

Public Prosecutor v Mark Kalaivanan s/o Tamilarasan and Others
[2003] SGHC 174

Case Number : CC 30/2003
Decision Date : 11 August 2003
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Hamidul Haq, Cheok Yu-Liang and Tan Wee Soon [Attorney-General & his Chambers] for the Public Prosecutor
Parties : Public Prosecutor — Mark Kalaivanan s/o Tamilarasan; Samynath A/L Marimuthu @ Marimuthu; K. Balamurugan

Criminal Law – Offences – Rape

Criminal Law – Abetment – Abetment of rape.

Criminal Procedure and Sentencing – Sentencing – Principles – Multiple charges concerning same incident – Whether global view of punishment relevant and appropriate.

1 In the early hours of 10 July 2001 a taxi-driver, Abdul Aziz drove into the carpark at the Newton Hawker Centre. He believed it was about 4.05am. As he advanced towards the Automated-Teller Machine ('ATM') kiosk he saw three men running past his taxi towards the food stalls. Moments later, a young Indian girl ran from the ATM kiosk and stopped his taxi. She got in through the passenger side of the car and appeared distraught. Abdul Aziz described her as 'distressed and hysterical'. She told him 'Uncle, three boys raped me and they beat me'. Abdul Aziz testified that he could see that the girl was bloodied and injured. The medical evidence showed that her injuries included abrasions to the head and face, as well as tenderness around the abdomen region. The medical evidence also showed the presence of spermatozoa in her vaginal and urethral areas. These evidence were given by Dr Goh Wei Ching, Dr Tay Seow Yian and also Dr Jasmine Heng, a forensic scientist.

2 While trying to calm the girl, Abdul Aziz also called the police. Shortly after that he noted that the girl had calmed down slightly and he let her have his handphone which she used to call her then boyfriend Rajesh Kumar who worked as a waiter at the 'Asoka Pub'. The girl in question was the complainant in this case. She is 22 years old and was known to her friends as 'X'. Rajesh Kumar testified that shortly after 4am he received a telephone call from X. This was the one made with Abdul Aziz's telephone. He said that X told him in Tamil repeatedly that three men raped her. Rajesh asked if she knew who they were. She told him that one of them was 'X's boyfriend'. Z was a friend of X and worked with her at the "N" pub as a waitress. Z was a full-time waitress but X was a part-time waitress. Z's boyfriend was Samynath A/L Marimuthu, the second accused in this case.

3 Rajesh then spoke briefly with the taxi-driver because X appeared too distraught to even tell him where she was. Rajesh, upon being told by Abdul Aziz that they were still at the Newton Hawker Centre, rushed there by taxi. The police were already there when he arrived. He asked X again if she knew who they were. This time she said that it was the three men were among the group she was with at the 'Asoka' pub at 1.20am. She told Rajesh that besides Samynath, one of the three wore a scarf (later ascertained at trial to be a bandanna) and the other wore a red-netted T-shirt. These two were later ascertained to be Mark Kalaivanan and K. Balamurugan, the first and third accused respectively. Mark is 24 years old, Samynath is 25 and Balamurugan is 26 years old. At the material time, the first accused was in the Navy performing national service. The third accused was a regular in the army. Samynath was unemployed.

4 At this point, it is relevant to trace what X and her friends were doing on the night just before 10 July 2001. X started her duty at 'N' on 9 July 2001 about 7pm. At 12.45am, 10 July 2001 her friend and colleague, Z asked if she (X) would join her and some friends at the 'Asoka' pub (where Rajesh was working). X agreed, pleased with the prospect of meeting Rajesh, with whom she had a minor misunderstanding earlier in the evening of 9 July 2001. Z and X arrived at the 'Asoka' pub at 1.20am. She was introduced to the second accused as Z's boyfriend. The others in the group were the first and third accused, one J, S (who was the girlfriend of the first accused), and P. This group including Z and X drank and danced while Rajesh was working. At 2.30am when the pub was about to close, X told Rajesh that she was going home but he, probably still peeved by their earlier misunderstanding, ignored her.

5 X was subsequently persuaded by Z to join the group at the Newton Hawker Centre for supper. When they arrived the group sat at two tables. Z and X were together while the other six were at another table. X and Z had an argument over the use of Z's handphone. X then borrowed the handphone from the second accused. The evidence from the second accused was that this handphone belonged to his girlfriend Yogeswari. A total of five calls were made from this handphone to Rajesh's handphone between 3.02am and 4.27am. X only managed to speak briefly to Rajesh once, and she was crying at that time so one of the accused took over the phone and spoke to Rajesh. Over the next few calls, the accused persons told Rajesh a number of lies, saying, for instance, that X had left Newton Hawker Centre and gone home. This particular and significant lie was told to Rajesh during the second call.

6 What happened at the Newton Hawker Centre was quite different. X did not go home. She was deceived into believing that Rajesh was on his way to take her home and that she was to wait for him at the ATM kiosk. She followed the three accused to the kiosk. The second accused took her there with the first and third accused just behind them. Independent evidence from the rest of the group, including S, showed that the three accused left the group about the same time; but none of those witnesses suspected foul play and were, therefore, not paying full attention, resulting in some minor discrepancies in their account of the events. The second accused took X behind the ATM kiosk and there he tried to hug her. When she pushed him away she was punched. She testified that she was assaulted on the head and face by two of the accused while a third covered her mouth. Thereafter, the second accused, first accused and third accused took turns in that order to rape her.

7 She was wearing several layers of clothing. For her top she had a brassiere and a blouse. She wore a pair of shorts over her panties, and a pair of tights over her shorts, and finally a pair of pants. Her pants were taken off her and was subsequently found nearby at the kiosk. Forensic evidence showed that the second accused person's semen was found on the pants. The first accused's semen was found in X's vagina. She testified that all three had penetrated her in vaginal intercourse. The three accused had tried variously to impute that X was a wanton of loose morals, but I do not think that there was any reliable evidence to sustain that assertion. I find her to be a reliable witness and accept her evidence.

8 After the sexual assault was over, X overheard the men talking as if they might harm her further. In fright and fear she made her escape and ran to the car park. The three accused were seen by Abdul Aziz running back towards the food stalls. Abdul Aziz impressed me as a very reliable witness although under cross-examination, he did at one stage agree with Mr Mohan, counsel for the first accused, that he cannot be absolutely sure. However, it is my distinct impression that he said this to avoid appearing that he was sure beyond a shadow of a doubt. His evidence overall was that what he had heard and seen were reliably imprinted in his memory and he had accurately recalled them in testimony in court. He testified that one of the three men wore a 'red jersey with blue pants' (fitting description of the third accused), another had a bandanna (fitting the description of the first

accused), and the third, a greyish-black T-shirt and black pants (fitting the description of the second accused). X stopped Abdul Aziz's taxi and got in. Abdul Aziz helped her call Rajesh as well as the police.

9 In the meantime, the friends of the three accused testified that the trio returned to their table about half an hour after leaving with X. S noticed scratches on the face of the first accused and his T-shirt was dirtied. He told her that he was chased 'by someone' and fell. He declined to elaborate when asked. S noticed that the second accused was perspiring and looking exhausted. P testified that when the three accused returned to their table she noticed that the first accused's T-shirt was dirtied. She also noticed that the third accused's trousers were unzipped and she could see his underpants.

10 In his defence, the first accused said that the second accused had taken X to the ATM kiosk and left her there. When he returned he told the first accused that X 'was high' and he had 'romanced her'. The first accused then wanted a piece of the action and so he followed the second accused back to the ATM (without the third accused). He found X to be lying on the bench and he carried her to the back of the ATM. Shortly after that he saw her masturbating the second accused. When she finished, he went to talk to her and the second accused left the place. X then started to cuddle him and he was aroused. They then had sexual intercourse but he claimed that she had consented because he had dated her twice before and on each occasion they had sexual intercourse too. This assertion was denied by X and I believe her.

11 The second accused also claimed that X masturbated him but he did not have sex with her. He explained that that was why his semen was found on her pants and not inside her. He said that after that he walked back to the food stalls alone and did not know what the other two accused were doing.

12 The third accused said that he did not have any sexual contact with X but he admitted to hitting her because he was angry that she led his friends, the first and second accused to commit rape. He claimed that he saw the first and second accused holding X down and raping her. So, when they finished, he suggested that they hit her and knock her out – or 'concuss her' in his own words – so that they will have time to get away. His evidence on the act of causing hurt, was contradictory and inconsistent with that of the first accused who said that he saw the third accused going behind the ATM kiosk to talk to X but soon heard her screaming and shouting obscenities at the third accused. This infuriated him (the first accused) because the third accused was his childhood friend. So that was why he and the third accused hit X. Some blood stains were found on his underwear.

13 The evidence of all the three accused were inconsistent with the evidence of independent witnesses who included their friends, Z, S, J and P, and also Rajesh and Abdul Aziz, as well as the medical and forensic evidence. More significantly, they contradicted each other so fundamentally that I have no doubt that their versions were not true. Furthermore, none of them had presented their defence or anything close to that in any of their previous statements to the police, and that included the cautioned statement under s 122(6). Finally, the first and third accused accepted their friends' testimonies that once at the food stalls, and once in the police van these two accused had spoken in Tamil to their friends, asking them not to tell the police that they (the accused) had left the tables at any time. This conduct was clearly incriminating in nature.

14 In the closing submissions, Mr Mohan on behalf of the first accused, and Mr Gurdaib Singh, counsel for the second accused pointed out a number of inconsistencies in the testimonies of the prosecution witnesses. I do not think that those discrepancies rendered their evidence unreliable. For example, whether the three accused left their tables at the same time or whether the second

accused went first followed by the first and third accused seems to me, in the circumstances, to be a difference in perception. It was likely that the second accused was either a few metres ahead of the other two, or in terms of time, the other two left a minute or less after him, but it may appear to some that the second accused left first, followed by the other two, and by others as all three leaving about the same time. I adopted the same approach in respect of the evidence of the three accused. Where they are minor and do not appear to be material, I do not hold them against the accused. The major contradictions, however, cannot be ignored. For example, two accused said that X only masturbated the second accused but the third accused said he saw the second accused having sexual intercourse with her. The different versions as to why the first and third accused hit X after the rape were also major discrepancies. The first accused also contradicted himself in court when he said that he had dated X twice before, but in his statement to the police he said he did not know her. His explanation that he was then afraid to tell the truth did not convince me.

15 I am satisfied that the prosecution had proved its case on all the charges against the three accused, and the defence did not raise any reasonable doubt in my mind and, accordingly, I found all three accused guilty as charged and convicted them. There was little by way of mitigation save that none of the three accused had committed any sexual offences previously, and that although they each faced three charges, all the offences concerned the same incident. In respect of the two abetment charges that each of them faced, they could be amalgamated into one. The decision lies with the prosecution, but in sentencing the accused, I think that the principle of a global or overall view of the punishment is relevant and appropriate. Further, although hurt was caused, the injuries suffered were not very severe. In the circumstances, I sentenced each accused to a total of 16 years imprisonment and 24 strokes of the cane.

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