Yu Eng Chin v Public Prosecutor
[2009] SGHC 57

Case Number : MA 192/2008

Decision Date : 09 March 2009

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Vijay Kumar Rai (Arbiters' Inc Law Corporation) for the appellant; Lee Jwee Nguan (Deputy Public Prosecutor) for the respondent

Parties : Yu Eng Chin — Public Prosecutor

Criminal Law

9 March 2009 Judgment reserved

Choo Han Teck J:

1 The appellant is 52 years old. He helped his wife run a school canteen. They have two grown up children, a son aged 22 and a daughter aged 20. He was tried and convicted on three charges of molesting the complainant, one Malik Sudarwati, his domestic maid who started work with the appellant in September 2005. The offences were committed between December 2008 and February 2009. In the first two charges, he was alleged to have fondled the maid's breast and kissed her on the lips. It was alleged in the third charge that he squeezed her breasts and inserted a finger into her vagina. He was sentenced to 12 months imprisonment on the first and second charges, and 18 months imprisonment on the third charge. The trial judge also ordered the imprisonment terms of the first and second charges to be concurrent and the third charge to run consecutively after the first two terms, making a total of 30 months imprisonment in total. The appellant appealed against the convictions as well as the respective sentences imposed.

2 Mr VK Rai, counsel for the appellant, submitted that the appellant was wrongly convicted because the trial judge's evaluation of the evidence was flawed. Counsel submitted that the trial judge disregarded material evidence and wrongly took into account irrelevant ones. There were unusual facts in this case that a judge hearing the trial could not help but note. First, the complainant had also made a police report against her subsequent employer's brother for molesting her. She was employed by that employer after her employment with the appellant was terminated. Secondly, Prity Sriwanti, the next maid employed by the appellant, also made a police complaint against him. She too alleged that the appellant had molested her. In respect of the first, Mr Rai submitted that it was not coincidence that the complainant lodged a complaint against two employers in succession. He also submitted that the complainant was goaded by the police to make the complaint when they were investigating a complainant by the other maid, Prity Sriwanti. The two unusual facts - the maid who complained against two successive employers, and the employer who was accused by two successive maids - stood out so starkly that no emphasis was required. The question was how should the trial judge proceed to make her findings? This appeal was mainly on questions of fact, and so the learned DPP urged me not to disturb the findings made in the court below. It seemed that whenever one party takes this position, the other will invariably remind the court that in clear instances and "in the interests of justice" the appellate court should overturn the findings of fact. Both propositions are sound in law and have been uttered time without number in the highest courts throughout the common law world. Which is the applicable proposition in any given case? That depends on the facts.

3 In a case like this, without any witness to the actual assault, the verdict will depend largely on the credibility of the complainant as well as the person accused. With one exception, the issues raised in this appeal were issues of fact. The trial judge described the process in which she went about considering the evidence and the witnesses in order to decide whether the prosecution had proved its case. The exercise was a little bit more complicated than that because even if the judge believed the complainant, she was still obliged to find out whether there was any evidence that might make it unsafe to convict the appellant. The trial judge therefore described all the opposing accounts of what happened. She assessed and formed an opinion as to the evidence and the credibility of each of the witnesses. She was mindful of the witnesses who were not called, namely, the appellant's son who was in the police force, and Prity Sriwanti. She decided to treat the absence of these witnesses as a neutral factor although she thought that it would be "much easier" for the defence to call the appellant's son. I understood the phrase "much easier" in the context of the judgment to mean that the son was a more useful witness to the defence than he would be to the prosecution, and that by reason of his relationship with the appellant, he should have more likely been called by the defence than the prosecution. Neither did the trial judge draw any damaging inference against the appellant in the absence of Prity Sriwanti's evidence. The appellant's admissions in his statements to the police were taken into account crucially in the assessment of the appellant's credibility. He denied under cross-examination that he had hugged the complainant and wanted her to be his lover, promising to build her a home in Indonesia if she were to become his girlfriend. He was then impeached by the statements to the contrary which he had made to the police. The complainant's inability to produce her diary in which she claimed she had recorded the incidents of molest was considered against other evidence, including the admissions of the appellant.

4 A judge of fact will invariably have to rely on some intuitive assessment of the witnesses. No amount of precept or rule can sufficiently enable an appellate court to rule that the trial judge was intuitively wrong. The correctness and accuracy of assessment in each case will differ because the intuitive judgment may differ among trial judges; and appellate judges themselves may also disagree as to what inferences should be drawn from the evidence. An appellate court may, however, review the testimony and test it against other evidence adduced in the case to see if the trial judge had formed an opinion that it should not. This is sometimes described as acting "against the weight of the evidence". I am not seeking to make a fine or academic distinction in this regard because I do not wish to invite lawyers to argue about when an appellate court can interfere with a finding of fact. Every lawyer knows the phrase "an appellate court would be slow to interfere with the finding of fact" and it has been uttered so often that it is in danger of becoming a legal cliché. What I wish to say is that an appellate court may err in its assessment of the evidence if it did so without taking into account the intuitive cognition of the veracity of the witnesses concerned. That is why an appellate court is said to be "reluctant to interfere with facts" found by the trial judge below. It could do so if it were confident that the trial judge was clearly wrong in making those findings. Was the trial judge wrong? This question cannot be answered without an examination of crucial facts; just as a deep analysis of individual facts alone may be inadequate and even misleading. The big and full picture must show beyond a reasonable doubt that the appellant committed the offences for which he was tried.

5 None of the complaints raised by Mr Rai in his arguments were so crucially strong as to enable me to hold that the findings below were wrong. As an example, Mr Rai argued that the complainant's evidence was suspect because she could not be sure whether the person she said molested her in a subsequent case was "Jimmy" or "Tommy". This sort of confusion could damn the witness as a liar, or it could be excused if the trial judge accepted the explanation given for it. Furthermore, the trial judge might have reasons to disregard it as sufficiently crucial in her assessment of the witness's credibility. The choice made by the trial judge is an exercise of judgment. And on issues of fact, there is an important distinction between finding that the fact was wrong, and finding that the judgment

below was wrong. The former requires the appellate court to decide the fact as if it was sitting as the trial court. The latter merely required the court to find instances in which the judgment made by the court below might be flawed such as to render a conviction unsafe. In this instance, the trial judge found that the complainant had made a mistake with the names of the two men. In the judge's assessment, the confusion was an error and not an act of dishonesty. This is a finding that this court, sitting in an appellate capacity and without other evidence to the contrary, cannot overrule.

6 All the other points raised by Mr Rai concerned specific findings of fact of a similar nature. For example, he submitted that the complainant's evidence should not have been given weight because she could not remember when the first incident of molest had taken place; that she could not recall the "number of kisses and the style of kissing"; and whether she had asked for a transfer to another employer. Counsel submitted that the complainant's testimony was contradicted by other witnesses. He said, for example, that the complainant mentioned at the beginning of her interview with police officer Yee Whai Peng but that officer said she mentioned it only at the end of the interview. Such facts are relevant, but how much weight to attribute to them depends also on the weight to be given to other facts, other evidence, and other explanations. The trial judge will have to consider the evidence in its totality and decide how much weight ought to be given to discrepancies and omissions. The trial judge addressed them all in her grounds of decision and was of the opinion that the defence had not created a reasonable doubt in her mind as to the appellant's guilt. I have no reason to impugn any of her findings of fact.

7 I now turn to the point of law. Mr Rai complained that the trial judge was wrong to have admitted the fourth charge into the court record. The fourth charge related to the complaint of molest by Prity Sriwanti. Counsel argued that this should not be permitted and it had unfairly prejudiced the mind of the trial judge. I agree that charges that were not meant to be tried before the same court should not be introduced before that court. Sometimes, the intention was to have them jointly tried, but that could not be done for some reason. That does not mean that the trial judge has to recuse herself from hearing the other charges. The court could have the odd charge stood down pending the outcome of the other charges, and the fact that it had merely marked the odd charge was not an error of law. The said charge was not taken into account nor used by the prosecution. It was the defence which, oddly, decided to raise the issue of Prity's complaint by questioning the investigating officer about it. If that charge was irrelevant and prejudicial, the defence should not have raised it at all. I do not need to discuss the relevance in law of Prity's evidence as similar fact evidence since that was not an issue below or before me.

8 Finally, Mr Rai submitted that the sentences were excessive. The trial judge considered *Chandresh Patel v PP* [1995] 1 CLAS NEWS323 and *Ng Chew Kiat* v PP [2000] 1 SLR 370 in which the offenders were sentenced to nine months imprisonment and three strokes of the cane. The appellant is above the age of 50. The sentencing court has to determine a sentence that is appropriate to the case at hand, and in order to do so, it has to balance two important factors so that some harmony is achieved. First, for the sake of consistency and predictability, it should keep like cases as close as possible. Secondly, it needs to make adjustments for the individual circumstances of the case at hand because no two cases are completely similar. It may make adjustments by taking the totality of the sentences into consideration or the totality of features in favour of, as well as against the offender. The sentencing court may, where the circumstances are exceptional, deviate from the norm. When it does, it should explain why it had regarded the case as such. If it could not be justified, then it might be in danger of being overturned on appeal on the ground that the sentence was manifestly inadequate or excessive as the case may be. The present case was not an exceptional case. What sentence the court finally determines is a matter within the court's discretion, so when a court addresses its mind to the factors that I had briefly stated above, the appellate court will not alter the sentences even if it were of the view that the sentences were higher or lower than what the

appellate court might have imposed. The only justification for interference by this court on the sentences is that they were either manifestly inadequate or manifestly excessive. In this case I do not think that there is any reason to upset the sentences imposed below.

9 The appellant's appeal against conviction and sentence is, therefore, dismissed. The sentences are to be served forthwith.