AKD *v* Public Prosecutor
[2010] SGHC 233

Case Number	: Magistrate's Appeal No 341 of 2009
Decision Date	: 13 August 2010
Tribunal/Court	: High Court
Coram	: Lee Seiu Kin J
Counsel Name(s)	: M Ravi (L F Violet Netto) for the appellant; David Khoo (Attorney-General's Chambers) for the respondent.
Parties	: AKD — Public Prosecutor

Criminal law

13 August 2010 Judgment reserved.

Lee Seiu Kin J:

Introduction

1 This is an appeal from the District Court by the appellant against his conviction and sentence. The complainant is a female Indonesian foreign domestic worker who was employed by the appellant's wife, B. The appellant was charged with, and claimed trial to, four counts of outraging the modesty of the complainant in his home, under s 354 read with s 73 of the Penal Code (Cap 224, 2008 Rev Ed) (the "Penal Code"). The charges were:

(a) DAC 7577 of 2009 – On 11 December 2007, at about 8.00pm, in the kitchen of [address redacted], the appellant used criminal force on the complainant intending to outrage her modesty by rubbing his left cheek against her right cheek and placing his penis against the back of her body.

(b) DAC 7578 of 2009 – On 12 December 2007, at about 9.00pm, in the kitchen of [address redacted], the appellant used criminal force on the complainant intending to outrage her modesty by touching her left breast.

(c) DAC 7579 of 2009 – On 26 April 2008, at about 12.10am, in the study room of [address redacted], the appellant used criminal force on the complainant intending to outrage her modesty by touching her left breast.

(d) DAC 7580 of 2009 – On 18 June 2008, at about 12.10am, in a bedroom of [address redacted], the appellant used criminal force on the complainant intending to outrage her modesty by hugging her and touching her left buttocks.

2 Section 354 of the Penal Code provides for punishment with imprisonment for up to two years, or with a fine, or with caning, or with any combination thereof. Additionally, under s 73(2), where the offender is an employer of a domestic maid or a member of the employer's household, the court may sentence him to one and a half times the amount of punishment to which he would otherwise have been liable.

3 In the District Court below, the appellant was convicted on all four charges. The district judge ("the DJ") sentenced him to seven months' imprisonment on the first charge, and four months' imprisonment for each of the remaining three charges, with sentences for the first and third charges to run consecutively. Dissatisfied with the conviction and sentence, the appellant appealed to this court.

4 After considering the submissions made by the parties and record of appeal, it is my judgment that this appeal against conviction be allowed. My reasons are as follows.

District Court Proceedings

Prosecution's Case

5 The complainant's testimony formed the backbone of the prosecution's case. The complainant is an Indonesian national who came to Singapore to work sometime in May 2007, through C Maid Agency (the "Maid Agency"). On 18 July 2007, the complainant began her employment in the appellant's household. The following was the evidence of the complainant.

6 The first incident occurred on 11 December 2007, at about 8.00pm. The complainant informed B about a leaking valve in the cabinet below the kitchen sink. B asked the appellant to fix it. The appellant followed the complainant into the kitchen. He looked inside the cabinet and told the complainant to wipe the water that had leaked out. While the complainant, who was squatting on the floor, was wiping off the water, the appellant squatted behind her and fiddled with the pipe connected to the valve. The complainant felt the appellant's body, in particular his crotch, pressing against her back. At the same time, the appellant also moved his head so that his left cheek touched her right cheek. The complainant smelt alcohol in the appellant's breath and she thought that he was drunk and did not realise what he was doing. Because of this, the complainant did not feel outraged at the time. It was only after the occurrence of the second incident that she realised that the first one in the kitchen was not as innocent or accidental as she had first thought.

7 The second incident took place the following day, 12 December 2007, at about 9.00pm, again in the kitchen. The complainant approached the appellant to inquire about the detergent she should use as she could not understand the Chinese characters on the label of a bottle that B had previously bought. B was not home at that time so the complainant took the bottle and went up to the appellant who was sitting in the living room. The appellant told her that it was for washing the dishes. However, the complainant was still unsure since B had also bought detergent for washing the toilet. The appellant then brought the complainant to the kitchen to check on all the bottles of detergent which were kept in the kitchen cabinet. Both of them squatted down (the appellant behind the complainant) in front of the kitchen cabinet to look at the bottles of detergent inside. In that position, the appellant then reached around the complainant's body and touched her left breast with his right hand.

8 The third incident took place a few months later, on 26 April 2008. It was just after midnight and the appellant was in the study room working on his computer. The complainant, who had just finished her chores, went into the study and asked the appellant for advice on computers. The appellant then got up from his computer area and sat in front of the complainant. In this position, the appellant suddenly reached out and touched the complainant's left breast.

9 The fourth incident occurred on 18 June 2008. The night before, the appellant's family went out to celebrate the birthday of the appellant's elder brother and they brought the complainant along. Upon returning home, the complainant was reprimanded when she was caught placing a piece of candy on the statue of a deity. It was then that the complainant told B that she wanted to return to

Indonesia because she had not been a good maid. The appellant subsequently approached the complainant and asked if she could bear to leave the children. He asked her to rethink her decision to leave. The complainant then went to her bedroom to contemplate the matter and she broke down and cried. Upon hearing her cries, the appellant and B came to her bedroom. The appellant subsequently told B to return to their bedroom to be with the children while he stayed with the complainant in the room. He spoke to the complainant while she continued to cry. The appellant then hugged her from the front and squeezed her left buttock with his right hand.

10 On 10 July 2008, the appellant and B brought the complainant to the Indonesian embassy to make a new passport. There, the complainant passed to a member of the embassy staff a letter in which she asked for help. As a result, she was interviewed by one D. She told him that the appellant had molested her. D advised her to flee the appellant's flat. On 11 July 2008, the complainant left the appellant's flat and sought shelter at the embassy.

11 The corroborative evidence adduced by the prosecution were as follows. The maid agent, E and a neighbour of the appellant F, testified that the complainant informed them of the appellant's alleged acts of molest. Two other letters written by the complainant were also produced. One was initially handed over to F by the complainant, but F subsequently returned it to the complainant and told her to pass it instead to the maid agency. That letter contained the complainant's version of events and listed the various acts complained of. The other letter was the one that the complainant passed to the embassy staff on 10 July 2008.

Appellant's defence

12 The appellant's defence before the District Court had two separate facets. First, he challenged the reliability of the complainant's accusations. Although he admitted to the background facts surrounding to the incidents, he flatly denied that he committed any act of molest. Additionally, with reference to the first and second incidents, he challenged the complainant's testimony on his physical position *vis-à-vis* hers. During the first incident, the appellant claimed that he was squatting on the left side of the complainant to check the leakage rather than squatting directly behind as the complainant claimed. In the second incident, the appellant claimed that he was the only one squatting at the cabinet beneath the sink and the complainant was standing behind him. In both incidents, the appellant claimed that he did not touch the complainant.

13 The second facet of the appellant's defence centred on the complainant's motive in making the above complaints. He pointed to several possible sources of her unhappiness. The appellant claimed that the complainant hated B for constantly scolding her for not doing the household chores. Another possible source could also be his rejection of the complainant's request to return to Indonesia for two weeks to celebrate Hari Raya. Lastly, the appellant also claimed that the complainant was upset with him when he refused to give her his laptop for free.

District Court decision

14 In the proceedings below, the DJ weighed the reliability and credibility of either side's version of events. The DJ considered whether the complainant's evidence was "unusually convincing" or was otherwise corroborated by independent witnesses (see *Khoo Kwoon Hain v Public Prosecutor* [1995] 2 SLR(R) 591). The DJ found that the complainant's testimony was internally consistent and in her final assessment, the DJ found her testimony to be credible. She accordingly accepted the complainant's version of events. In doing so, the DJ found the defences and explanations by the appellant to be without merit. The DJ consequently found the appellant guilty and convicted him on all four charges.

Deliberation

15 The central issue before me is whether there is sufficient evidence to conclude that the charges were made out beyond reasonable doubt. As V K Rajah JA in *XP v Public Prosecutor* [2008] 4 SLR(R) 686 cautioned at [98]:

> The question for the court in every case is not whether it suspects the accused has committed the crime but whether the Prosecution has proved beyond any reasonable doubt that he has indeed committed it. It is trite that courts can never convict on the basis of suspicion and/or intuition. Such is the conclusion demanded by and enshrined in that cardinal principle, the presumption of innocence, upon which is founded the most elemental rule of the criminal justice system: that the Prosecution must establish guilt beyond any reasonable doubt. ... The adversarial system that we have adopted requires the Prosecution to conscientiously and irrefutably ensure that an unbreakable and credible chain of evidence secures the guilt of the accused. It is not flawless in that perfectly proper prosecutions may sometimes fail because of unexpected frailties in the evidential links. Our system is, however, an eminently credible, pragmatic and effective one that tempers idealism with a healthy dose of realism. The rules are clear and precise, and neither the Prosecution nor the Defence can or should complain if they fail by them. By rigorously demanding and upholding exacting standards from both the Prosecution and the Defence alike, the courts are able to ensure that public confidence in our legal system does not falter.

16 Upon a thorough evaluation of the evidence in the trial below, I find that there is insufficient evidence on each of the four charges to prove them beyond reasonable doubt. Furthermore, bearing in mind that the entire case against the appellant hinged upon the complainant's word against the appellant, I am unable to agree with the DJ below that the complainant's version was coherent, compelling and credible. I now set out the reasons for coming to this conclusion.

First charge

17 With respect to the first incident on 11 December 2007, I find the complainant's version of events highly improbable. The complainant said that she was squatting in front of the kitchen cabinet below the sink while the appellant squatted behind her with his legs parted and wrapped around her back. She claimed that it was in that position that the appellant worked on the leaking pipe. It was also in that position, and while repairing the pipe with both hands, that the appellant pushed his body against hers with his crotch touching her buttocks. At the same time, the appellant moved his head forward so that his left cheek touched her right cheek. I found this to be quite an astounding position to get into. It is quite difficult to imagine how the appellant could be squatting behind the complainant, with his crotch pressed against her back, and at the same time for both his hands to be manipulating the pipe which is located at the wall in the back of the cabinet. It would be a feat that only a contortionist can achieve, and he would have to have long arms given that the pipes are located at the back of the cabinet. Furthermore it would be extremely difficult for the appellant to press his cheek against the complainant's cheek as his left arm and left shoulder would be in the way. Even if I assume that this was not difficult in and of itself, the meeting of the cheeks had to be performed in the squatting positions described above. Indeed, when the complainant was confronted with these questions, she could not satisfactorily explain how it was physically possible.

18 An additional point is that it is unlikely that the appellant would conduct himself in such a vulgar manner openly in his home. Even if B was not in the kitchen at the time, she could have come in at any time from the living room. It is difficult to contemplate any husband taking the same risk in the circumstances. Indeed, he had ample opportunities to molest the complainant when nobody else was

at home and yet nothing is alleged to have happened during those times.

Second charge

19 The second incident allegedly occurred a day after the first on 12 December 2007, again in front of the kitchen sink cabinet with both of them in the same squatting positions. This time the appellant, squatting behind the complainant, used his right hand to touch her left breast. Again, there is an element of physical improbability that tarnishes the reliability of the complainant's testimony. It would have been more natural for a person in the position of the appellant to reach for the right breast rather than the left. Furthermore, with both in squatting positions, the complainant's knees and arms would be in the way and even if they were not, it would have been quite easy for her to block the appellant's hand when he stretched his arm around her.

20 As with the first incident, it is the complainant's own evidence that the appellant's children were in the living room. Considering their proximity and the fact that the appellant had ample opportunities to molest the complainant when they were alone in the flat, it is puzzling that he would take the risk of molesting the complainant at that moment.

Third charge

21 The third incident purportedly occurred on 26 April 2008, in which the complainant claimed that the appellant touched her left breast in the study room of the flat. Putting aside the discussion of the description of the act proper, I am not persuaded as to the complainant's version of events. The complainant had not revealed or reported her claims of molest by the appellant in December 2007 to B, the embassy or the police. She explained that she did not have the opportunity to do so and was afraid that B would not believe her. Given such fear and apprehension on her part, I find it surprising that she would approach the appellant in the dead of the night, in his study room, to engage in a discussion on laptops and computers. If the two previous incidents had indeed taken place, an ordinary person would be truly apprehensive and wary of any interaction with the molester. Indeed, the complainant had said that she was frightened of the appellant. Yet she approached the appellant in the dead of night when the rest of the family was asleep and he was alone in the study. The complainant explained that she wanted him to change and that she respected the appellant's family and wanted the appellant to know about her family so that he could sympathise and pity her. In my view, such an explanation is incongruous and contrary to ordinary human experience.

22 What makes the evidence more incredible was the complainant's reaction after the purported act of molest. During cross-examination, the complainant was asked about what happened after the appellant touched her breast. She said that she pretended not to respond to the appellant and continued to sit there and carried on with the conversation. She had done so to avoid angering him. This explanation however does not sit logically with her evidence. This was a woman who had been molested two times prior to this incident. Even if she had wanted the appellant to change, all her hopes of a better relationship with the appellant would have been thrown out of the window when the appellant molested her a third time.

23 Furthermore, if the complainant had the courage to approach a man who had touched her twice because she wanted him to change, it is difficult to accept her explanation that she feared angering him. Any person would have been taken aback by an unwanted touch in those circumstances and at the very least, get away from the molester to avoid risk of further molest.

24 The complainant's failure to recollect crucial details also put her evidence in doubt. She had testified that she was seated at the entrance of the study room while the appellant was working on

his computer. As the conversation progressed, the appellant got up and sat in front of her. It was in this position that the appellant reached over and touched her left breast. In cross-examination, she could not recall whether the appellant had used his left or right hand to touch her left breast. I accept that in many cases victims are unable to recall some details due to the shock or speed of the events. However the complainant did not seem to have trouble recalling the main details of this and other incidents. If this event did in fact happen, she would have been able to see it in her mind's eye and would, in all likelihood, be able to envision the act as it had happened.

25 Finally, if the appellant had molested her twice before, on this third occasion, when the appellant moved towards the complainant and sat directly in front of her, one would have expected that she would be put on guard. But apparently she was not.

Fourth Charge

26 The fourth act complained of purportedly occurred after the complainant's outburst in the early hours of 18 June 2008. In my view, the complainant's version of events seemed somewhat improbable given the supposed history between herself and the appellant. Again, there would already have been three separate incidents of molest in the span of roughly six months. The complainant would have been expected to be on her guard when the appellant entered her room and subsequently directed B to leave the room. Similarly, it is difficult to comprehend how the complainant would even allow the appellant the opportunity to touch her again by allowing him to come close to her and give her a hug. In fact, her inaction in both instances leading up to the purported touch was detrimental to the overall probability of her evidence.

General observations

The complainant's testimony

27 In the court below, the DJ accepted the complainant's testimony and rejected that of the appellant. The DJ stated at:

> 44 … I found [the complainant] to be a forthright and candid witness who was able to give a coherent, compelling and credible account of the acts of molest that had been perpetrated against her by the [appellant]. She was able to give clear and sufficient details as to what the [appellant] had done to her on each occasion …
>
> 45 I found [the complainant's] testimony contained a ring of truth, sufficiently detailed and textured that it could not be dismissed as a complete fabrication. It was uncanny that all the 4 acts of molest occurred in circumstances which had some basis ...

28 There is no doubt that the DJ had the advantage of being in a position to assess the demeanour of a witness. However, as was noted in *Bala Murugan a/l Krishnan v Public Prosecutor* [2002] 2 SLR(R) 420 at [21], although an appellate court would be generally slow to disturb the findings of the trial court, it would do so if "the findings below were clearly wrong or the balance of evidence was against the conclusion reached by the trial court or where the inferences drawn by the trial court were found to be not supported by the primary facts". In my view, what the DJ had failed to do was to assess the substance of the complainant's evidence in closer detail; in particular, she did not appear to have taken into consideration the matters set out in [17]–[26] above.

29 In the present case, virtually the entirety of the prosecution's evidence rests on the word of a single witness with no corroborative evidence other than the behaviour of the witness. In such

circumstances it behoves the court to weigh very carefully the quality of the complainant's evidence and examine it for inconsistencies and errors of logic and to see whether the details of the incidents connect. In the first incident, the DJ had failed to consider that the manner in which it took place as described by the complainant was not only quite impossible to achieve, but also unlikely given that they were in the kitchen which B could have entered at any time. In the second incident, the DJ again did not consider the improbability of the appellant reaching all the way around her with his right hand to touch her left breast as well as the ease with which she could have fended off that hand with her right arm. In the third incident, the DJ had not found anything unusual in a young woman who had been molested twice before putting herself in a situation in which she was alone with her attacker in the dead of night. In the fourth incident, the DJ did not find it unusual that a woman who had been molested three times before, could have allowed her perpetrator to insist that the two of them be left alone in the bedroom and subsequently also allowed him to be in such close physical proximity.

30 The DJ had observed that it was uncanny that the four acts of molest occurred in circumstances which had some basis. I take this to mean that the DJ meant that therefore it was more likely to be truthful. She probably took this view since the appellant did not deny the existence of the situational backdrops of the purported acts. However it is equally possible for a person who has decided to make up a story to base it on actual events rather than to conjure up a total fabrication. This is especially possible where the witness is an intelligent one, or one who may be prone to fantasy that is triggered by events such as the close proximity during the first two incidents and the late night tête-à-tête in the third incident. My point here is that when the above alternatives are considered, her view that it was uncanny for all four acts to have some basis does not lead solely to the conclusion that the complainant was telling the truth.

31 The DJ observed that the complainant did not embellish her evidence and therefore it was likely to be the truth. While this is a possibility, the DJ overlooked the fact that, if the complainant had described more egregious acts, she would have been hard put to explain why she did not report the matter immediately. Often there is more than one explanation for something, and in this case, the DJ had not considered other possibilities and as a result found that the single possibility that she identified lent support for the complainant's veracity.

32 It was only on 11 July 2008, seven months after the first two incidents, that the complainant reported the alleged incidents of molest at the Indonesian Embassy. Had the complainant's employment in the appellant's family been her first, the delay could well be explained by ignorance and lack of experience. However, this was the complainant's third stint as a foreign domestic worker in Singapore. Importantly, she admitted in court that she had problems in her past employment and that she sought help from her maid agency then. For example, when she felt that one of the family members of her previous employer behaved in an untoward manner, it had taken her less than a week to seek help and request a change of employer. And yet, although E from the maid agency had made two routine phone calls to her to check on her well-being after the first two incidents complained of, and the complainant. could very well have told E about those incidents, E did not record her as making any complaints.

33 After the complainant made the report at the Embassy, she told the staff there that she wanted to return home and did not want to report the matter to the police. The DJ took the view that this reinforced the veracity of the complainant's evidence in that she was not out to frame the appellant. Again, this is only one possible explanation. Another equally plausible explanation is that the incidents were not true and she merely wanted a pretext to terminate her contract.

34 Based on the foregoing I do not, with respect, agree with the DJ that the complainant's

account was coherent, compelling and credible.

Appellant's defence

35 In her decision, the DJ pointed to the inconsistencies between the testimonies of the appellant and B. However, it must be borne in mind that their recollection of the events may be quite different as the complainant's allegations surfaced only some seven months after the first two incidents and one to three months after the subsequent two incidents. Those incidents related to very minor events in their lives and it would have been surprising if they had much recollection of them. I would venture to suggest that if their recollections were well matched, it would be likely that they had colluded to give similar versions.

36 Secondly, a person put in jeopardy in a criminal trial could be expected to embellish facts in order to ensure an acquittal. The appellant had claimed that the complainant had such a repulsive body odour that he could not have done the acts complained of. However, B did not corroborate this. Different people may have different sensitivities to smell, but even if the appellant's story is not true, this does not necessarily mean that his assertion of innocence is also not true. What is important is whether the complainant's testimony is the truth.

Conclusion

37 This is a situation in which the entire case rests on the testimony of a single witness. The only possible defence of an accused person is a "bare" denial. In the circumstances, it is incumbent on the trial judge to examine critically the evidence of the witness and consider every possibility. It was held in *Public Prosecutor v Mardai* [1950] MLJ 33 ("*Mardai*") that it is "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" (*per* Spenser Wilkinson J). In *Tang Kin Seng v Public Prosecutor* [1996] 3 SLR(R) 444, Yong Pung How CJ reviewed the authorities, including *Mardai*, and endorsed the following approach at [44]:

> In my view, the right approach is to analyse the evidence for the Prosecution and for the Defence, and decide whether the complainant's evidence is so reliable that a conviction based solely on it is not unsafe. If it is not, it is necessary to identify which aspect of it is not so convincing and for which supporting evidence is required or desired. In assessing the supporting evidence, the question then is whether this supporting evidence makes up for the weakness in the complainant's evidence. All these would, of course, have to be done in the light of all the circumstances of each case and all the evidence, including the defence evidence, as well as accumulated knowledge of human behaviour and common sense.

I respectfully agree, and adopt this approach.

38 The DJ had taken great pains to explain the behaviour of the complainant and the appellant, and their possible motives. However, as I have pointed out above, in several important areas, the DJ had selected an explanation for the complainant's actions that supported her veracity but had failed to consider equally plausible explanations that favoured the appellant's version. This led the DJ to the view that the complainant was telling the truth whereas the appellant was not.

39 I have set out above the aspects of the complainant's evidence that are not satisfactory. In particular I am unable to see how her evidence of the positions of the appellant and herself in relation to the first incident is physically possible. Her evidence (with respect to the third incident) that she would put herself in a one-on-one situation with the appellant in the dead of night after two earlier

acts of molest is also difficult to believe. The only possibly corroborative evidence is a letter written by the complainant to the neighbour, F. However that is not sufficient to outweigh the problems with the complainant's own evidence. The onus rests on the prosecution to prove its case against the appellant beyond reasonable doubt. The instances of the inconsistencies and the incredible nature of the complainant's evidence, taken individually, might not have affected the validity of the conviction. However, when considered in their entirety, I find that the conviction by the DJ based on such evidence to be unsafe. I accordingly set it aside and acquit the appellant.