

PUBLIC PROSECUTOR

V

BESAR BIN AHMAD

INTERMEDIATE COURT — IC CRIMINAL TRIAL NO. 9 OF 1993

JUDGE HAYATI.

27TH APRIL, 1996.

JUDGMENT

The defendant, Besar bin Ahmad, who is also known as 'King-Kong' faced a charge of rape, it being alleged as follows —

"That you on the 27th day of October, 1992, at about 2300 hours, at an open space Kampong Mumong, Jalan Seria/Belait By-Pass, Negara Brunei Darussalam, committed rape on NORHAYATI BTE HJ LANDOK (16 years) and you have thereby committed an offence punishable under section 376(1) of the Penal Code".

At the trial, the prosecution added an alternative charge of attempted rape in the following terms

"That you, on the 27th day of October, 1992, at between 10.00 p.m. and 11.00 p.m. in a car registration number KD 6348 parked at an open space at Kampong Mumong, Jalan Seria/Belait By-Pass, in Brunei Darussalam, did attempt to commit rape on one Miss X

(NORHAYATI BTE HJ LANDOK) and in the commission of the said attempted rape you voluntarily caused hurt to the said Miss X and you have thereby committed an offence punishable under section 376(2) of the Penal Code read with section 511 of the same".

The proper name of the complainant appeared in each charge but she will be referred to as

'Miss X' in this Judgment.

The defendant pleaded not guilty to both the charges.

I remind myself that in a criminal prosecution, the burden lies upon the prosecution which must establish, so that I am sure, every element of any charge which is brought beyond reasonable doubt. This burden lies on the prosecution throughout the case and does not change.

I should also add that a conviction on one charge does not mean that I mustreach the same conclusion on the other. It is necessary to consider the evidenceon each charge separately, in order to ensure that the prosecution hasestablished all the element of the offence on that charge beyond reasonabledoubt.

I should also perhaps mention it for the purpose of record why this casetook a long time to come to trial.

The defendant was first charged in Court on 27th October, 1992. At thattime, the complainant was about 15 years old. Alleged rape was supposed to havetaken place on 27th October, 1992. The

P.I. commenced on 17th June, 1993 and defendant was committed for trial onthe rape charge on 19th June, 1993. The case was then fixed for hearing on 10th January, 1994to 15th January, 1994. On 10th January, 1994, defendant did not appear. Awarrant of arrest was issued. The police could not trace the defendant until9th January, 1996. Defendant was remanded from 9th January, 1996 todate.

It is obvious that this delay is not attributable to the Court or to theprosecution but due to the fact that the defendant absconded.

THE CHARGES

The main charge is that of rape.

Section 376 of the Penal Code defines rape as being committed when a man has sexual intercourse with a woman in the circumstances whichare set out in five descriptions in that section. These include sexualintercourse with a woman —

- (1) against her will ;
- (2) without her consent ;
- (3) with her consent when this was obtained by putting her in fear of deaorth or hurt ;
- (4) with or without her consent, when she is under 14 years ofage.

According to the explanation attached to that section, it is sufficient toconstitute rape if there has been some penetration of the woman by the maleorgan whether or not this is followed by an ejaculation inside or outside thewoman. The fact of ejaculation is not conclusive and it may be absent in thecase of rape or attempted rape.

The second charge is of attempted rape and in the commission of the attempted rape, voluntarily caused hurt to the complainant (hereinafterreferred to as 'Miss X').

In order to establish that an attempted rape took place, it is necessary for the prosecution to show that the accused tried to commit the offence of rape and that what he did would have amounted to rape if he had been successful in his attempt.

In a charge of rape and also attempted rape, corroboration of the evidence of the complainant is required, and I have to direct myself in the same way as provided for by *DPP v Kilbourne* (1973) AC 729.

Having warned myself that it is dangerous to act on the evidence of the complainant alone, I may nevertheless do so. If I am satisfied that her evidence is so credible that I am sure of the guilt of the defendant and I am prepared to act on the complainant's evidence alone. Complaints which have been made by a victim in the sexual case do not, in English law, amount to corroboration of her evidence. Under that system, complaints amount to no more than what is called evidence of the consistency of her conduct. In Brunei, however, such evidence may amount to corroboration as ruled by Honourable Chief Justice in *PP vs AbdRahman and Others* (C.T. No. 7 of 1988).

Section 157 of the Evidence Act is in general terms and provides that the evidence of a witness may be corroborated by an earlier statement by that witness at or about the time the fact took place. In the Abdul Rahman case, the Honourable Chief Justice decided that evidence of a complaint is

admissible as corroboration if the complaint was made as soon as can reasonably be expected after the incident occurs.

I am satisfied that the complaint which was made by Miss X to her mother, Dayang Lampai binti Tamin (PW2) was a complaint made by her at the earliest possible moment.

PW2 testified that on that night the 27th October, 1992, the time she could not remember, the defendant who had been staying with them and whom she treated like a son, and her daughter, Miss X returned home. She saw Miss X went straight into her room. When the defendant left, Miss X came out. PW2 said Miss X looked angry and she was crying. PW2 was surprised and asked her what's the matter. Miss X then told her that she met the defendant at the Padang. He had told her that her half brother had asked her to go home. On hearing that, she followed the defendant home. Defendant drove her home. But, on the way home, the defendant stopped at a lonely spot at Jalan Pandan, undressed her and raped her. PW2 asked Miss X if she consented because if she did, PW2 will ask him to marry her. But, Miss X said 'No'. Miss X also told her, defendant warned her not to tell PW2, or he will kill her.

This complaint having been made at the earliest opportunity constituted corroboration of Miss X's evidence. The most important piece of corroborative evidence also lies in statement made by the defendant to the police which I will refer to later.

According to her evidence, on the night of 27th October, 1992 she and her brother and sister went to KBRC Padang to watch a stage show. She met the accused who told her 'Babu (mother) asked you to go home. She is not well'. Accused also told her male friend Abat, 'you better go home too, or something will happen'.

Miss X then followed defendant home in his friend's car.

However, instead of going home he took her to a dark and lonely road at Jalan Pandan to look for a friend. He stopped on a vacant land where houses were being constructed. Defendant asked her to take off her T-shirt. She refused. She told him she has her menses. He held her neck and climbed on top of her. He lowered the front seat where she was sitting. He pulled her shirt. Miss X bit his arm. He asked her to take off her jeans. She refused. He punched her stomach. He asked her to take off her jeans. She struggled. But he managed to pull her T-shirt above her breast and removed her jeans and underwear up to her ankle. She kept telling him she's having her menses. He ignored her. He took off his jeans. Miss X tried to escape. But, he pulled her back. He tried to put his 'barang' (penis) inside my 'barang' (vagina). But, she said, she was still struggling and he held her neck. He repeatedly tried again but it 'slipped' (masok-lepas). He tried to put his finger and his penis into her vagina. But, it was still 'in and out'. Miss X said she was not sure if defendant penetrated her. She was also not sure if he ejaculated. But, she said, she saw him throw something away outside the car. He then told her to dress.

He then drove the car home. He told Miss X 'Don't tell Babu (mother). If you do, 'mati kau' (you will die)'.

They arrived home. When defendant left, she complained to her mother immediately.

A police report was lodged by the complainant at about 3.00 a.m. on the 28th October, 1992.

She was examined by Dr Nyo (PW1) at SSB Hospital on 28th October, 1992 at 7.30 a.m.

Dr Nyo (PW1) found the following injuries as found in her Report (P2):

- 1) Neck – a bruise mark about 2 x 1cm on the right side near the sternomastoid muscle border about the middle of the neck.
- 2) Axilla – both sides of anterior axillary fold - bruise and scratch marks in fan-shaped.
- 3) Breasts – no injury detected.
- 4) Right arm – bruise mark about 4 x 3mm and some scratch marks on the medial side.
- 5) Abdomen – No external injury detected tenderness present over the punched site on the left lumbar region.
- 6) Pelvic examination - Public hair normal. Blood clot tangled with hair. Menstruating. Vulva – Normal. Fourchette – bruised. Hymen torn with a small haemotoma about 0.5 x 0.4cm. Vaginal wall intact.

She also wrote a follow-up note (P3).

She concluded in her Report (P2) that there was some injury to her vulva present which may be due to attempted sexual intercourse as given in her story.

In the Report and in Court, she does not seem sure whether penetration has occurred 'most probably there was' she said. She also said a finger may also cause the small tear in the hymen.

She said, the complainant who was 15 years old then seems to know what she meant by rape. She said 'penetration of the male organ into her vagina'.

She testified that the bruises on the neck and axilla could be caused by pressure being applied to the area. Bruises on the arm could be sustained during a struggle. The tenderness on the abdomen could be caused by a punch.

The prosecution also tendered a Report made by Dr Haji Hadi Mohd Zuhdi who gave evidence at the P.I. but had since been terminated from his contract and left Brunei. His whereabouts is unknown.

The defendant consented to the Reports (P10) being tendered by the prosecution, under section 380A of the C.P.C.

A Malay translation of the Report had been served on him. Dr Hadi found the following injuries on the defendant —

- (1) Bite marks which conform the upper and lower teeth over the right forearm.
- (2) Another bite marks made by similar upper and lower teeth over left arm with bruises just above the bite marks.

The prosecution also tendered a statement made by the defendant to the police which the defendant did not object to as being given voluntarily (P7).

In his statement, the defendant admitted telling Miss X that her mother had asked her to go home. He also admitted undressing Miss X. He also admitted trying to insert his penis into Miss X's vagina but Miss X told him, his penis is too big and he therefore stopped and inserted one of his fingers instead for a while when Miss X told him to stop.

Defendant admitted that he had some feelings for Miss X but Miss X already has a boyfriend. Defendant's statement provides corroboration in so much to the extent that he did attempt to have sexual intercourse with the complainant although he made it appear as if it was with Miss X's consent.

Defendant chose to remain silent and did not call any witnesses for his defence.

FINDINGS

I accept that the complainant is a truthful and credible witness. She also gave her evidence fairly in the sense that she does not exaggerate but informed the Court when she is not sure of something. I find her evidence both reliable and credible.

The complainant's evidence is corroborated by the medical evidence. The evidence and Report of Dr Nyo, who examined Miss X on 28th October, 1992, confirmed that she had a small, recent tear in her hymen which can be caused by any forceful introduction of foreign bodies. The foreign bodies can be a penis, or a finger or any blunt object.

She also detected bruises on Miss X's neck, axilla and right arm and tenderness on her stomach.

Miss X's evidence is also corroborated by the defendant's statement to the extent that he did attempt to have sexual intercourse with Miss X on the material date and time as alleged.

Dr Hadi found bite marks on him as stated in his Report (P10) and as shown in photographs (P6).

The complainant testified that she tried to struggle and bite the defendant's hand. Defendant held her neck and punched her in the stomach. The bruises and the tenderness in her stomach found by the doctor and the bite marks on the defendant corroborated her story in this respect.

The complaint made by Miss X immediately to her mother which was consistent with her complaint to the police and with her evidence throughout also provides corroboration of her evidence.

The only issue left to be decided by the Court in order to find defendant guilty of rape is whether there was penetration.

The complainant, who was about 15 years old at the time of alleged rape, testified fairly and honestly that 'he repeatedly tried to put his finger and his 'barang' (penis) into my private part but I struggled. He held my neck. He then put his finger and his private part but it was 'masok-lepas' (in and out)'.

'I think I could feel his finger and penis inside me. But it was in and out. I am not sure if he did penetrate me'.

Dr Nyo (PW8) was not very sure whether there was penetration of Miss X's vagina by the defendant's penis. In her early Report dated 28th October, 1992, when she examined Miss X at about 7.30 a.m., she concluded that the injuries she found on Miss X were 'possibly caused by struggle and rape'. In her note dated 21st January, 1993; she noted at para 5 :

"Intact vaginal wall doesn't mean that the girl has not lost her virginity. As for whether there was any sexual intercourse, I cannot say definitely. There was some injury to her vulva present, which may be due to attempted sexual intercourse as given in her story. No spermatozoa was

recovered from her vagina and acid phosphate being normal may be due to the fact that the girl was menstruation at that time or no ejaculation occurred inside the vagina".

In Court, PW8 was fairly and equally unsure. Asked whether there was penetration or sexual intercourse? Probably there was. 'Can't say definitely. Injury may be due to attempted sexual intercourse'.

'If much force had been used, finger may also cause the small tear in hymen'.

'Definitely, a blunt object could have been inserted into the vagina. It could have been a finger'. I am satisfied on the evidence that the events described by the girl and which to a large extent, was corroborated by the defendant's own statement which he admitted was voluntary did take place.

Although the defendant made it appear as if Miss X had consented to what happened, I accept Miss X's evidence which was amply corroborated by the medical and other evidence that I have earlier mentioned, that Miss X did not consent to what happened that evening.

The only issue left to be decided by the Court, is whether there was penetration which will find the defendant guilty of rape.

In this respect, Miss X's evidence is unreliable. She was only about 15 years old at that time. The Gynaecologist, PW8, was unsure as to whether there was penetration or sexual intercourse or if the small tear in Miss X's hymen was caused by defendant's penis or finger.

Miss X said defendant tried to put both finger and his penis, but it slipped 'masok/lepas'. Defendant claimed he attempted to put in his penis but Miss X said it was too big and he stopped. He inserted his finger instead.

That being the case, there is, I feel reasonable doubt as to whether an offence of rape had been committed.

There is, however, I find, sufficient evidence to convict defendant on the alternative charge of attempted rape. I should not of course, find an accused person guilty of attempted rape, unless I was satisfied that the evidence goes beyond what would be necessary for the offence of outraging the modesty. I must be satisfied that the accused, whatever his original intention may have been attempted to commit the offence of rape as defined in section 375 on the person of Miss X. The evidence of attempted rape must be clear. Did the defendant intend to carry out the offence in spite of her lack of consent?

I have no doubt that the defendant did. I am satisfied that he attempted to rape her and in the course of the attempt, voluntarily caused hurt to her, by holding her neck, punching her abdomen causing the injuries found by PW8.

I find that the defendant was unable to complete the act of rape only because of the fact that Miss X was menstruating or indeed, she was too small, or she was struggling and in fact managed to bite his arm and shoulder.

so.

I am sure, nevertheless, that he did try to penetrate Miss X against her will but he failed to do

I convict the defendant of the offence of attempted rape and in the course of that attempt voluntarily caused hurt to Miss X, as charged in the alternative charge punishable under section 376(2) of the Penal Code.

SENTENCE

The defendant is aged 28 and single. He was employed in the Survey Department at Kuala Belait. At present, he is serving a sentence of 3 years imprisonment with regard to an offence under the Misuse of Drugs Act.

Section 511 of the Penal Code provides that the same penalty as for a substantive offence is to apply to an attempt, save that, the maximum period of imprisonment is not to exceed half the maximum period of imprisonment prescribed for the full offence.

An offence of aggravated rape in the circumstances set out in section 375(2) would carry a minimum sentence of 8 years and 12 strokes. The maximum sentence of rape would be 30 years and 24 strokes. For an attempted rape, in the circumstances of section 376(2) the maximum period of imprisonment would be 15 years.

This is certainly not a case of minimum sentence. Miss X, looked upon him as her brother. He had been staying with her family for more than 2 years. He abused Miss X's trust and her family's. He purposely misused that trust by misleading the girl that she was being taken home to her mother.

It is of no mitigation at all that he said he had some feelings for the girl. If true that should have made him feel more protective towards her. Instead, he abused her himself. He absconded for well over a year. Although an alternative charge of attempted rape was put in, early at the beginning of the trial, he chose to plead not guilty and subject the girl to the trial.

I impose on the defendant sentences of 10 years imprisonment, to run from today and the minimum 12 strokes.

(HAYATI BINTI POKSDSP HAJI MOHD SALLEH) Judge

27th April, 1996

DPP Rahayu for Public Prosecutor. Accused in Person. Unrepresented.