



Summary of Judicial Decision

HKSAR v L.Y.Y.

CACC 84/2018; [2020] HKCA 270

Decision : **Application for leave to appeal against conviction allowed**
Date of Hearing : **8 April 2020**
Date of Judgment : **8 April 2020**
Date of Reasons for Judgment : **29 April 2020**

Background

1. The Applicant was convicted after trial by a jury of one count of indecent assault and three counts of attempted rape. He was sentenced to 12 years of imprisonment. These offences took place in the years of 2012-2015 when the victim X, the Applicant's daughter, was aged 11-13. In the years of 2015 and 2016, X did make belated complaints to some people but this complaints evidence did not amount to evidence of 'recent complaint' in law. Such complaints evidence was however adduced throughout the trial, by way of examination of witness. The Applicant's appeal was allowed by the Court of Appeal on the sole ground that the jury might have misused X's post-assault complaints evidence. A re-trial was ordered but X decided not to testify against her father again. The charges against the Applicant was therefore dismissed.

Issue in dispute

2. Whether the learned trial judge's direction on the complaints evidence was proper and adequate.

Department of Justice's Summary of the Court's judgment

(full text of Court of Appeal's judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=127604&QS=%28I%2By%2By%29&TP=JU)

3. The last offence took place on a day between 2014 and 2015. Since September 2015, X had made complaints to PW3 about the Applicant's sexual assaults, PW3 being a church worker doing some gospel work at X's school (2015 complaint evidence). In late 2016, X also made similar complaint to her teacher and PW4, a social worker at X's school (2016 complaint evidence).
4. In the opening address of the prosecutor, on fiat, reference was made to



X's complaints to the above persons of the sexual assault by the Applicant. In PW3's evidence-in-chief, she testified that X did complain to her about the Applicant's sexual assault. Such complaint evidence was further elicited in greater details during cross-examination of PW3 and PW4.

5. It was accepted both in the trial and in the appeal that the 2015 and 2016 complaints evidence did not, in law, constitute 'evidence of recent complaint'. Such complaints evidence was self-serving hearsay evidence which normally had no probative evidence and thus inadmissible. The exceptions included : (i) when prosecution adduced it to explain how the case was brought up to court; and (ii) to counter the defence accusation of 'recent fabrication'. (Paragraphs 11, 21)
6. It was an error on the part of the prosecutor on fiat : (i) to make reference to the 2015 complaint evidence in her opening address; and (ii) to elicit the 2015 complaint evidence in PW3's examination-in-chief. As to 2016 complaint evidence, it was admissible on the basis in explaining how the case was reported to police. (Paragraph 22)
7. The learned trial judge's directions failed to properly direct the jury on the issue of 'recent complaint' and, considering the entirety of the summing-up, the Court was not certain whether the jury had misused the 2015, or even the 2016, complaints evidence. Since this was a 'one-on-one' sexual assault case, whether the jury had properly assessed X's credibility was of utmost importance. Lacking a proper direction, the Applicant's conviction was unsafe. The application for leave was thus granted and the appeal against conviction was allowed. (Paragraphs 22-24, 26)

**Prosecutions Division
Department of Justice**

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