve the issues in dispute. As a layperson, and being unfamiliar with court craft, he digressed at times, but had been civil in his questioning. Similarly, I gave the DPP the latitude to cross-examine the accused himself. Consequently, I believed the accused not because I disbelieved the complainant, but because the accused convinced me with his testimony, which was supported not only by his police statements, but also one important undisputed fact – that the accused had ejaculated outside the complainant's body. This was the result of his rubbing his penis on the complainant's external genitalia. There was no evidence that the accused did not penetrate because he tried but failed, for example, that the complainant ran away, or that he was caught before he could do so. He had the time to complete the sexual act and he did. That sexual act was masturbating against the body of the complainant. If the complainant felt pain it might possibly be due to a brief instance in which the tip of the penis could have momentarily touched her more sensitively. Alternatively, the complainant might have felt pain from the mere fact that the weight of the adult accused was bearing down on her. I do not think that the accused decided not to penetrate the complainant only because the latter felt pain.

9 The learned DPP referred me to passages from the judgments of Yong Pung How CJ in *Tang Kin Seng v PP* [1997] 1 SLR 46 at [68], and *Lee Kwang Peng v PP* [1997] 3 SLR 278 at [67], respectively, to persuade me to accept the complainant's evidence. It is useful to remember the rules as to when it might be appropriate to require corroborative evidence in support of fragile young voices. Those rules are all commonsensical. One such rule that perhaps stands out more prominently is that the evidence of the trial must be evaluated in its entirety. Every young witness is an individual who will exhibit some general characteristics of a young person in her circumstances, and also the special characteristics personal to her that makes her different from others of her age. Ultimately, the court is to assess the reliability of the evidence of this special young witness before it and not just any young person generally. The complainant was sufficiently articulate, but is still a very young child. I did not get the impression that she was not telling the truth. In that sense, I believed her, as I did the accused. But she seemed to me to be less cogent, and her recollection of the event less stable than that of the accused. I am thus unable to give so much weight to the report of Dr Loi which recorded the complainant as saying of the accused, "after which he unzipped his trousers, lay on top of her and inserted his penis into her vagina". That was not sufficient proof of an attempt given all the other facts. Although the complainant was able to testify largely in English, I am not satisfied that she was able to understand the legal intricacies of attempted rape. There was no evidence to show that she had used another language to describe the event. Consequently, I am of the view that her account of the facts might not have been accurate. On the whole, I am left with the impression that it was told in approximate terms – terms that her young mind thought were

sufficient to convey her story. It is not that she did not use precise words like "pain" and "inside", but whether the meaning she had wanted to convey resided in the words used. The concluding opinion of issues like these could only be made in the totality of the evidence, and that included the manner in which it was given in court.

10 I am thus left with some strong doubts as to the act as well as the intention of the accused in respect of the second charge against him for the offence of attempted rape. However, I am left with no doubt that he had committed an offence under s 354 of the Penal Code in that he had outraged the modesty of the complainant by, in the words of the original second charge, "putting [his] penis on [the complainant's] vagina and masturbating".

11 There remained only one more issue. The accused claimed that there were only two instances in which he had molested the complainant. One was the incident concerning the second charge, and the other was the incident concerning the third charge. Although he admitted to the act stated in the first charge, he maintained that that took place during the same incident as that in the second charge. After hearing the testimony of the accused and the complainant, I am left with some doubt as to whether the complainant was clear in her recollection. It may also have been a misunderstanding in the course of recording the statement. The complainant had used the phrase "on another occasion" in her written statement, but I do not have the impression that there were three separate incidents and not just two. The accused did not have the benefit of legal counsel, but that was not to say that he was justified in not knowing the law. In this case, the mistake was not one of a mistake of law in that he was not saying that he did not know that it was legally wrong to commit those acts. He admitted the acts stated in the first charge without reservation, save that he thought the charge was in respect of the same incident complained of in the second charge. I believe that he was genuinely mistaken. The statement of facts relating to the first and third charges did not assist the Prosecution's case that there were three separate incidents and not two. I accept the evidence of the accused that the act complained of in the first charge was part of the second charge. That being the case, the first and second charges were, in effect, part of the same offence. It would not be right therefore that the accused be convicted of three charges as if he had committed three separate and distinct offences. I therefore amended the first charge to a charge under s 354 of the Penal Code, incorporating the particulars as stated in the original first charge as well as in the original second charge, as follows:

> You, [MY] are charged that you, sometime in June 2005, at [complainant's home address], Singapore, did use criminal force on [the complainant] (Female/9 years old …), with intent to outrage her modesty, to wit, by putting your penis on her vagina and masturbating; and further by using your finger to poke and rub her vulva and inserting your finger into her vagina, and you have thereby committed an offence punishable under s 354 of the Penal Code.

I had not disturbed the original wording of the particulars in respect of the use of the finger to poke and insert into the complainant's vagina even though Dr Loi testified that an act like that would have torn the hymen. The question of poking and inserting is one of degree. I am of the view that the extent of poking and inserting in the circumstances of the present case were not physically sufficient to tear the hymen. Similarly, the degree of penetration, if at all, by the accused person's penis was brief and not sufficient to tear the hymen, and not legally sufficient to constitute rape because the penetration would have been very slight and done in the course of rubbing on the complainant's abdomen and vulva. For the avoidance of doubt, I am not here holding that a brief or slight penetration does not count as penetration for the purpose of rape.

12 The amended first charge was read to the accused. He admitted it and had nothing to say in his defence. I convicted him accordingly on the amended first charge as well as the third charge, and

acquitted him on the second charge (the charge of attempted rape). He was sentenced to 14 months imprisonment on the amended first charge and two months imprisonment on the third charge. The terms of imprisonment was ordered to run consecutively and to take effect from 19 August 2005.