The Curious Case of Bunya Anak Jalong: Lessons on Trial Advocacy

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Introduction

In the common law system, the 'principle of orality' takes centre stage in the adversarial system of trial. This mode of trial pits two adversaries against each other. It is premised on the belief that with each side presenting his or her version of the truth, it is the best way for the trier of fact to ascertain the probable truth.[1] In a criminal case the prosecution presents its evidence to establish the elements of the charge against the accused. The role of the defence is merely to cast doubt on the prosecution case.[2] Once reasonable doubt is established at the end of the whole case as to whether the accused person committed the offence, meaning that the prosecution has failed to make out a case beyond reasonable doubt, he is accordingly entitled to an acquittal.[3]

In the common law adversarial system the advocate is not concerned to arrive at the truth.[4] The principal role of the advocate is to persuade the tribunal that his client's case should prevail.[5] And this is done primarily by each side calling witnesses to testify on oath. The evidence is elicited by each witnesses advocate by examination-in-chief and re-examination. The other side is allowed to challenge the witness testimony by cross-examination.

The role of the judge (the fact finder if there is no jury) is to adjudicate rather than participate. Advocacy texts always point to making the evidence 'persuasive' for the fact finder. However many advocates will admit that the simplicity ends there. The internet is rife with jokes about advocates questioning of witnesses with undesired results. Take this one example for instance[6]:

> Attorney: This myasthenia gravis, does it affect your memory at all?
> Witness: Yes
> Attorney: And in what ways does it affect your memory?
> Witness: I forget
> Attorney: You forget? Can you give us an example of something you forgot?

At the most, this provides moments of hilarity. At other times, cases may be lost and won simply because of the conduct of the questioning. This article illustrates one such instance in the Malaysian case of *Bunya Anak Jalong v The Public Prosecutor*.[7] This case prompted much discussion about the laws pertaining to statutory rape.[8] But is also illustrates the pitfalls awaiting

1 Thomas A Mauet and Les A McCrimmon, *Fundamentals of Trial Techniques* (2edn, LBC Information Services, Australia) 1.
2 *Woolmington v DPP* [1935] AC 462.
3 *Loo Ting Meng v Pendakwa Raya* [2014] 1 AMR 389 at [31].
4 'Guide to Advocacy' (Middle Temple 2014) <www.middletemple.org.uk/sites/default/files/.../mt-advocacy-guide> accessed 12 June 2016.
5 See (n4).
6 Jason W Stevens, '18 Hilarious Things Lawyers Have Actually Said to Witnesses in Court' (The Federalist Papers Project n.d.) <http://www.thefederalistpapers.org/us/18-hilarious-things-lawyers-have-actually-said-to-witnesses-in-court> accessed 12 June 2016.
7 [2015] 5 AMR.
8 Charles Ramendran, 'Wan Junaidi: There are loopholes in statutory rape laws' (The Sun Daily 2015) <http://www.thesundaily.my/news/1418904> accessed 12 June 2016.

an advocate who fails to thread carefully when questioning witnesses' and where the objectives of the principles of examination-in-chief, cross-examination and re-examination are not carefully adhered to.

Background to the Case

Bunya Anak Jalong was accused of raping a girl in May, June, July and August 2011 at a hotel in Sibu. The complainant, aged 15 and four months, became pregnant and gave birth to a child at Sibu Hospital on 5 Feb 2012. Her adoptive mother lodged a police report on 5 Mar 2012 leading to police investigations and subsequently the arrest and prosecution of the accused in the Sibu Sessions Court on four counts of rape.[9]

The first charge stated that Bunya had raped the complainant at the end of May 2011 in a hotel room, framed under Section 376(2)(d) of the Penal Code.[10] The second, third and fourth charges were for sexual intercourse with a minor but with consent in the subsequent months of June, July and August at the same hotel, and framed under Section 376(1) of the same Code.[11]

Section 376(1) of the Penal Code provides that whoever commits rape shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to whipping.[12]

Section 376(2)(d) of the Penal Code provides that whoever commits rape on a woman without her consent, when she is under 16 years of age shall be punished with imprisonment for a term of not less than five years and not more than 30 years and shall also be liable to whipping.[13]

Section 375 of the Penal Code provides that a man is said to commit rape when he has sexual intercourse with a woman under circumstances falling under paragraph (a) to (g). The explanation to Section 375 states that penetration is sufficient to constitute the sexual intercourse necessary for the offence of rape.[14]

On 31 Oct 2013, the Sessions Court convicted the accused on all four charges and imposed a 15-year jail sentence and five strokes of the rotan for the first rape charge, as well as nine years' imprisonment and two strokes of the rotan each for the other three charges, which were to run concurrently. The court also ordered RM40,000 in compensation to be paid to the girl.[15]

Bunya appealed to the High Court against the convictions, sentence as well as the order to pay compensation. High Court Judge Supang Lian dismissed the appeals against conviction, varied the imprisonment sentences, ordered Bunya to pay the compensation and affirmed the sentences of caning.[16]

Bunya then appealed to the Court of Appeal against the whole High Court decision. Judges Datuk Abdul Wahab Patail, Datuk Linton Albert and Datuk Seri Zakaria Sam allowed the appeal, saying the conviction was not safe.[17]

Findings of the Court of Appeal

The main issue before the appellate court was whether there was penetration. Section 375(f) of the Penal Code provides that sexual intercourse with a minor, with or without her consent, is an offence when she is below 16 years of age. The explanation to the provision states that penetration is sufficient to constitute the sexual intercourse necessary for the offence of rape.[18]

DNA testing had confirmed the accused as the father of the child borne from the alleged rape.[19] The prosecution contended that this was proof of penile penetration. The Court of Appeal acknowledged that this would be compelling evidence that the accused (appellant) had committed the alleged rapes as charged.[20] On the face of it, it would appear a

9 *Bunya Anak Jalong v Public Prosecutor (and Another Appeal)* [2016] AMEJ 0255 at [1].
10 *Bunya Anak Jalong v Public Prosecutor (and Another Appeal)* [2016] AMEJ 0255 at [1].
11 *Bunya Anak Jalong v Public Prosecutor (and Another Appeal)* [2016] AMEJ 0255 at [1].
12 Penal Code (Act 574).
13 Penal Code (Act 574).
14 Penal Code (Act 574).
15 *Bunya Anak Jalong v Public Prosecutor (and Another Appeal)* [2016] AMEJ 0255 at [2].
16 Phyllis Wong, 'Uproar over man's acquittal in child rape' (Borneo Post 2015) <http://www.theborneopost.com/2015/05/10/uproar-over-mans-acquittal-in-child-rape/> accessed 12 June 2016.
17 See (n16).
18 Penal Code (Act 574).
19 *Bunya Anak Jalong v Public Prosecutor (and Another Appeal)* [2016] AMEJ 0255 at [23].
20 *Bunya Anak Jalong v Public Prosecutor (and Another Appeal)* [2016] AMEJ 0255 at [23].

rather straight forward case for the prosecution to prove but for the fact that the defence volunteered a novel argument to explain the conception.

At first instance, the accused had testified inter alia that there had been no penile penetration, that his hand or finger had semen on them after he had ejaculated and that while he continued to touch the complainant's (PW4) vagina, PW4 had touched his semen and that both of them had inserted their fingers into her vagina.[21] The appellant contended that the conception occurred because of the insertion of the semen stained fingers into PW4's vagina. The appellant contended that since penetration was not by penile, therefore there was no rape.

The issue therefore was one of whether penetration by penile was necessary for conception. If it was not, the conception could have taken place because of delivery of semen by fingers. This would explain the matching DNA of the child and the accused. Such penetration by fingers will also bring it outside the ambit of Section 375(f) of the Penal Code which requires penile penetration. To support their contention, the appellant pointed to the testimony of one witness for the prosecution, Dr Nurulhuda Binti Samsudin (known as Prosecution Witness 8 or PW8).

It was contended by the appellant that both the Learned Trial Judge and the Learned High Court Judge on appeal failed to appreciate adequately and properly or at all the evidence of PW8, an Obstetrics & Gynecology Specialist, when she said that in a normal case where the woman is fertile and the man is fertile conception can occur as long as semen bearing spermatozoa is introduced into the vagina and when she also said there was no need in such a case for supervised medical process as in the intrauterine insemination.[22]

The evidence of the court of first instance was perused by the appellate court. The first witness for the prosecution, Justina Lau Sie Wei (PW1), a Medical Officer in the Pediatric Department in Sibu Hospital, had expressed her doubt about the appellant's contention. This was noted by the appellate court which observed:

> *The possibility of conception by insemination by delivery of semen by fingers was put to PW1, a Medical Officer testifying for the first time. Her answer was she had not heard of any case report of fertilization taking place other than by sexual intercourse. In her reply, she remarked pertinently that "... If it can be done so easily then we do not need artificial fertilization." Given her experience her answer that she had not heard as such is not definitive as to whether it could happen. We took it she meant that fertilization taking place other than by sexual intercourse needs to be done in a conducive environment at the specialised medical facilities.*[23]

The Court of Appeal then went on to consider the testimony of PW8. A reading of the grounds of the judgment of the appellate court indicates that the testimony of PW8 was central to the finding of the appellate court.

The Court of Appeal referred to the cross-examination where defence counsel sought to prove that 'penile penetration' did not occur and that conception could happen even without penile penetration. According to a reading of the Court of Appeal's judgment:[24]

> *Dr. Nurulhuda (PW8) testified in cross-examination:*
>
> *Q15: In a normal case where the woman [is] fertile and [the] man is fertile, conception can occur as long as semen b[e]aring the spermatozoa is introduced to vagina?*
>
> *A: Yes, that possible.*
>
> *Q16: You don't actually need to supervise medical process as in the intrauterine insemination if they are fertile?*
>
> *A: Possible.*

Counsel is permitted to re-examine his witness after cross-examination. Re-examination allows a witness to explain and clarify relevant testimony which may have been weakened during cross examination. Where the cross-examination has not cast any 'doubts' on the testimony of the witness and the evidence remains largely unblemished, then re-examination would not have a useful purpose.

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21 *Bunya Anak Jalong v The Public Prosecutor* [2015] 5 AMR at [1].
22 *Bunya Anak Jalong v The Public Prosecutor* [2015] 5 AMR at [20].
23 *Bunya Anak Jalong v The Public Prosecutor* [2015] 5 AMR at [61].
24 *Bunya Anak Jalong v The Public Prosecutor* [2015] 5 AMR at [62].

In the Bunya Jalong case, counsel for the prosecution re-examined his witness (PW8). This re-examination proved to be a turning point in the case. The Court of Appeal noted:[25]

> *In re-examination, PW8 testified:*
>
> *Q5. Can the conception occur if the sperm is placed just at the mouth of the vagina?*
>
> *A: No, it must be placed within the vagina at the very least.*
>
> *Q6: How about the percentage of success in intrauterine insemination?*
>
> *A: Roughly between 4% to 16 %. Very low.*
>
> *Q7: Can this process being done without medical facilities?*
>
> *A: No.*
>
> *Q8: Refer to Q8 A No. 11 of cross-examination. Can you confirm that if a freshly ejaculated semen laden with spermatozoa is introduced to the vagina by the finger inserted, could conception occur?*
>
> *A: It is possible.*
>
> *DPP: No further question.*

The Court of Appeal then went on to base its finding in the following manner:

> *There was no other conclusion that the deputy public prosecutor accepted the prosecution witness' answer to re-examination question Q8. Even if the public wisdom is that other than penile penetration and introduction of semen, fertilisation occurs only by medically supervised insemination, there was confirmation by the prosecution's own expert witness, PW8, in a direct answer in re-examination and accepted by the deputy public prosecutor, that if a freshly ejaculated semen laden with spermatozoa is introduced to the vagina by the finger inserted conception could occur.*[26]

The Court of Appeal further observed:

> *Subsequent to this, no further evidence was adduced by the prosecution that PW8 was incorrect. We puzzled over these unusual testimony and what it means. Evidently, it means that even if fertilization is even less likely to be successful by means of delivery of fresh semen by fingers compared to medically supervised insemination, it nevertheless was possible.*[27]

The Court of Appeal held that this was 'reasonable doubt' when it stated:

> *Upon a maximum evaluation of the whole of the evidence before the court, the supposition that fertilisation occurred in this case by the introduction or delivery of semen by fingers, was no longer "but not in the least probable", but became a reasonable doubt because to the testimony of PW8, there was the testimony of the appellant, properly having been laid out in cross-examination of the medical officers, that fingers had been so used. The confirmation by PW8 made the challenged but unshaken testimony of DW1 just is at the very least bit probable as to raise a reasonable doubt. The sole basis that gave rise to a reasonable doubt has nothing to do with belief in the version of DW1, but that PW8's testimony is that DW1's version was possible.*[28]

The re-examination of prosecution witness (PW8) indicated that there was a possibility of conception occurring because of delivery of semen by fingers. Therefore, the very fact of conception was not of itself conclusive proof of penile penetration. The conception need not occur because of penile penetration.

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25 *Bunya Anak Jalong v The Public Prosecutor* [2015] 5 AMR at [63].
26 *Bunya Anak Jalong v The Public Prosecutor* [2015] 5 AMR at [64] (emphasis added).
27 *Bunya Anak Jalong v The Public Prosecutor* [2015] 5 AMR at [65] (emphasis added).
28 *Bunya Anak Jalong v The Public Prosecutor* [2015] 5 AMR at [75].

Conclusion

It was observed by Wright and Miller that under the adversarial system "the trial judge cannot behave like a French magistrate and embark on a personal fact-finding expedition, however deficient the efforts of counsel may appear."[29] The court can only proceed on the basis of the evidence adduced by the parties.[30] This point was reiterated by the Court of Appeal in its concluding remarks:

> *A material prosecution witness, PW8 testified that fertilisation of ova by introduction of fresh semen by fingers was possible. No steps were taken to call a more experienced doctor to give evidence to explain away the testimony of PW8. There is no excuse on the record for not obtaining expert evidence that could be called to counter it. The court is left with one inference, that the prosecution accepted the confirmation by PW8 and the result must follow.*[31]

The questioning of witnesses' therefore becomes all the more important as this provides the basis of the court's decision. The Honourable Society of the Middle Temple notes:

> *In one sense, it is impossible to teach the art of advocacy. No matter how long or thorough the advance preparation, the unexpected keeps breaking in, and instinct has to take over. Nevertheless, there are ground rules which make the advocate's task easier and lessen the chances of an emergency turning into a disaster.*[32]

Advocacy is essentially the art of persuasion. While thorough preparation and sound analytical skills are vital, equally important are performance skills such as examination-in-chief, cross-examination and re-examination. And an adherence to the principles which underpin these modes of questioning ensures that the art of persuasion succeeds.