P.C.
G.H.H. G.F.

Judgment
41/1964

No. 16 of 1964

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA IN THE COURT OF APPEAL AT KUALA LUMPUR

BETWEEN:

CHIU NANG HONG (Defendant) (Appellant)

- and -

THE PUBLIC PROSECUTOR (Prosecutor) (Respondent)

CASE FOR THE RESPONDENT

RECORD

78662

1. This is an appeal by special leave from a judgment and order of the Court of Appeal at Kuala Lumpur (Thomson C.J. Hill J.A. and Syed Shah Barakbah J.A.) dismissing an appeal from a judgment dated 22nd November 1962 of the High Court at Kuala Lumpur (Ong J. without a jury) whereby the Appellant was convicted of rape contrary to Section 376 of Malayan Penal Code and sentenced to 18 months imprisonment.

2. On 20th November 1962 the Appellant pleaded 'not guilty' before the High Court at Kuala Lumpur (Ong J. without a jury) to a charge "That you, on 10th May 1962 at about 11.00 a.m. at 1A Lorong Parry Kuala Lumpur in the State of Selangor committed rape on Philomena Lim and thereby committed an offence punishable under Section 376 of the Penal Code. pp. 1 - 2.

3. The trial occupied the 20th, 21st and 22nd November 1962 and at the conclusion thereof Ong J. found the Appellant guilty, convicted him as charged, and sentenced him to 18 months' imprisonment. On 2nd January 1963, Ong J. delivered Grounds of Judgment. On 14th January 1963 the Appellant filed a Petition pp. 1 - 46. pp. 47-55.

pp. 56-59 of Appeal to the Court of Appeal at Kuala Lumpur. The said appeal was heard on 24th January 1963 and
pp. 59-65 dismissed by the Court of Appeal. The judgment of the Court was delivered by Thomson C.J.

4. The provisions of the Penal Code of the Federated Malay States (FMS Cap 45), as extended throughout the Federation of Malaya by virtue of the Penal Code (Amendment and Extended Application) Ordinance, 1948, which are relevant to the offence of rape are as follows:-

Section 375.

"A man is said to commit rape who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

First.	Against her will.
Secondly.	Without her consent.
Thirdly.	With her consent, when her consent has been obtained by putting her in fear of death or hurt.
Fourthly.	With her consent, when the man knows that he is not her husband and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent.
Fifthly.	With or without her consent, when she is under fourteen years of age.
Explanation.	Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
Exception.	Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age is not rape.

Section 376.

"Whoever commits rape shall be punished with penal servitude for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to a fine or to whipping."

5. The case for the prosecution in the High Court was conducted on the basis of the third category of rape as defined in Section 375, i.e. that the Appellant had had sexual intercourse with the Complainant with her consent but having obtained her consent by having put her in fear of death or hurt. The Appellant did not deny that he had had sexual intercourse with the Complainant on the date or at the place specified. But he claimed that her consent had been freely given and indeed that it was she who on the day in question and on the only two previous occasions on which they had met (4th and 9th May 1962) had made amorous advances to him. pp. 38-39 pp. 36-39 pp. 35-38 pp. 33-35

6. The Complainant was a married woman of 28 who had been married for 9 years, was the mother of three children, and who at the time of the offence was living with her husband and family. With the exception of the date of the offence and of the two previous days in May 1962 the Appellant did not make, nor was any evidence called to support, any suggestion of loose or immoral conduct on the part of the Complainant. The place of the offence, 1A Lorong Parry, was a house in the suburbs of Kuala Lumpur which appeared from the evidence to be, and was described by the Court of Appeal as 'some sort of private brothel'. The Appellant did not dispute that he knew this house, that he had used it before, or that he had taken the Complainant there, although he said he had done so in response to the Complainant's wish that they should go somewhere quiet. p. 60 p. 36

7. The basic issue in the case, therefore, was whether the Court was satisfied beyond a doubt that the Complainant's consent to sexual intercourse with the Appellant was obtained by his putting her in fear of death or hurt. As Ong J. said in his Grounds of Judgment "There was in general no dispute as to the facts except in so far as they had some bearing on the question whether (the Complainant's) consent was voluntary or co-erced." p. 48 l.3-6

8. In his Grounds of Judgment Ong J. said he believed the Complainant. He said "Her evidence had throughout the ring of truth, whereas the accused's story sounded like a broken cymbal". He also said of the Appellant "His evidence served to confirm my belief in his guilt". The learned Judge set out in some detail the grounds which had moved him to accept the truth of the Complainant's story; and, having considered these Grounds, the Court of Appeal said p. 51 l.20-22 p. 50 l.12-13

"..... we are forced to the conclusion that the trial judge was overwhelmingly influenced by the impression, admittedly a subjective impression, which he formed of the credibility of the prosecutrix and that that compelled him to accept her evidence as evidence of truth even after the most meticulous examination of every piece of the prosecution evidence and of the
p. 63 evidence of the appellant and of the defence witnesses". That being so, the Court of Appeal reminded themselves that they had not seen or heard the witnesses as the trial judge had done and came to
p. 63 the conclusion that, unless they were satisfied there had been a miscarriage of justice (which they were not), it would be wrong for them to interfere with the findings of fact made by the trial judge.

9. The case appears to have been conducted throughout both in the High Court and in the Court of Appeal on the footing that the law and practice as to corroboration in sexual cases were the same in the Federation of Malaya as in England, namely that in all charges of sexual offences juries should or must be directed that it is not safe to convict on the uncorroborated testimony of the Complainant but that they may do so if they are satisfied of its truth. As appears from paragraphs 17 - 22 hereof, the Respondent desires to advance an alternative submission on the basis that there are significant differences between the law and practice of Malaya and the law and practice of England with regard to corroboration. Nevertheless, on the basis of identity between the law of Malaya and the law of England with regard to corroboration the Respondent's primary contention is that the record of proceedings herein reveals no reason for interfering with the verdict of the trial judge or the judgment of the Court of Appeal.

10. In this case, there was no jury. The learned Judge having seen and heard the witnesses, including the Appellant, convicted him and gave his Grounds of Judgment several weeks later. The Respondent does not contend that the evidence contained anything which in English law could fairly be described as corroboration of the Complainant's evidence in the sense of a separate item of evidence implicating the person against whom the corroborative evidence is given in relation to the matter concerning which corroboration is necessary i.e. whether the Complainant's consent was co-erced. For the purpose of this submission therefore the Respondent concedes that this

was a case where the trial judge not having found corroboration nevertheless expressed himself as satisfied by the truth of the evidence given by the Complainant.

11. The Respondent concedes that, as the Court of Appeal pointed out, in a case where a judge is sitting with a jury, the absence in the charge to the jury of any warning as to the danger of convicting without corroboration amounts to an appealable misdirection and further accepts that the learned Judge's Grounds of Judgment contain no express warning, administered by the judge to himself, as to such a danger. p. 63

12. But the Respondent contends that if, on a fair reading of the Grounds of Judgment, it is clear that the trial judge was aware of the desirability of corroboration and of the danger of convicting without it, and nevertheless accepted the Complainant's story as true and as sufficient to prove the guilt of the accused beyond a reasonable doubt then there has been no misdirection and there is no appealable error.

13. The Respondent contends that in the case of a judge sitting alone there is no requirement of law practice or justice binding him to make explicit in his Grounds of Judgment delivered after conviction any warning as to the danger of convicting without corroboration of which, as a judge charged with functions in relation both to law and fact, he is presumed to be aware. The Respondent respectfully adopts and supports the Court of Appeal's description of the difference between

(a) a judge's duty to warn a jury, which must necessarily be explicit and in clear and suitable terms

and

(b) his duty to warn himself, which need not be explicit, so long as it is clear in one way or another, that at the moment of conviction he had such a warning clearly in mind.

14. The Respondent submits that in this case it is clear that the learned Judge had such a warning in mind at the moment of conviction

(a) from a fair reading of his Grounds of Judgment delivered on 2nd January 1963

(b) from the fact that, as the learned Judge's notes of Counsels' closing addresses reveals,
p. 46 Counsel for the Appellant dwelt heavily on the absence of corroboration whereas it was not suggested by the Deputy Public Prosecutor that the evidence contained anything which could fairly be described as corroboration.

15. The only place in the learned Judge's Grounds of Judgment where there is any reference to corroboration comes towards the end of the said Grounds when the learned Judge said "She was content to leave it plain and unvarnished and I could not but come to the conclusion that she was speaking the truth and that
p. 55 l.5-9 in all material circumstances her evidence was corroborated by the facts". It is respectfully submitted that the learned Judge was not here using the word 'corroborated' in any technical sense but was describing the surrounding circumstances as proved in evidence and which appeared to him to be so much more consistent with the truth of the Complainant's evidence than with that of the accused as to justify the learned Judge in convicting him. The learned Judge expressly said that the accused's own evidence served to confirm his belief in the accused's guilt and while it is not contended that anything said by the Appellant in evidence either amounted to or was treated by the learned Judge as corroboration in a technical sense, it is respectfully submitted that the appearance and demeanour of the accused while on trial was legitimately taken into account by the learned Judge when deciding whether the case against the accused had been made out beyond a reasonable doubt.

16. It is submitted that, as the learned Judge found, the medical evidence was either completely neutral on the issue of consent or co-ercion or was of such little weight in favour of the accused as to fall short of justifying him in entertaining a reasonable doubt as
p. 55 to the guilt of the accused

17. The Respondent's alternative submission, which was admittedly not raised or canvassed either before the trial judge or the Court of Appeal is based on the proposition that there are significant differences between the law and practice of England and the law and practice of Malaya both as to the necessity for and the desirability of corroboration and as to what constitutes corroboration.

18. In this connection, the relevant provisions of the Evidence Ordinance of the Federation of Malaya

(No. 11 of 1950) are as follows:

Section 3(1)

"A fact is said to be 'proved' when after considering the matter before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists."

Section 8(2)

"The conduct of any party or of any agent to any party in any suit or proceeding in reference to such suit or proceeding or in reference to any fact in issue therein or relevant thereto and the conduct of any person an offence against whom is the subject of any proceeding is relevant if such conduct influences or is influenced by any fact in issue or relevant fact and whether it was previous or subsequent thereto."

Explanation 1. "The word 'conduct' in this section does not include statements unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of the Ordinance.

Explanation 2. When the conduct of any person is relevant any statement made to him or in his presence and bearing which affects such conduct is relevant.

..... Illustration (J). The question is whether A was ravished.

The facts that shortly after the alleged rape she made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made are relevant.

The fact that without making a complaint she said she had been ravished is not relevant as conduct under this section though it may be relevant:-

As a dying declaration under Section 32(a) or as corroborative evidence under Section 157."

Section 114

"The Court may presume the existence of any fact which it thinks likely to have happened regard being had to

the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. The Court may presume ... Illustration (b) that an accomplice is unworthy of credit unless he is corroborated in a material particular."

Section 134

"No particular number of witnesses shall in any case be required for the proof of any fact."

Section 157

"In order to corroborate the testimony of a witness any former statement made by such witness, whether written or verbal on oath or in ordinary conversation relating to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact may be proved."

19. In view of the provisions of Section 157, the Respondent contends that the prosecutrix's complaint to the police on 12th May, 1962 constituted corroboration within the meaning of the Evidence Ordinance. The complaint was made some 40 hours after the commission of the offence but no objection was taken to its admissibility at the trial nor any criticism made of its admission on the hearing of the Appeal. In the submission of the Respondent any such objection or criticism would have been without foundation, the learned Judge having dealt with the comments made by defence counsel as to the lateness of the complaint and having expressly accepted the prosecutrix's account of her reasons for delay in his Grounds of Judgment. In any event, the statement was made to an authority legally competent to investigate the fact and S. 157 places no restrictions on the time within which a statement to such an authority may be made.

pp.53-55
p. 55

20. Further it is submitted that on a true reading of the aforementioned sections the law relating to corroboration in sexual cases in the Federation of Malaya differs from English law in that (1) the specific reference in illustration (J) of Section 8 to a recent complaint as corroborative evidence under Section 157 shows that what can amount to 'corroboration' differs in Malaya and England. A recent complaint in a sexual case can never amount to corroboration in England because it is the settled

rule that corroboration must be found in evidence extraneous to the witness whose evidence is to be corroborated. Evidence of recent complaints is admissible in England under certain conditions, not as corroboration but as an exception to the general rule against admitting previous consistent statements. (2) The provisions of Section 134 and illustration (b) to Section 114 show that the requirements of corroboration, if they exist at all in Malayan law, are much less stringent than in England. Section 134 specifically states that no particular number of witnesses shall in any case be required for the proof of any particular fact, while it is clear law in England that where corroboration is required it must come from a source extraneous to the person whose testimony needs corroboration. Moreover, the permissive character of the language of Section 114, (The Court may presume) contrasts with the rule in England that a Court must presume an accomplice's evidence to be unworthy of credit and that therefore a direction must be given to the jury warning them of the danger of convicting without corroboration.

21. The Respondent concedes that two reported cases Public Prosecutor v. Mardai (16 M.L.J.33)

and

Koh Eng Soon v. R. (16 M.L.J.52)

contain statements which, while recognising that the law as to corroboration in Malaya or Singapore is different from that in England, introduce English rules of practice as to corroboration. But both were appeals from a Magistrate to a single Judge under provisions of the Criminal Procedure Code which enabled the said judge to exercise powers of revision and to quash the verdict of a magistrate if, inter alia, it appeared to be against the weight of the evidence. In R. v. Veluthan (4 M.L.J.277) the Court of Criminal Appeal for the Straits Settlements held that in a rape case the unsworn evidence of a child of tender years should be subject to the same principles or rules of practice as apply (in England) to the acceptance of the evidence of accomplices, and that unless it was clear that the jury had otherwise had the danger of convicting in the absence of corroboration brought to its notice, a conviction based on a summing-up to a jury which contained no such warning would be quashed. The matter does not appear to have been considered by the Privy Council and the only

S.231 and Chapter XXI C.P.C.

reference to corroboration in the Privy Council (Lim Siew Neo v. Pang Keah Swee 24 M.L.J. 111) was in a landlord and tenant case and was, in the respectful submission of the Respondent, made per incuriam, no reference having been made either in argument or in the opinion of the Board to Section 157.

22. The Respondent therefore contends:

(1) that the English law as to corroboration has no place in the law of Malaya;

(2) alternatively that the requirements of Malayan law as to corroboration, having regard to the provisions of the Evidence Ordinance, are much less stringent than in England;

(3) and that consequently, the failure of a judge sitting alone to make an express reference in his Grounds of Judgment (delivered after conviction) to a warning as to corroboration is neither a misdirection nor an irregularity such as would justify either the Court of Appeal or Her Majesty's Privy Council in intervening.

23. The Respondent respectfully refers to the fact that the Board has frequently emphasised that it is not a Court of Criminal Appeal and that in Besant Kumar v. King Emperor (1915) Solicitors Journal 453 the Board refused leave to appeal on the grounds that failure by a trial judge (sitting with assessors) to warn the assessors as to the desirability of corroboration did not amount to "grave and substantial miscarriage of justice" such as to justify the Board in granting special leave to appeal.

24. In so far as the case for the Petitioner is based on the complaint that the learned Judge drew wrong inferences from the evidence or excluded relevant matter or included irrelevant ones, or that the Court of Appeal misconstrued the learned Judge's grounds of judgment the Respondent contends the learned Judge's assessment of the evidence was correct, alternatively that the matter was exclusively one for the learned Judge who acted on no wrong principles and did not in any way misdirect himself.

25. The Respondent respectfully submits that the judgment of the Court of Appeal at Kuala Lumpur was right and ought to be affirmed and that this Appeal ought to be dismissed for the following (among other)

R E A S O N S

(1) BECAUSE the issue before the learned Judge was essentially a matter of credibility (within the required standard of proof) on which with the advantage of seeing and hearing the witnesses he was entitled to come to the conclusion he did.

(2) BECAUSE in convicting the Appellant the learned Judge clearly had in mind both the danger of convicting the accused in the absence of corroboration and his entitlement to do so, if satisfied with the requisite degree of proof as to the truth of the Complainant's story and notwithstanding the absence of corroboration.

(3) BECAUSE no rule of law or practice requires a judge sitting alone as judge of both law and fact to include in grounds of judgment (delivered after conviction) an explicit reference to the dangers of convicting without corroboration such as he would have been bound to include (in England) if he had been summing up (before conviction) to a jury.

(4) BECAUSE, if corroboration was required, it was to be found in the Complainant's statement to the police, to the admissibility of which no objection was taken and the admissibility of which was entirely a matter for the learned Judge.

(5) BECAUSE, on a true construction of the Evidence Ordinance no corroboration was required, alternatively the requirements as to corroboration are so much less stringent in Malaya than in England as to make the absence of any express warning as to the dangers of convicting in its absence in ex post facto grounds of judgment amount to something less than a misdirection or an appealable error.

(6) BECAUSE there was no substantial contravention of any rule of law or practice nor any miscarriage of justice.

(7) BECAUSE of the other reasons given in the judgment of the Court of Appeal.

W. PERCY GRIEVE

W. A. B. FORBES

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O N A P P E A L

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B E T W E E N :

CHIU NANG HONG — Appellant

- and -

THE PUBLIC PROSECUTOR — Respondent

CASE FOR THE RESPONDENT

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