

M.C.
GM4-62

Judgment
4/1/1964

IN THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL

No. 16 of 1964

ON APPEAL FROM THE SUPREME COURT
OF THE FEDERATION OF MALAYA

IN THE HIGH COURT OF KUALA LUMPUR

B E T W E E N :-

**UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
23 JUN 1965
25 RUSSELL SQUARE
LONDON, W.C.1.**

CHIU NANG HONG

Appellant

- and -

THE PUBLIC PROSECUTOR

Respondent

CASE FOR THE APPELLANT

78661

1. This is an appeal by Special Leave from the Judgment and Order of the Court of Appeal at Kuala Lumpur dated the 24th January, 1963 whereby the Appellant's appeal from his conviction on the 22nd November was dismissed. Special Leave to appeal was granted by an order of His Majesty the Yang di-Pertuan ~~Gera~~ **AGONG** dated the 26th February, 1964. p.65,1.16
p.65,1.23
2. The Appellant was charged with having committed rape against one Philomena Lim on the 10th May 1962 and was convicted by Ong J. and sentenced to 18 months imprisonment. p.47,1.1
3. The Appellant appealed to the Court of Appeal, who stated that, reading the notes of evidence in cold print it might well be that in their own minds they might feel something else than satisfaction as to the proof of the Appellant's guilt, yet felt bound to dismiss the appeal. p.63,1.17
4. The principal questions arising in this Appeal are:-
 - (i) Whether the trial judge misdirected himself as to corroboration.
 - (ii) Whether the Court of Appeal erred in regarding the Appeal before them as one in which they were unable to interfere despite their misgivings about the evidence.

5. Much of the evidence in the case was not in question. The Appellant admitted that during the month of the 10th May, 1962, at premises Lorong Parry, Kuala Lumpur he had sexual intercourse with the prosecutrix. It was common ground that they had first met at a party on the 4th May, 1962, where there was drinking and dancing. The prosecutrix was in the company of her husband. She and the Appellant had met again at a similar party on the night of the 9th May. She had danced with the Appellant on both nights. On the second night her husband had drunk too much and had been driven home by his wife and on the morning of the 10th May he was suffering from a bad headache. On the morning of the 10th the prosecutrix went to a dancing school where she had been taking lessons for some time. While she was there the Appellant rang her up. He called at the dancing school and together they went in his vehicle to a house where the Appellant's friends used to meet and where intercourse took place. Afterwards they left, again in the Appellant's van, and he drove her home.

p.39,1.10
p.33,1.12
p.8,1.15
p.34,1.1
p.9,1.22
p.35,1.21
p.9,1.27
p.35,1.37
p.11,1.25
p.39,1.25

6. The important differences in the evidence of the prosecutrix and the Appellant were, however, as follows:-

She said that there was nothing special in the relationship between them at the two parties, although perhaps he was paying her more marked attention at the party on the evening of the 9th. She also agreed he had put two used wine glasses in her handbag that night when the party was lively and gay. She denied dancing with him very affectionately and cheek-to-cheek. She also denied suggesting to the Appellant that he should ring her up at the dancing school the next morning. On the morning of the 10th the Appellant rang her up at the dancing school and said her husband was with him, was not feeling well and had asked the Appellant to fetch her. The Appellant had fetched her and taken her to the house in Lorong Parry and had there pushed her into a room and secured the door. He told her not to shout and putting his hands over her neck said if she shouted he would strangle her. She was shocked and because of his size did not dare to put up a fight. She was afraid to cry out and she was so frightened that she just stood still in the middle of the room, while he undid and removed her garments one by one. He carried her to the bed, took off his own shirt and trousers and had sexual intercourse with her. She was quiet while he

p.14,1.15
p.15,1.33
p.14,1.37
p.16,1.16
p.9,1.28
p.10,1.3-
11,1.23

(3)

drove her back in the van, nor did she sob and cry that morning when it was all over as she had to go back to her duties and attend to her 3 children. She did not tell her husband that night when he came back from work at 6.30. Her husband stayed only a few minutes, then rushed to hospital to bring his mother home at 8.30, when he went straight to bed. The next morning he was late leaving the house for work. She went out in the car with him and he dropped her on the way to her dancing lesson. The next night her husband came home at 8.30 with a friend, having been in a car accident, stayed a short while and then left to see about his car. At midnight when her husband came home she told him about the behaviour of the Appellant. Her husband was upset and angry and said "Well it is up to you whether you want to keep up an affair with him or make a report".

p.12,1.6-
1.27

7. The Appellant's account was that at the two parties the prosecutrix became increasingly friendly, danced very close to him and pressed his hand and asked him twice on the 9th to ring her at her dancing school the next morning. He was reminded of doing so when her husband rang up that morning to thank him for his hospitality and to say that he had a bad headache. When the Appellant spoke to her she asked him to come round and then suggested that they should go "Anywhere quiet". She agreed to go to his friends mess. There they went to one of the rooms where there was a double bed. After some preliminary approaches which were entirely amicable he removed her clothes with her assistance on the bed and had connection with her with her consent. Beforehand he had left to go to the kitchen, taken two bottles of "Green spot" put two straws in and they had both sipped from the bottles. Afterwards he had driven her home and they had talked about pianos which the Appellant sold.

p.34,1.20-
40,1.7

8. Evidence was also given for the prosecution by the prosecutrix's husband. On the morning of the 11th his wife had been depressed and withdrawn. On that night when he woke her up about midnight she had said she did not want to go to a ball in a party including the Appellant and when asked why, broke down, crying, and told her husband about the reason. He denied saying the words that his wife had reported. She was not a very educated woman. She might have thought that he

p.27,1.10
p.27,1.19

p.28,1.6

p.27,1.33 said such words. He told her he would leave it for her to decide whether to report the matter. His wife took dancing lessons as she wanted to be more modern in her outlook. She had never been out to a night club or a cabaret before the occasions in May or to any social parties to such a late hour. She was a typist when they married 9 years ago and had been looking after the house and the babies since 1956. He had been slightly tipsy on the night of the 9th May. He didn't know how the wine glasses came to be in his house until he saw them and asked his wife.

p.29,1.19 A further prosecution witness was a servant named
p.30,1.21 Wong May Kiew at the house in Lorong Parry. She remembered seeing the Appellant leave with someone else on the 10th May. On tidying the room where the Appellant had been with the prosecutrix she found two empty green spot bottles containing straws. No money had been left with them although this was customary when visitors took bottles from the refrigerator.

p.32,1.1 The medical evidence showed no signs of bruising or force having been used.

pp.42-4 Apart from the Appellant, another witness for the defence was Benjamin Henry Sheares a professor of gynaecology and obstetrics who said that the evidence was consistent with the story of the prosecutrix and of the Appellant. But if she had been in such a state of shock as she had described, her senses would have been dulled and it was unlikely that she would have remembered in great detail as she did in the witness box the details of her clothing which were removed and in which order they had been removed. A dance hostess Maswa Binti Mohd Salleh, who had been present on the 9th said the prosecutrix and the Appellant danced very close "like an embrace".

p.50,1.12 9. The learned trial judge stated that the Appellant's own evidence confirmed his belief in his guilt. The husband's evidence was in no way attacked or shaken, showing that the wife was a domesticated person who had not previously been to night clubs. There was no suggestion "that she was a flighty person with any weakness for baubles or frivolities. The human frailty revealed about her was the one not uncommon among those of her sex and her station in life - the desire to keep

p.50,1.14

up with the Joneses by acquiring some social poise and polish in learning how to dance".

He believed the complainant whose evidence had the ring of truth whereas the Appellant's story sounded like a broken cymbal. "First, I did not think that there was in fact any voluntary demonstration of undue familiarity during those two evenings by her towards a man who had hitherto been an utter stranger. The ice had just been broken. During the first evening, there were only four people, one of whom was her husband. Hence any alleged amorousness on her part towards the accused during dancing must be set down to mere imagination on his part or a misinterpretation of ordinary feminine coquetry. As to their second encounter, the accused would have the Court believe that the timid quondam typist had suddenly blossomed forth into a veritable courtesan who practised on him, during the course of one evening, the arts and wiles of a seasoned wanton." He discounted the suggestion that the two were dancing cheek-to-cheek as her head barely reached his shoulder. He concluded that the Appellant's version of what happened at the parties was wrong. Secondly as a logical corollary he accepted her version of the telephone conversation of the 10th May. Thirdly, he accepted her version about his threats in the room. The maidservant's evidence he decided was false. Her memory had been surprisingly good about the bottles while it was vague about the bed sheet. Further no money had been found on the table to pay for the drinks. The Appellant had offered no explanation why he should not have paid for them. (N.B. He was in fact never cross-examined on this point). Fourthly, the Judge thought there could be no satisfactory explanation for the prosecutrix's invention of the incident if it was untrue. He did not think "that the pangs of a remorseful conscience were in keeping with the character of such a female as the accused tried to make her out to be". Had she been a schemer she could have fabricated evidence of missing buttons, torn under clothes or bruising. "I could not but come to the conclusion that she was speaking the truth and that in all material circumstances her evidence was corroborated by the facts."

p.51,1.20

p.51,1.49

p.52,1.11

p.52,1.21

p.52,1.36

p.53,1.36

p.53,1.43

p.54,1.43

p.55,1.6

He accepted her explanation of the belatedness of her complaint. As to the discrepancy between her report of the words spoken by her husband and her husband's

p.55,1.10

own account, he said "The topic of conversation must have been terribly upsetting for both of them at the time and it is only natural that neither of them could have remembered the words then said with exactitude and clarity so as to be able to reproduce the gist of their discussion in perfect accord some months afterwards." As to the opinion of the expert he thought there was nothing so cogent to make him feel reasonable doubts about the guilt of the Appellant.

p.62,1.45 10. The Court of Appeal felt that the trial judge had approached the matter with very great anxiety. They were forced to the conclusion that he was overwhelmingly influenced by the impression which he formed of the credibility of the prosecutrix. Hence it was difficult for them to see any grounds on which they could interfere despite their doubts on reading the evidence. The trial judge was also of the same race as the parties.

p.64,1.11 On looking at the reasons given by the judge they thought he was well aware that the only evidence to support conviction was the uncorroborated evidence of the prosecutrix. He looked for corroboration, did not find it and was aware that he had not found it yet felt compelled to accept her evidence as true. He had considered the improbabilities of her evidence such as the delay in telling her husband and yet in spite of it he felt himself compelled to convict. The Court of Appeal ended by saying "We know of no case that would justify us in interfering with the findings of a trial judge on a question of fact which are based entirely on the assessment of credibility, which ignore no relevant fact, which take into no account no fact that is irrelevant and where there has been no substantial contravention of any rule of law or judicial procedure".

p.65,1.5

11. It is respectfully submitted that the learned trial judge misdirected himself as to corroboration and that the Court of Appeal erred in stating that the judge recognised the wisdom of having corroboration and was aware that he had not found it.

The learned judge stated in his reasons that the prosecutrix's story was corroborated by the facts in all material circumstances. In so far as there was any corroboration it was of the Appellant's evidence and disproved her account: This was the effect of the

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evidence of the maid-servant, who was a witness for the prosecution, the evidence of the dance hostess, that of the gynaecologist and her own account of what her husband said when she first mentioned the matter to him.

12. It is further submitted that the Court of Appeal erred in saying that the judge's conclusions were entirely based on the credibility of the prosecutrix in the witness box. The judge's reasoning was based on general considerations which he thought made it unlikely that the Appellant's account was true: the fact that she had been a domesticated wife so far and would have been unlikely to fling herself at a stranger; that she could not have danced cheek-to-cheek since her head only came up to his shoulder; that there was no possible motive for her invention of the story; that she could have fabricated better evidence. These appear to have been the determining factors in the judge's finding and it would accordingly have been legitimate for the Court of Appeal to have considered the weight of the evidence against the Appellant.

13. Further the Court of Appeal erred in holding that the judge had ignored no relevant fact and had not taken into account any fact that was irrelevant. It is submitted that the judge wrongly rejected the evidence of the maidservant who was a prosecution witness, partly on the grounds that the Appellant could not explain why he had not paid for the bottles, when he was never asked about it. Further he ignored the importance of the husband's remarks as reported by the wife when she first mentioned her complaint against the Appellant. The judge also never considered the inherent improbability of the account given by the prosecutrix of her intercourse with the Appellant especially in the light of the gynaecologist's evidence.

14. The Appellant respectfully submits that this Appeal should be allowed, his conviction should be quashed and his sentence set aside for the following amongst other

R E A S O N S

1. BECAUSE the trial judge misdirected himself on the question of corroboration.
2. BECAUSE the Court of Appeal erred in holding that the Judge's conclusions were based on credibility

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of the witnesses and also in holding that the judge had ignored no relevant facts and had not taken into account any irrelevant facts.

3. BECAUSE the trial Judge failed to observe the inconsistencies in the case for the prosecution and also failed to take account of the material circumstances and probabilities.
4. BECAUSE the Court of Appeal failed to apply its mind afresh to the evidence.

Dingle Foot Q.C.

Dick Taverne

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