Privy Council Appeal No. 16 of 1964

Chiu Nang Hong - - - - - - - - *Appellant*

v.

The Public Prosecutor - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE FEDERATION OF MALAYA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JULY 1964

Present at the Hearing:
LORD REID.
LORD HODSON.
LORD DONOVAN.
[*Delivered by* LORD DONOVAN]

The appellant was convicted in the High Court of Kuala Lumpur on 22nd November 1962 of rape and sentenced to eighteen months imprisonment. His appeal to the Court of Appeal at Kuala Lumpur was dismissed on 24th January 1963.

By order of His Majesty the Yang di-Pertuan Agong dated 26th February 1964 he was granted special leave to appeal to the Board.

The appellant, who is of Chinese origin, is the proprietor of a retail business in Kuala Lumpur, where he has lived since 1940. His age was apparently not given in evidence, or at any rate is not recorded. The complainant was one Philomena Lim, a married woman, aged twenty-eight at the time, with a husband aged forty, and with three young children. At the time of the alleged offence she had been married nine years. Her husband was a civil servant in Kuala Lumpur. The complainant was a typist for the first four years of her married life. Since then her sole occupation has been that of a housewife and mother.

The appellant first met the complainant on 4th May 1962 at a Club in Kuala Lumpur, being introduced to her by a Mrs. Roberts who was a common acquaintance. The evening was spent dancing and taking refreshment.

The second meeting of the two was five days later, namely on 9th May at a party at the Eastern Hotel Cabaret organised by the appellant in honour of the Japanese Commercial Attaché whom he knew. The other guests included the complainant and her husband. After dinner the party went to the Cosmopolitan Club, then to eat at some near-by eating stalls, and then back to the Club. The party broke up at 3 a.m. By this time the complainant's husband was tipsy, and the complainant drove him home in their car. During this evening also there was dancing. The complainant gave evidence which was not disputed that she never drank alcoholic liquor.

It was at the third meeting between the appellant and the complainant which took place on the following day that the alleged rape occurred. According to the evidence given by the complainant at the trial it came about in this way.

At 9 a.m. on that morning, i.e. 10th May 1962, she commenced a dancing lesson at a dancing school kept by one Daniel in Kuala Lumpur. During the lesson the appellant telephoned her, saying that her husband had a very bad headache, that he, the appellant, was taking him to a friend's house, and would call at the dancing school and take the complainant to her husband when the dancing lesson was over.

The appellant did in fact arrive at the dancing school in his small trade motor van, and waited for the complainant's dancing lesson to finish. He then drove her to a house No. 1A Lorong Parry in Kuala Lumpur, and persuaded her to enter, saying " Your husband is inside ". She entered the house following the appellant, who, after taking her down a corridor, pushed her into a room with a double bed in it. At once he placed a chair against the door, and told her not to shout. If she did, he would strangle her. In saying that he put his hands near her neck. He also said that if she did shout it would be no use as the people in the house were all his friends. He then proceeded to strip her. First he took off her blouse. Then her brassiere, then her jeans, then her underwear. During this time she was standing still, too frightened to do anything. After undressing her the appellant took her to the bed. He then took off his own trousers, came on top of her, pushing her legs apart with one of his knees, and had intercourse with her. While doing so he kissed her on the ear. After intercourse she said to him " Why should you do this to me " and he replied " Forbidden fruit is sweeter ". At no time did she struggle or shout for help. She was shocked and frightened. After it was over, the appellant drove her back to her house in his van.

Their Lordships have recounted the details of the complainant's version for a reason which will presently appear.

The appellant's evidence was different. He said that on the evening of the 4th May he danced frequently with the complainant. After the initial dance she became very friendly and was dancing very close to him. On the evening of the 9th May they danced even more together, and she held his hand very tightly and occasionally squeezed it. During one of the dances she asked him in a whisper to telephone to her at the school of dancing and in reply to his question " What time ", she said " Any time between 9 and 10.30 in the morning ". As she was going home that evening, she told him not to forget to call her in the morning.

The next morning the appellant received a telephone call from the complainant's husband thanking him for the party, but saying he had a headache, for which the appellant recommended a small brandy and a rest. This call reminded him, he said, that he had promised to telephone to the complainant, at the dancing school. He did so, and she asked him to call for her there at 10.30 a.m. He went in his business van, having the business name plainly on both sides, and met the complainant. She entered the van, and in reply to a question where she would like to go said " Anywhere quiet ". He drove to the house, 1A Lorong Parry, and after going inside by himself and seeing a vacant room, he came back and invited the complainant in. She followed him inside and into the room. He shut the door, which had a Yale lock. There was no reason to put a chair against it, and he did not do so. There was another door in the room bolted from the inside. He went and fetched two bottles of " Green Spot " mineral water and two straws, and they drank some. After some preliminary love play, she co-operated in taking off her clothes, and intercourse took place on the bed. Afterwards she asked him to drive her home, and he did so, and when he drove away she waved him goodbye.

There was thus a direct conflict between the appellant and the complainant on the crucial issue of consent. She averred that she was frightened into submission: he that she willingly agreed.

The complainant said nothing to her husband when he came home that evening. Nor did she mention the matter till about midnight on the following day, when her husband, coming home late, woke her up. She then told him what had happened. They went to the police the following morning, made a complaint, and the prosecution followed.

At the trial which took place before Ong, J. sitting alone, the complainant gave evidence to the effect already indicated. The prosecution also called, among other witnesses, a servant who worked at the house 1A Lorong Parry. She testified that she left the house on the morning of the incident at about

10 a.m. when there was no visitor there, and returned soon after 11 a.m. when again nobody was inside the house. But as she was going in she saw a car being driven away by the appellant whom she knew. Some other person was seated in the car in front. In cross-examination she said that when she went into the only room in the house with two doors, she found two empty bottles of " Green Spot " with straws on the table. Contrary to usual custom, the money for them had not been left on the table. She reported the fact to her employer.

This evidence was obviously important since it contrasted sharply with the complainant's version of being threatened with violence as soon as she entered the room, and being overcome with fear. If true, the evidence showed that the appellant left the room to get the mineral water, and that on his return they drank some of it. In the meantime the complainant could have left. The learned judge, however, treated the servant's evidence on this point as spurious, though she was called for the prosecution. He said its falsity was demonstrated by her " unwitting disclosure " that no money was left to pay for the drinks. The learned judge, of course, was in the best position to assess the quality of the evidence he heard: and their Lordships would not in the circumstances lay any stress on the opposite view that had the servant intended to deceive the Court she could, presumably, easily have said that the money for the drinks had been left behind.

Dr. Benjamin Henry Sheares a specialist in Gynaecology and Obstretics was called for the defence; and it is because of his evidence that their Lordships have recounted the complainant's story in some detail. The doctor's view was that she would be unlikely to be able to give such a detailed account had she been in a state of shock because of what happened. The learned judge did not think this evidence sufficiently cogent to raise a reasonable doubt in the appellant's favour.

He convicted the appellant, sentenced him to eighteen months imprisonment, but allowed bail. This was on the 22nd November 1962. Notice of appeal being given by the appellant on 14th January 1963, the learned Judge, as he was then obliged to do, put in writing the grounds of his judgment. After setting out the conflicting stories, Ong, J. said he believed the complainant, whose evidence had the ring of truth, whereas " the accused's story sounded like a broken cymbal ". He thought there had been no undue familiarity shown by the complainant when she had danced with the appellant. They hardly knew each other, yet the appellant would have the Court believe that on the second occasion when he met her " the quandam typist . . . had suddenly blossomed forth into a veritable courtesan ". The appellant's allegation that they had danced cheek to cheek was not borne out by the witness who, it was predicted, would prove it: and in fact the complainant's head barely reached the appellant's shoulder. Hence, the learned Judge said, he did not think it possible that they could have danced cheek to cheek. The witness referred to was a dance hostess at the Eastern Cabaret who said that the appellant and the complainant " danced very close—like an embrace ", and does not appear to have been cross-examined on the point. The learned judge also found that the complainant had never invited the appellant to telephone to her, that she was threatened with personal injury in the house, was paralysed with fright, and so lost her will to resist. She submitted through fear of injury. Her delayed confession to her husband was not, he thought, due to remorse. She had simply waited for a propitious moment to inform him.

On appeal, the Court of Appeal decided that it could not interfere with the learned Judge's judgment, though merely reading the notes of evidence the members of the Court might feel something less than satisfaction as to the guilt of the appellant. But the learned Judge had seen and heard the witnesses: he was aware of the danger of convicting without some corroborative evidence of the complainant's story, and he knew that there was no such evidence. Nevertheless he was convinced of the truth of the complainant's story, and in that position was entitled in law to convict the appellant.

Their Lordships would be of the like opinion if it were correct to say that the learned Judge knew that he was convicting in the absence of corroborative evidence, and bearing the risk in mind of doing so, yet felt convinced of the truth of the complainant's story. But the Board feels great doubt whether this is a correct assessment of the situation.

The crucial question was whether the complainant consented, and the risk of convicting on her own evidence alone was clear. Some corroborative evidence was most desirable, that is to say, some evidence coming from a source independent of her, which tended to show that she did not consent of her own free will. She did not struggle or shout, she did not try to leave the room, her clothing remained intact, and her body unmarked. She made no complaint until after the lapse of nearly forty hours. Not unnaturally in his closing speech to the Judge, Counsel for the appellant dwelt on the desirability in these circumstances of corroboration, and the learned Judge's note of the evidence shows that Counsel did so repeatedly. In these circumstances the Judge would clearly have the matter well in mind: and his judgment shows that he examined all the surrounding circumstances with great care. Having done so, he announces his conclusion in the following terms: " I could not but come to the conclusion that she " (the complainant) " was speaking the truth, and that in all material circumstances her evidence was corroborated by the facts ".

Their Lordships are asked not to give this passage the interpretation it would ordinarily bear: and to hold that the learned Judge was not using " corroboration " in the sense above defined, but in a sense which indicated no more than this, namely, that the circumstances were consistent with the complainant's story. Their Lordships cannot do so. This was not an extempore judgment, but a well considered judgment given in writing, albeit some six weeks after the trial. The conclusion comes after a careful and meticulous examination of the circumstances, in which the desirability of corroboration, in the legal sense of that term, must have been in the mind of this very experienced judge. He nowhere refers to the absence of corroboration: and when at the close of his judgment he announces that the circumstances afford corroboration, their Lordships cannot presume, on virtually no grounds, that he intended to say simply that the circumstances afforded consistency only. The circumstances were, indeed, consistent also with the appellant's story.

Their Lordships do not need to emphasise that the circumstances did not afford corroboration of the complainant's allegation of no consent. That was the view of the Court of Appeal: their Lordships share it: and the Public Prosecutor admits it. The case is one therefore where the appellant has been convicted on the basis that the complainant's allegation was corroborated when it was not. It is accordingly one of those cases where the protection of the rule which guides Courts in these matters has, in effect, been withheld from the appellant. There is thus a miscarriage of justice bringing the case within the category of cases where the Board will intervene.

Their Lordships would add that even had this been a case where the learned Judge had in mind the risk of convicting without corroboration, but nevertheless decided to do so because he was convinced of the truth of the complainant's evidence, nevertheless they do not think that the conviction could have been left to stand. For in such a case a judge, sitting alone, should in their Lordships' view, make it clear that he has the risk in question in his mind, but nevertheless is convinced by the evidence, even though uncorroborated, that the case against the accused is established beyond any reasonable doubt. No particular form of words is necessary for this purpose: what is necessary is that the Judge's mind upon the matter should be clearly revealed.

Their Lordships recognise the careful nature of the judgment in the present case: but on this particular point it is ambiguous as the differing interpretations of the Court of Appeal and of their Lordships show; and there should be no ambiguity upon such a matter where the liberty of the subject is involved.

It was argued in the alternative on behalf of the appellant that the Court of Appeal erred in not applying its own mind afresh to the evidence. Their Lordships are not convinced that the Court of Appeal failed to do so. The passage in the learned Chief Justice's judgment which is relied upon by the appellant is as follows:—

> " In every system of administration of law more advanced than the exercise of tribal justice by the assembly of the tribe there must be some organ of society to whom society delegates its powers of deciding such matters as the guilt of offenders. That is the Judge. In our view there is much wisdom in the aphorism '*Optima est lex, quae minimum relinquit arbitrio judicis*'. So far as we are concerned, however, it is not for us to criticise the limits which the law imposes on the judicial power, it is our duty to accept them and if necessary to interpret them. And, so long as the authority to which that power is delegated keeps within these limits and observes the rules appointed by the law for the exercise of that power then his decision must be accepted."

It was argued that this meant that even if the Court of Appeal thought that the verdict of the trial judge was wrong, the Court could not intervene unless he had committed some error: and that in the absence of such error, the Court could not examine the evidence afresh with a view to altering his decision if the Court considered that justice required it to do so.

Their Lordships do not so interpret the judgment of the Court of Appeal. By section 29(1) of the Courts Ordinance 1948, the Court may " confirm, reverse or vary the decision of the trial Court or may order a re-trial or may remit the matter with the opinion of the Court of Appeal thereon to the trial Court or may make such other order in the matter as to it may seem just . . .". The width of the jurisdiction thus conferred is inconsistent with the limitation alleged by the appellant to have been imposed by the Court upon itself in the present case. Their Lordships do not further elaborate the point since it is not necessary to their conclusion to do so.

Finally the respondent sought to argue that there were significant differences between the law and practice in England and the law and practice of Malaysia as to the necessity for and the desirability of corroboration, and as to what constitutes corroboration. No such argument was submitted to the Courts below, whose views upon the matter would be indispensable to the Board. In the circumstances this fresh argument was not heard.

Their Lordships have reported to the Head of Malaysia their opinion that the appeal should be allowed and the appellant's conviction quashed.

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In the Privy Council

CHIU NANG HONG

v.

THE PUBLIC PROSECUTOR

DELIVERED BY
LORD DONOVAN

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