IN THE HIGH COURT OF MALAYA
IN SHAH ALAM
SELANGOR DARUL EHSAN
CRIMINAL 7
[CRIMINAL APPEAL NO.: 42S-180-05/2012]

MOHD FAIRUS MUSLIM ... APPELLANT

AGAINST

PUBLIC PROSECUTOR ... RESPONDENT

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Statutory rape - Imprisonment of 12 years and 3 strokes of rotan - Appellate interference - Whether findings of trial judge warrants appellate interference - Whether sentence imposed was excessive*

CRIMINAL PROCEDURE: *Police investigation - Police report - Reluctance of victim in lodging police report within 3 hours - Whether delay in lodging first information report is a ground to doubt prosecution's case*

CRIMINAL LAW*: Rape - Girl below statutory age of consent - Whether ingredients of offence of rape under s. 376 Penal Code satisfied - Penetration - Presence of semen - Whether presence of semen important to prove offence of rape - Whether ejaculation and complete penetration needed to be proved*

EVIDENCE*: Witness - Expert witness - Credibility - Sexual offence - Witness giving evidence for second time in cases relating to sexual offence - Witness's area of expertise was not in sexual cases - Whether evidence of witness admissible*

EVIDENCE: *Corroboration - Sexual offence - Rape - Testimony of expert on condition of hymen - Testimony of witness at scene of crime - Whether evidence of complainant must be corroborated - Whether evidence of expert witness consistent with testimony of victim - Whether testimony of witness at scene of crime on the day of incident can corroborate testimony of victim*

EVIDENCE: *Corroboration - Sexual offence - Rape - Testimony of expert on condition of hymen - Testimony of witness at scene of crime - Whether evidence of complainant must be corroborated - Whether evidence of expert witness consistent with testimony of victim - Whether testimony of witness at scene of crime on the day of incident can corroborate testimony of victim*

[Appeal dismissed and sentence passed by trial judge is affirmed accordingly.]

Case(s) referred to:

Ah Mee v. PP [1967] 1 LNS 3; [1967] MLJ 220 FC ***(refd)***

Aziz Bin Mohamed Din v. PP [1997] 1 CLJ Supp 523 HC ***(refd)***

Bhandulananda Jayatilake v. Public Prosecutor [1981] 1 LNS 139; [1982] 1 MLJ 83 FC ***(refd)***

Dato Mokhtar Bin Hashim v. Public Prosecutor [1983] CLJ Rep 101 FC ***(refd)***

Dato Seri Anwar Bin Ibrahim v. Public Prosecutor [2002] 3 CLJ 457 FC ***(refd)***

Junaidi Bin Abdullah v. Public Prosecutor [1993] 4 CLJ 201 SC ***(refd)***

Lim Teng Keng @ Mohd Iskandar Abd v. PP [1999] 1 LNS 19; [1998] MLJU 152 HC ***(refd)***

Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***

Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***

Mohamed Abdullah Ang Swee Kang v. Public Prosecutor [1987] CLJ Rep 209; [1987] 2 CLJ 405 SC ***(refd)***

Mohamad Terang Bin Amit v. PP [[1999] MLJU 134 HC ***(refd)***

Muharam Bin Anson v. Public Prosecutor [1980] 1 LNS 137; [1981] 1 MLJ 222 FC ***(refd)***

P'ng Hun Sun v. Dato' Yip Yee Foo [2013] 1 LNS 320; [2013] 6 MLJ 523 CA ***(refd)***

Pendakwa Raya lwn. Mohamed Malek Ridhzuan Bin Che Hassan [2013] 8 CLJ 359 CA ***(refd)***

Pendakwa Raya lwn. Ramakrishnan a/l Subramaniam dan lain-lain [2012] 9 CLJ 443 CA ***(refd)***

PP v. Mardai [1949] 1 LNS 65; [1950] MLJ 33 HC ***(refd)***

Public Prosecutor v. Chan Wai Heng [2008] 5 CLJ 805 CA ***(refd)***

Razi Bin Amin v. PP [2010] 7 CLJ 771 HC ***(refd)***

Sidek Bin Ludan v. Public Prosecutor [1995] 1 LNS 219; [1995] 3 MLJ 178 HC ***(refd)***

Sim Ah Oh v. Public Prosecutor [1961] 1 LNS 124; [1962] MLJ 42 HC ***(refd)***

Thavanathan a/l Balasubramaniam v. Public Prosecutor [1997] 3 CLJ 150 FC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 173(h)(i), 180, 182

Evidence Act 1950, ss. 45, 133A

Penal Code, ss. 375, 376

Other source(s) referred to:

Ratanlal & Dhirajlal's Law of Crimes, 27th Ed Vol.2 p.2317

GROUNDS OF JUDGEMENT

A) The Charge Against the Appellant

The appellant, Mohd Fairus Bin Muslim, was charged before the Sessions Court Shah Alam for rape under section 376 of the Penal Code. The details of the charge disclose that the offence was committed on 22 April 2011 around 1400hrs at No 1-111 Apartment Vanessa Persiaran Meranti Utara Serendah, in the District of Hulu Selangor, Selangor. The victim was at the material time aged 15 years and 6 months.

The appellant claimed trial to the charge.

On 23.5.2012 the appellant was found guilty by the Sessions Court and convicted under section 376 Penal Code and sentenced to 12 years imprisonment and 3 strokes of the rotan.

The appellant has now appealed to the High Court against his conviction and sentence.

B) Prosecution Case

The Prosecution case, as borne out by the evidence adduced, disclose that the victim, SP5, had on 22.4.2011 attended school from 7.30 a.m until 12.30 p.m.

At about 12.30 p.m the appellant met SP5 at the school and invited her to follow him. At the time, SP5 and the appellant were lovers. The appellant drove SP5 in his car to No.1-111 Apartment Vanessa, Persiaran Meranti Utara Serendah, Hulu Selangor, Selangor “the apartment”.

After they arrived there at about 2 p.m, the appellant met with Rajendra Kumar a/l Vasudevan SP6 who rented out the apartment and the appellant obtained the keys to the apartment. The appellant and SP5 then entered the apartment where the appellant changed his clothes and wore a blue boxer shorts.

The appellant then invited SP5 to enter into a room at the apartment. SP5 testified that the room had a large bed with a bed sheet and a pillow with a pillow case. The appellant then proceeded to engage in sexual intercourse with SP5 for about 10 minutes.

SP5 further testified that that was the second time she had sexual relations with the appellant at the same place. SP5 testified that she had only ever had sex with the appellant. Not long after, at approximately 3.30 p.m, there was a knock on the door of the apartment. The appellant opened the door and discovered that there were police in front of the apartment. The police proceeded to escort the appellant and SP5 to the Balai Polis Serendah for further investigation.

At the police station, as a result of further information and investigation, a re-arrest of the appellant was carried out. The appellant was then handed over to Siti Nor Baizura Binti Jalal (Investigating Officer) SP7, for further action.

At around 7.15 p.m on 22.4.2011 a police report Serendah Rpt : 853/11 was lodged by Norazmam B. Ahmad, SP2, who was the father of SP5. On 23.4.2011 at around 1.18 a.m, SP5 was taken to Selayang Hospital and examined by Dr. Abdul Hafidz Bin Abdullah, SP4.

As a result of the said examination, it was found that there was an "old tear at position 2, 3, 7 and 10 o'clock to the hymen and a fresh injury to the *'posterior fourchette'*. The medical report was tendered and marked as P4.

c) Defence Case

In summary, the defence case was that the appellant admitted having known SP5 since one month before the incident. The appellant said that he had communicated with SP5 over the telephone for about 10-11 times although he said that most of the calls were made by SP5.

On the day of the incident, the appellant said that he did not want to meet SP5 at Serendah because he was not free as he was working that day and that it was his break time.

The appellant testified that the meeting that day was at the behest of SP5 as it was an opportunity for her to meet the appellant as her father and mother were at work at the time. It was SP5, according to the appellant, that took a bus to Serendah and called him at the Serendah bus stop close by the apartment.

The appellant testified that he only brought SP5 to the apartment to merely engage in conversation and he denied having sexual intercourse with SP5. The appellant also testified that previously, the reason he brought SP5 to the apartment was at the request of SP5 as she did not want to be seen with the appellant at Sungai Buloh.

Subsequently, the appellant changed his version and said that he had requested SP5 to come to Serendah by bus, giving the reason that he did not want to encourage SP5 to meet him, but to no avail.

D) Grounds of Appeal

The appellant has raised several grounds of appeal in his Petition of Appeal. In summary, the main grounds of appeal are as follows -

a) The Sessions Court Judge had erred in that had he undertaken a maximum evaluation on the evidence of the prosecution *"penile penetration"* was not proved.

b) The Sessions Court Judge had erred in accepting the evidence of SP4, the doctor, without considering that

- This was the second time SP4 had given evidence in a sexual offence case.
- SP4's area of expertise was not in sexual cases.
- SP4's evidence in Court was merely based on his medical report P4 and not on other records.
- It was not stated in P4 whether the tear in the hymen was due to a blunt object or sexual attack.
- The old tear to the hymen could have been more than 72 hours.

- There was no view on whether vigorous *"masturbation"* could have caused the tear to the posterior fourchette.

- It was not stated in P4 whether the wound to the *"posterior fourchette"* was an old one or new

- SP4 did not make a finding on "*penile penetration"* to the victim.

c) The Sessions Court Judge had erred in that he held that SP5's evidence was corroborated by SP4

d) The Sessions Court Judge had erred when he held that the fact that the Accused and SP5 met at the apartment and not in a public place raised an inference that the Accused had sexual relations with SP5.

e) The Sessions Court Judge had erred when he took into account facts favourable to the Prosecution while he *"glossed over"* facts favourable to the defence. These include interalia, that the photographs taken of the scene contradicted SP5's evidence, no DNA profile was developed

on semen stains on panties, no boxer shorts were found and reluctance of SP5 in lodging a police report.

f) Failure by SP5 to lodge a police report

g) The Sessions Court Judge erred when he failed to conduct an examination on SP5 pursuant to the provisions of Section 133A Evidence Act 1950 and straightaway proceeded to accept her sworn testimony.

h) The Sessions Court Judge erred in failing to take into account the *"slip-shod"* investigation. As an example, there was no statement recorded form SP4, no effort made to ascertain SP5's evidence that the mattress had a sheet and pillow with a cover sent for DNA analysis and failure to secure the crime scene.

The rest of the grounds in a gist, relate to alleged infirmities in the Prosecution evidence, categorizing the defence as one of a bare denial and finally, that the sentence passed was too severe and against established legal

principles. Of the grounds of appeal raised, this Court finds that only some merit serious consideration and these will be dealt with accordingly. So much for the grounds of appeal.

E) Principles Regarding Appellate Interference

I must now come to the principles that operate to justify a court hearing an appeal interfering with the decision of the trial court. In the case of *P'ng Hun Sun v. Dato' Yip Yee Foo* [2013] 6 MLJ 523 the Court of Appeal observed that :-

> *"When the finding of the trial judge is factual, however the fact finders decision cannot be disturbed on appeal unless the decision of the fact finder is plainly wrong (see China Airline Ltd v Maltran AirCorp. Sdn Bhd & Anor Appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163; Zahara Bt. A. Kadir v Ramuna Bauxite Pte Ltd & Anor [2011] 1 LNS 1015; Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650; [2013] 1 LNS 1.*

The findings of fact of the trial judge can only be reversed when it is positively demonstrated to the appellate court that;

a) By reason of some non-direction or misdirection or otherwise the judge erred in accepting the evidence which he or she did accept; or

b) In assessing and evaluating the evidence the judge has taken into account some matter which he or she ought not to have taken into account; or

c) It unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he or she cannot have taken proper advantage of his or her having seen and heard the witnesses; or

d) *In so far aside the Judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witness which he or she accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.*"

I pause to make the observation that the principles stated apply with equal force to criminal matters as they do to civil. With these principles in mind the grounds raised were considered.

F) Analysis and Findings

1. Whether prima facie case made out?

In the grounds of judgment, the Sessions Court Judge referred to section 173(h)(i) of the Criminal Procedure Code which sets out the duty upon a court if it finds that a prima facie case has been made out.

Section 180 of the Criminal Procedure Code states that when the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the Accused.

The exercise that a judge sitting alone has to undertake in considering whether a prima facie case has been made out was considered in *Looi Kow Chai & Anor v. PP* [2003] 2 MLJ 65.

It is an important test so much so that I quote the relevant part verbatim.

> *"It therefore follows that there is only one exercise that a judge sitting alone under s.180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution*

evidence to the maximum evaluation and to ask himself the question : If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the Prosecution case? If the answer is in the negative then no prima facie case has been made out and the Accused would be entitled to an acquittal."

The Sessions Court Judge in his grounds of judgment had alluded to the above test and proceeded to undertake the maximum evaluation test by subjecting the prosecution evidence to careful scrutiny.

This he did by considering the ingredients of the offence under section 376 Penal Code as follows –

1. The Accused had sexual relations with the victim

2. There was penetration

3. The victim was under 16 years of age so that consent was not an issue

4. Corroboration was required as a *"rule of prudence"*.

2. Ingredients of the offence of rape

In so far as is relevant for the purposes of this case, pursuant to section 375 Penal Code, a man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the following descriptions –

a) With or without her consent, when she is under sixteen years of age

In respect of SP5's age, the Sessions Court Judge relied, as he was entitled to do, upon production of the birth certificate exhibit P5. SP5 being under sixteen years of age at the time of the incident meant that consent or absence of consent is not in issue.

3. Was there penile penetration?

The explanation to section 375 says that penetration is sufficient to constitute rape. To constitute penetration it must be proved that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little. The only thing to be ascertained is whether the private parts of the accused did enter into the person of the woman. It is not necessary to decide how far they entered. It is not essential that the hymen

should be ruptured, provided it is clearly proved that there was penetration even though partial. For the offence of rape to be committed, it is not necessary that there should be complete penetration. The word *"penetrate"* according to the Concise Oxford Dictionary means *"find access* into or through, *pass through"*. See Ratanlal & Dhirajlal's Law of Crimes, 27th Ed Vol. 2 page 2317.

SP5, the victim herself, testified that on the day of the incident while at the apartment, the appellant took off her uniform and her underwear and inserted his penis into her vagina. SP5 described that she felt pain at the time and that her knees was in an upward position at the time. SP5 testified that she saw the appellant's penis which described as hard (erect) at the time. She also said the light in the room was bright and that the appellant had inserted his penis in and out of her vagina a total of 3 to 4 times. She further testified that the sexual act lasted for about 10 minutes.

SP4, Abdul Hafidz Bin Abdullah, was the medical doctor who examined SP5 after the incident. SP4's testimony was that as a result of his examination he discovered an old wound to the hymen at the 2, 3, 7 and 10 o'clock position

and a fresh wound to the victims' posterior fourchette. This wound was certified as occurring within 72 hours of the incident. SP4's testimony was that the wound to the posterior fourchette occurs during vigorous sex and also in the case of sexual assault on women.

The medical examination conducted on SP5 was at 1.18 a.m on the 23 April 2011 which was approximately 11 hours after the incident. This only serves to confirm that the wound to the posterior fourchette was a fresh one and occurring within 72 hours.

In cross examination it was suggested to SP4 that his opinion that the tear to the posterior fourchette could have been caused by vigorous sex or sexual attack on a woman was only a general opinion.

SP4 replied that it was not and that it was the result of clinical examination studies conducted in the USA. SP4 also in his testimony testified that he had asked SP5 whether the tear to the posterior fourchette was as a result of vigorous masturbation, to which he said she replied in the negative.

In the case of *Lim Teng Keng @ Mohd Iskandar Abd v. PP* [1998] MLJU 152 the conviction of the appellant by the Sessions Court was upheld when the High Court concluded that both the evidence of the child relating the incident of rape to a teacher and the medical evidence that there was penile penetration on account of the presence of fresh tears in the hymen that could have occurred within 7 days of the examination, was sufficient evidence of the guilt of the appellant.

In *Mohamad Terang Bin Amit v. PP* [1999] MLJU 134, the High Court found corroborative evidence of the victim in the testimony of a houseman doing his second year in Obstetrics and Gynaecology who had examined the girl and found that there was an old hymen tear and her vagina admitted 2 fingers easily which a specialist gynaecologist concluded was the result of penile penetration.

In *Razi Bin Amin v. PP* [2010] 7 MLJ 756, it was held that the courts should be practical and adopt common sense principles when dealing with rape. It also held that in rape, the most vital ingredients are, the identity of the offender and the sexual act itself i.e. fact of penetration however slight. It is not in dispute here that the appellant is the alleged offender.

In cross examination it was also suggested to SP4 that if there was sexual activity to SP5 within 72 hours, there would be traces of sperm in the cervix. SP4's reply to this was that it would not necessarily be so as sperm only takes 20 minutes to liquefy after ejaculation from the male penis and so it could have exited the vagina or entered the cervix and into the womb.

The object of the cross examination obviously was to show the absence of penile penetration indicated in turn by the absence of sperm in the vagina. In "Medical Jurisprudence and Toxicology" by Modi 21st Edn; p 369 and cited in Ratanlal & Dhirajlal's Law of Crimes 27th Edn, Vol.2 p 2334 it states –

> *"Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case medical officer should mention the negative facts in his*

> *report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."*

It goes further to state that the above observations were quoted with approval by the Supreme Court in *Madam Gopal Kakkad v. Naval Dubey* where the court also relied upon Parikh's Textbook of Medical Jurisprudence and Toxicology, wherein it is observed:

> *"Sexual intercourse – in law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.".*

The above observations were quoted with approval in the case of *Pendakwa Raya lwn Mohamed Malek Ridhzuan bin Che Hassan* [2014] 1

MLJ 363 where it was held, interalia, that the presence of semen was not a requirement by law in order to prove the offence of rape. For the offence of rape, what was required is penetration and not ejaculation.

This court is therefore satisfied that based on the evidence and the foregoing authorities, the prosecution had successfully proven that there was *"penile penetration"* to SP5.

4. Credibility of SP4

The appellant has also raised the fact that this was only the second time that SP4 had given evidence in a case of a sexual nature and that his expertise was not solely in sexual cases.

In *Dato Mokhtar Bin Hashim v. Public Prosecutor* [1983] 2 MLJ 232, 278 it was opined by Abdoolcader F.J as follows :

> *"Mr. Jagjit complains that Gee has never given evidence in the High Court but we can see no rule requiring this as a prerequisite to accepting him as an expert. He has given evidence, as he said, in the lower court and even if he had not that would not debar*

him from being accepted as an expert if he could satisfy the Court as to his standing, as there is always a first time for everything. Previous testification in court as an expert witness is no doubt an added consideration but not necessarily the primary consideration for an otherwise qualified person.".

SP4 would of course, be classified as giving expert evidence under section 45 Evidence Act 1950. Therefore, this court finds no merit in the contention that as this is only the second time SP4 has given evidence his evidence cannot be received. As is plain from the preceding quote, there is a first time for everything and even the fact that a person had not given evidence previously would not operate to preclude him from being an expert witness.

The further point taken that SP4's expertise was not solely in sexual cases does not detract from the admissibility of his evidence. See *Junaidi Bin Abdullah v. Public Prosecutor* [1993] 3 MLJ 217, 229. As far as the question of weight is concerned, the Sessions Judge was entitled to consider the credibility of the SP4's evidence as he had the audio visual advantage as a trier of fact. In *Sim Ah Oh v. Public Prosecutor* [1962] MLJ 42 at p.43 it was held

that "The evidence of the expert must be tested like any other evidence against the facts upon which he is deposing.".

In summary, the Sessions Judge having heard and seen SP4 testify had made a finding of fact based on his assessment of SP4's credibility and his decision on his matter should not be lightly disturbed. That this is so is clearly borne out by the authorities earlier referred to in respect of the principles governing appellate intervention.

5. Was there corroboration of SP5's evidence?

Now, it is trite that in cases involving sexual assault, the evidence of the complainant must be corroborated. This is however, a rule of prudence. It was established as far back as 1964 by *Thompson LP in Din v. PP* [1964] MLJ 300 where it was held. *"If however she complains of having been raped, then both prudence and practice demand that her evidence should be corroborated."*

In the case of *Aziz bin Mohamed Din v. PP* [1996] 5 MLJ 473, Augustine Paul J (as he then was) held : *"Although there is no specific rule that*

requires the evidence of a witness to be corroborated, there is a rule of practice stressing the need for corroboration in rape cases."

Even earlier in *PP v. Mardai* [1950] MLJ 33, Spenser Wilkinson J said : *"Whilst there is no rule of law in this country that in sexual offences the evidence of the complainant must be corroborated, nevertheless it appears to me, as a matter of common sense, to be unsafe to convict in cases of this kind unless either the evidence of the complainant is unusually convincing or there is some corroboration of the complainant's story."*

In *Ah Mee v. PP* [1967] MLJ 220, Ong FJ explained that corroboration in a legal sense connotes some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence.

In *Thavanathan a/l Balasubramaniam v. Public Prosecutor* [1997] 2 MLJ 401. 418-419 it was held :

> *"In the celebrated case of RV Baskerville [1916] 2 KB 658, Lord Reading CJ expressed the requirements of corroborative evidence*

> *thus (at page 667) "evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it."*

Reverting to the facts in the instant case, and as alluded to earlier, the testimony of SP4 clearly showed that there was an old tear to the hymen at the 2, 3 ,7 and 10 o'clock positions. Coupled with the fact that there was a fresh tear to the posterior fourchette within 72 hours, the evidence is consistent with the testimony of SP5 that she was raped by the accused.

SP4 further explained that the cause of the tear was as a result of the insertion of a blunt object and also as a result of sexual intercourse.

This court therefore finds that the Sessions Court Judges' conclusion on the matter of corroboration was correct and his findings on this point do not warrant appellate interference.

The evidence of SP6, Rajendran Kumar a/l Vasudevan Pillai affords further corroboration of SP5's testimony in that it squarely places the accused at the scene of the crime on the day of the incident. Indeed, this fact was never put in dispute by the appellant.

SP6 testified that he had rented out the apartment for RM60.00 to the accused. The apartment was at C1-111 Apartment Vanessa Serendah resort, the scene of the rape incident. SP6 further testified that he had opened the door of the apartment before handing the keys of the apartment to the accused. SP6 was further present when the police went to the apartment and the police had earlier sought SP6's assistance to open the apartment before the accused finally opened it.

SP8 was the police personnel who received information about the presence of a male Malay together with a girl wearing a school uniform and behaving in a suspicious manner. SP8 had asked the accused to open the door of the apartment and upon entering he found that SP5 was in there together with the accused.

Taking all of this evidence in totality, it is this court's finding that there was ample corroboration to connect the accused with the crime of rape of SP5 on the day of the incident.

6. Sworn testimony of SP5

One of the grounds of appeal raised by the accused was that the Session Court Judge had erred in failing to conduct a preliminary inquiry on SP5 in respect of her ability to give sworn evidence. Section 133A of the Evidence Act 1950 relates to the evidence of a child of tender years and SP5, being 15 years and 6 months old at the material time would fall into that category.

Section 133A reads as follows –

> *"Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code of the Federated*

Malay States shall be deemed to be a deposition within the meaning of that section."

As is clear from the wording of the section, this deals with the situation where a child of tender years does not in the opinion of the court, understand the nature of an oath. In such circumstances, the child may given unsworn evidence if the court is satisfied that he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

Thus this section applies only to unsworn evidence. The law relating to the sworn evidence of a child is still governed by the rule of prudence.

In *Sidek Bin Ludan v. Public Prosecutor* [1995] 3 MLJ 178, the manner of ascertaining the capacity of a child witness was considered. The trial court should by way of a preliminary inquiry ascertain the capacity of the child to understand the questions and give rational answers.

The object of this exercise is to determine whether the child is in a position to be sworn. See *Muharam Bin Anson v. Public Prosecutor* [1981]

1 MLJ 222. In *Public Prosecutor v. Chan Wai Heng* [2008] 5 MLJ 798, it was observed that it is not obligatory that the questions must have been posed by the trial judge himself as a prerequisite to the admissibility of the evidence. As such there is no specific procedure for the inquiry, the trial court may adopt its own procedure in order to ascertain the capability of the child.

The Sessions Court Judge had here addressed his mind to the relevant procedure when he satisfied himself of SP5's capability to understand the questions and give rational answers. From the notes of evidence, it is clear that the Sessions Judge subjected SP5 to the test of ascertaining her capacity to give sworn evidence and concluded that she had the intelligence to be examined in court.

This court therefore finds no merit in the appellant's contention that the Sessions Court had erred in straight away proceeding to accept SP5's sworn testimony.

7. The absence of a police report by SP5

The appellant has raised as a ground of appeal the fact of the reluctance of SP5 in lodging a police report within 3 hours even though advised by SP7, the Investigating Officer.

In *Ratanlal & Dhirajlal's Law of Crimes* 27th Ed Vol.2 p.2353, 2354 it is was made clear that mere delay in filing First Information Report is no ground to doubt the case of the prosecution that the evidence given by her should not be accepted. Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the First Information Report.

In the event, SP2 Norazman Bin Ahmad, the victim's father did lodge a report exhibit P3 on 22.4.2011 at 1915 p.m. This court therefore finds no merit in this ground.

If thus follows from all that has been considered up to now that the Sessions Court Judge had carefully considered the evidence of the prosecution and had subjected that evidence to the maximum evaluation test. Having done so, this Court finds that the Sessions Court Judge had not erred in finding that

a *prima facie* case had been made out and in subsequently calling for the appellant's defence.

8. Did the appellant's defence raise a doubt?

The substance of the appellant's defence has been set out earlier and I do not propose to repeat them here. Suffice to say that the appellant does not deny being present with SP5 on 22.4.2011 at the apartment. He however denies that any sexual intercourse took place.

The appellant in his defence went to great lengths to make it appear as though it was SP5 who had made unsolicited advances to him in the form of telephone calls. He also painted a picture that suggested he had tried to dissuade SP5 from meeting him on the day of the incident upon the pretext that he was at work that day and that it was his rest time.

He suggested further that SP5 had wanted to meet him that day because a window of opportunity had opened in the form of both her parents being away at work. The appellant also testified that the reason he brought SP5 to the apartment was at the latter's request as she did not want to be seen with

the accused at the Sungai Buloh area. The appellant however, later testified that he had asked SP5 to come to Serendah by bus, the reason given being that he thought that that would dissuade SP5 from meeting him but to no avail.

Notwithstanding the appellant's testimony, the fact remains that he brought SP5 to the apartment, albeit according to him, in order to merely have a conversation. The appellant denied having had sexual intercourse with SP5 at the apartment.

Now, the duty of the court at the end of the defence case is set out in section 182A of the Criminal Procedure Code. Subsection (1) states that at the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

What is the "doubt" that will warrant an acquittal? In *Dato Mokhtar Bin Hashim & Anor v. PP* [1983] 2 MLJ 232 the Federal Court said –

> *"To warrant an acquittal however the doubt created must not merely be a fleeting doubt or a capricious doubt but a doubt in respect of which a substantial reason can be given. The question to ask now is – has the defence evidence created a reasonable doubt on the truth of the prosecution story?".*

In *Miller v. Minister of Pensions* [1947] 2 All ER 372, Denning J (as he then was) said interalia –

> *"The degree of cogency need not reach certainty, but it must carry a high degree of probability".*

When viewed in its totality and evaluated in the light of the prosecution evidence, in particular that of SP5 and SP4, the defence evidence has failed to raise a reasonable doubt in the prosecution case.

The Sessions Court Judge was of the view that if, as the appellant had suggested, that it was SP5 that initiated the meeting that day and that the

appellant was not in the least interested in meeting SP5, he could have easily dispensed with her presence by meeting her in a public place for a meal or drink at the Serendah or Sungai Buloh area. Why was there a need to bring SP5 up to the apartment just to engage in conversation?

One other factor considered by the Sessions Judge was why would the appellant choose to bring SP5 to the apartment, when there was a restroom provided by his employers at Serendah for lorry drivers?

Further, if as the appellant would have the court believe, it was his rest time and he did not want to meet with SP5, why would he agree to fork out RM50.00 in order to rent the apartment just to have a conversation with SP5?

The Sessions Court Judge also observed that if it was true that most of the time it was SP5 who made the telephone calls, he could have easily turned off his telephone or indeed just refuse to answer the calls. Surely after a number of times, SP5 would have got the message that the appellant was not in the least interested in her and that would surely end the matter.

One other factor considered was the relative difference in age and maturity between SP5 and the appellant. This Court finds that it would be more probable that the appellant, being much older at age 31 and more mature, would have made his advances prevail over the much younger SP5 than otherwise.

In the opinion of this Court, the Sessions Court Judges' assessment of the defence of the appellant cannot be faulted. He had correctly subjected the defence to proper evaluation and scrutiny when viewed in totality against the whole of the prosecution case in coming to his decision.

This court therefore finds no good reason that warrants appellate interference. The appeal of the appellant was therefore dismissed.

9. Sentence

The court hearing the appeal ought not to interfere with the sentence imposed by the trial judge and commonly do not change the sentence unless it was satisfied that the sentence imposed the judge was manifestly inadequate or insufficient or excessive or illegal or was not the appropriate sentence in

view of all the facts disclosed, or that the Court had clearly erred in applying the correct principle in the evaluation of the sentence. See *Bhandulananda Jayatilake v. Public Prosecutor* [1982] 1 MLJ 83 (see para 17); *Dato Seri Anwar Bin Ibrahim v. Public Prosecutor* [2002] 3 MLJ 195 and *Pendakwa Raya lwn Ramakrishnan a/l Subramaniam dan lain-lain* [2013] 2 MLJ 549.

The appellant was sentenced to a term of imprisonment of 12 years and 3 strokes of the rotan by the Sessions Court. In doing so, the Sessions Court Judge had taken into account the press reports regarding the prevalence of rape incidents and the sentencing trends which he found to be disturbing. He also referred to the many unreported cases of infant dumping as a result of this crime.

He had also considered the public interest while also balancing that with the principle of deterrence and further that the message needs to be clear to the public that the courts take such cases seriously. This Court finds that the Sessions Court had not erred in passing the sentence that it did.

It is trite that an appellate court will not alter a sentence merely because it might pass a different sentence. In *Mohamed Abdullah Ang Swee Kang v. Public Prosecutor* [1987] 2 CLJ 209 at p.214 it was held –

> *"In assessing the length of custodial sentence, the Court must look at the overall picture in perspective by considering, firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as deterrence does not justify the court in passing a sentence of greater length than what the facts of the offence warrant…".*

Applying the above principles to the instant case and bearing in mind that there is no cross appeal by the prosecution in respect of sentence, this Court finds no good reason to interfere with the sentence passed by the Sessions Court which is not found to be manifestly excessive and therefore affirms the sentence passed accordingly.

(COLLIN LAWRENCE SEQUERAH)
Judicial Commissioner
High Court of Malaya
(Shah Alam)

Dated: 23 JULY 2014

Counsel:

For the appellant - S Seelan

For the respondent (Public Prosecutor) - Izalina Hj. Abdullah