Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik
[2007] SGHC 47

Case Number	: CC 23/2006
Decision Date	: 03 April 2007
Tribunal/Court	: High Court
Coram	: Choo Han Teck J
Counsel Name(s)	: Christopher Ong Siu Jiu and Crystal Ong (Deputy Public Prosecutors) for the Prosecution; Udeh Kumar s/o Sethuraju (S K Kumar & Associates) for the accused
Parties	: Public Prosecutor — Mohammed Liton Mohammed Syeed Mallik

3 April 2007 Judgment reserved.

Choo Han Teck J:

1 Pursuant to the direction of the Court of Appeal made on 9 February 2007, the statement recorded from the accused on Christmas Day of 2005, known as P73, was admitted into evidence and, consequently, the evidence of the case should be reviewed together with it. The statement made some vague references to a second incident of rape and a second incident of sodomy. The accused was charged with two charges of rape and two charges of sodomy, but I convicted him of only one charge each of rape and sodomy and acquitted him of the other two because I doubted the evidence of the complainant on those two charges. P73 did not persuade me that the complainant's evidence had been bolstered to merit a change of view.

2 The references in P73 to the second rape and sodomy incidents were very brief and stated in the following terms: "I rested for a while before I approached her again. I asked her to open her leg and she just listen to me. I then inserted my penis into her vagina again and started moving. I keep moving but I cannot ejaculate, so I took put my penis and tried to put it inside her anus again. My penis did not go into her anus because she moved her body away." The complainant had testified that at the end of the afternoon, she did have one instance of consensual sexual intercourse with the accused. I am not fully convinced that this reference in P73 was a reference to a second incident of rape. Reading the statement as a whole, and having regard to the accused person's explanation, I am not convinced that this second vaginal intercourse was the second and not the third. It is important to remember that as far as the accused was concerned, there was never a "third". The second one was the consensual intercourse, and his description in P73 was consistent with the complainant's evidence at trial of what she described as the "third", the consensual, act. I am also not certain that the narration of the acts had been recorded in a precise chronological order. When the accused was asked (in question no.22 in P73): "On the second time while you were moving your penis inside Tuti's vagina, did you ask her "why water cannot come out"? The accused person's reply was, "When I asked her she said that maybe I am too tired and I am perspiring, she even suggest to me to rest a while." This kind of conversation made sense only in the context of this case, and it seemed to indicate that there was no second rape. There was also the problem of communication between the accused and the interpreter, who was not a native Bengali speaker, in the recording of that statement. In my assessment of this accused, I am minded to give him the benefit of the doubt that his version was true. I will not place it any higher than that to avoid any misunderstanding as to the conduct of either the interpreter or the recording officer. They are not on trial.

3 The reference to the second sodomy incident described in the statement quoted above was

only an attempt and not a completed act. In view of the discrepancy between the act of an attempt and the completed act that the complainant testified at trial, I do not think it safe to convict the accused on the second charge of sodomy. The learned DPP submitted that the statement would at least indicate an attempted sodomy. There was, however, no application by the learned DPP to amend the charge, and although the court has the power to amend the charge on its own accord, or convict the accused on the basis that the evidence disclosed an offence other than the one which the accused was charged, it would not normally do so unless the evidence had been proved beyond reasonable doubt. I do not think that the second sodomy charge should be amended because the evidence indicating an attempt was not sufficient in the circumstances of this case. P73 also mentioned that the accused had cut the complainant with a knife, but in that statement the accused also stated that he did not know how that came about and thought it might have been accidental when the complainant and he were struggling and fighting earlier on. The accused also testified that he had protested his innocence but was told by the interpreter to take the cue from the investigating officer. The accused had also tried to speak a few times in English but was told to speak only through the interpreter. As previously mentioned, there is no need to impute any sinister motive or conduct on the part of either the interpreter or the investigating officer since they were themselves following the procedure of recording a statement. But noting this is not a basis for concluding that the accused must therefore be lying. I cannot reach that conclusion on the evidence of this case.

4 The DPP submitted that the statement in P73 must be given its "full weight". I assumed that that was to urge me to accept the statement as compelling truth. I had already found that the facts of this case were unusual and complex. What was absolutely clear was that what transpired between the accused and the complainant arose from a lovers' quarrel. In those circumstances, allegations of criminal offences, especially sexual offences without consent, must be evaluated together with the evidence of the past history of consensual sex between them, the history of their relationship, and how much of their testimonies could be accepted safely. Unlike civil cases, where the court may choose between two competing stories and accept the one on a balance of probabilities, that is to say, accepting that version because it seemed more plausible than the other, in a criminal case, there is an important norm to be taken into account at all times – that where there is a reasonable doubt, that doubt must be resolved in favour of the accused. It is inherent with the requirement that the prosecution proves its case beyond reasonable doubt. What this means is that unlike a civil case, the court's verdict might not merely be determined on the basis that as between the two competing stories, which version was the more plausible one. In a criminal case, the court may find that the complainant's story to be more probable than that of the accused person's version, and yet, be convinced that there is a reasonable possibility that the accused person's story could be true. If that were the case, the court's duty is to acquit. Unlike a civil case, the court need not make a decision by concentrating on which of the two versions was more probable. In the criminal trial the court must remind itself to break from any habitual inclination to contemplate the question of the burden of proof on the basis of a civil case, and instead, ask itself whether there was a reasonable possibility that the accused person's version was true. There are many ways of understanding and applying this precept. One example is this. If a guilty verdict can only be made by drawing an inference that the accused was not telling the truth, and there was nothing other than the court's impression of the accused as a witness, then the court should convict if it disbelieves the accused. Giving the accused the benefit of the doubt in such a case meant simply that the judge believed that the accused might be telling the truth, even though, if compelled to make a choice only between "probable" and "improbable", he might have to say it was improbable. In some such situations, the judge might have no better guide than his intuition, which is not a perfect gauge; but sometimes, that is all there is available to save an innocent man from conviction.

5 At the conclusion of the trial, I was not convinced of the complainant's evidence in respect of the first, second, third, fifth, and eighth charges and acquitted the accused of those charges. Having

now considered P73 and the testimonies of the investigating officer, the interpreter, and the accused in respect of that statement, and reviewing the evidence, both oral and documentary, I am not persuaded that P73 made any difference to my findings and orders, and find no reason to alter them in any way. The verdict and orders made at the end of the trial on 27 October 2006 shall therefore remain.