

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN JENAYAH NO. K-06B-64-08/2023**

ANTARA

ZOLKAPLI BIN LONG @ MOHAMAD

PERAYU

DAN

PENDAKWA RAYA

RESPONDEN

(Dalam Perkara Mahkamah Tinggi Malaya Di Alor Setar
Dalam Negeri Kedah Darul Aman, Malaysia
Rayuan Jenayah No: KA-41LB-7-07/2022

Antara

Pendakwa Raya

Perayu

Dan

Zolkapli Bin Long @ Mohamad
(No. K/P: 680826-09-5029)

Responden

Dalam Perkara Mahkamah Majistret Di Langkawi
Dalam Negeri Kedah Darul Aman, Malaysia
Kes Tangkap No: KD-82-01-02/2019

Antara

Pendakwa Raya

Dan

Zolkapli Bin Long @ Mohamad
(No. K/P: 680826-09-5029)



KORAM:

**SUPANG LIAN, JCA
HAYATUL AKMAL BINTI ABDUL AZIZ, JCA
MUNIANDY KANNYAPPAN, JCA**

JUDGMENT

- [1] The appellant, Zolkapli Bin Long @ Mohamad, is appealing against conviction and an 18-month prison sentence for an offence under section 354 of the Penal Code (PC/Act 574), which is use of criminal force on a woman with intent to outrage her modesty.

The Charge

- [2] In this case, the appellant stood charged for the criminal act as follows:

“Bahawa kamu pada 20/10/2011, jam lebih kurang 2.45 petang, bertempat di Pejabat Suruhanjaya Syarikat (SSM) Tingkat 1 Pejabat LADA, Mukim Kuah di dalam daerah Langkawi, di dalam Negeri Kedah Darul Aman di dapati telah menggunakan kekerasan jenayah kepada Noor Shaheera binit Miran KPT: 920902-02-5568 dengan maksud untuk mencabul kehormatannya, dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum dibawah seksyen 354 Kanun Keseksaan.”

The Case for the Prosecution

- [3] On 20.10.2011, at approximately 2.45 pm, the victim (SP2) went to work at the Companies Commission of Malaysia (SSM) office in Langkawi. While she was in the appellant's office, he allegedly fondled her left breast and kissed her right cheek. SP2 reported the incident to colleagues and family before filing a police report the following day.



- [4] The Magistrates' Court, on 23.8.2020, had initially acquitted the appellant at the close of the prosecution's case, ruling that the prosecution has failed to prove a *prima facie* case. However, on appeal, the High Court on 13.10.2021 reversed the acquittal and ordered the appellant to enter on his defence. This order was made by High Court Judge 1 (HCJ 1). Notably, no written grounds of judgment were provided for his decision.
- [5] On 24.2.2022, at the end of the trial, the Magistrate acquitted the appellant, finding that the defence had raised a reasonable doubt in the case for the prosecution as to the guilt of the appellant. This led to another appeal lodged by the prosecution. That appeal was also allowed on 12.3.2023 but by High Court Judge 2 (HCJ 2) who had convicted the appellant and sentenced him to 18 months imprisonment.

Procedural Timeline

- 20.10.2011: Alleged incident at the SSM Office, Langkawi.
- 24.02.2022: The Magistrates' Court acquitted the Appellant at the end of the prosecution's case, ruling no *prima facie* case was proven. The prosecution had appealed against that decision to the High Court. HCJ 1 had allowed the appeal and reversed the order of acquittal made and substituted with an order for the accused to enter on his defence to the charge preferred against him. In other words, HCJ 1 had decided that premised on the evidence available before the learned Magistrate, there was sufficient credible evidence establishing a *prima facie* case against the appellant and it was for him to defend himself.



- After hearing the defence of the appellant, the Magistrate had acquitted him. The prosecution had appealed against that decision to the High Court, wherein the appeal was heard by HCJ 2.
- 12.3.2023: HCJ 2 allowed the Prosecution's appeal, setting aside the acquittal, found the appellant guilty, convicted him and sentenced him to 18 months imprisonment.
- On application by the appellant, stay of execution of the said sentence was allowed and the appellant was allowed bail pending appeal with conditions to the Court of Appeal (CA).
- Pursuant to subsection 50 (2) of the Courts of Judicature Act 1964 (CJA/Act 91), an appeal shall lie to the CA, **with the leave of the CA**, against the decision of the High Court in the exercise of its appellate jurisdiction in respect of this criminal matter which was originally decided by the Magistrate's Court. But such appeal shall be confined to only questions of law which have arisen in the course of the appeal and the determination of which by the High Court has affected the event of the appeal, like in the present case.
- 28.7.2023: Leave to appeal was granted by the CA on the following question of law:

“Bolehkah dapatan fakta Mahkamah Majistret berkenaan kredibiliti saksi diakas oleh Mahkamah Tinggi bila mana tiada sebab untuk berbuat demikian dan bila mana Mahkamah ini pun juga tidak ada penghakiman Mahkamah Tinggi?”

- Thereafter, the petition of appeal to the CA sets out *inter alia* the following grounds for appealing:
 - (i) Pesuruhjaya Kehakiman (PK) gagal teliti Alasan Penghakiman (AP) Mahkamah Majistret berkenaan kredibiliti saksi-saksi pendakwaan.



- (ii) Tiada alasan Mahkamah Tinggi semasa arahan untuk 'defence called' berkenaan kredibiliti saksi-saksi pendakwaan.
- (iii) Gagal teliti pengesahan Hakim Mahkamah Tinggi yang benarkan rayuan Pendakwa Raya seperti diperuntukan bawah seksyen 319 Kanun Tatacara Jenayah.

Core Legal Arguments

[6] Counsel for the appellant, raises two critical questions of law. It is argued that an appellate court should rarely interfere with a trial judge's findings on witness credibility unless they are plainly wrong, as the trial judge has the audio-visual advantage of seeing and hearing the witnesses.

Material Discrepancies

[7] The specific inconsistencies and credibility issues noted by the Magistrate regarding the prosecution's witnesses, particularly the complainant (SP2), are the following:

Inconsistencies in SP2's Testimony

[8] The Magistrate found that the testimony of the complainant (SP2) was inconsistent and lacked reliability when compared to her original police report (Exhibit P2):

- In her oral testimony, SP2 claimed the appellant left the office twice. She stated that upon his second return, he touched her left breast and kissed both her cheeks. However, in her police report (P2), she stated he only left once and, upon returning, hugged her from behind before touching her breast and kissing her cheek.



- In court, SP2 testified that she was shocked and stunned but did not scream. The Magistrate noted that the details she provided eight years after the incident were more detailed yet inconsistent compared to the report she made just one day after the event.
- The Magistrate found it unreasonable that SP2 could not accurately remember the incident details when filing police report the very next day, yet claimed to recall specific, though conflicting details eight years later during the trial.

Credibility and Corroboration Issues

[9] Beyond specific testimony, the Magistrate highlighted broader failures in the prosecution's case:

- The Magistrate ruled that SP2's testimony was not supported by the other prosecution witnesses called to testify.
- The prosecution failed to call any independent witness to support their version of events, despite the incident allegedly occurring in an office setting.
- The Magistrate explicitly stated that the credibility of the prosecution's witnesses was shaken (*goyah*) during cross-examination, leading to doubts about the overall reliability of the evidence regarding the location and the incident itself.

[10] The appellant argues that because the Magistrate had the audio-visual advantage of observing the witnesses' demeanour first hand, these findings of fact should not have been overturned by both HCJ 1 and HCJ 2 without substantial and compelling reasons. The crux of the appeal is that since HCJ 1 provided no written



grounds, it is impossible to determine if such compelling reasons actually existed.

[11] The credibility of the victim SP2 was a central pillar in the High Court's decision to convict. The court analysed her conduct immediately following the incident and the consistency of her narrative to determine if she was a witness of truth.

[12] On the other hand, the Magistrate had specifically found the prosecution's main witness (SP2) to be inconsistent and unreliable. The main thrust of the appeal is that the decision by HCJ 1, who had ordered for the appellant to enter on his defence, lacked written reasons. Thus, the appellant contends:

- It violates section 319 of the Criminal Procedure Code (CPC/Act 593), which mandates that a judge certify the grounds for allowing an appeal;
- It prejudices the appellant's right to a fair trial under Article 5 of the Federal Constitution, as he does not know why his initial acquittal was overturned; and
- That resulted in HCJ 2 deciding without knowing the reasoning behind the first High Court's intervention.

[13] The appellant argues that the conviction is unsafe because the High Court interfered with the Magistrate's findings on credibility without clear justification or documented reasoning. Consequently, the appellant seeks for the appeal to be allowed and the conviction and sentence to be set aside.



[14] The appellant's legal argument rests heavily on the principle that a trial judge is best positioned to determine the truth. Because the Magistrate personally saw and heard the witnesses, the law grants their findings a high level of protection from being overturned by higher courts. The rationale for the foregoing proposition in law is explained below.

1. The "Audio-Visual Advantage" Principle

[15] The appellant cites the landmark case of ***Herchun Singh & Ors v. PP*** [1969] 1 MLRA 382 to argue that an appellate court must be slow in disturbing findings of fact made by a trial judge. This is because:

- The trial judge has the unique advantage of observing the demeanour and behaviour of witnesses while they testify, something that cannot be captured in a written transcript;
- Findings of fact are considered *prima facie* correct and should only be overturned if there are substantial and compelling reasons to do so; and
- The function of an appellate court is not to make its own new findings of fact but to review if the trial court's findings were plainly wrong or against the weight of the evidence.

2. Maximum Evaluation at the Prima Facie Stage

[16] The appellant referred to ***PP v. Mohd Radzi Abu Bakar*** [2006] 1 CLJ 457 to highlight the trial judge's duty at the close of the prosecution's case:



- A trial judge must conduct a maximum evaluation of all prosecution evidence before deciding whether to call for the defence;
- This evaluation includes assessing the credibility of witnesses and drawing necessary inferences;
- The appellant argues that by overturning the initial acquittal, the High Court essentially replaced the Magistrate's evaluation with its own, which the Federal Court in *Mohd Radzi* stated is no part of the function of an appellate court.

3. The Mandatory Duty to Provide Reasons

[17] The appellant relied on several cases, including *Thong Ah Fat v. PP* [2012] 1 SLR 676 to emphasize why written grounds are essential:

- Requiring a judge to state their reasons ensures that a decision is based on logic and evidence rather than whim or fancy;
- As noted in *Thong Ah Fat*, the duty to give reasons is a facet of judicial accountability, ensuring that justice is not only done but *seen to be done*;
- Without written reasons from the first High Court judge, the appellant's right to appeal has been compromised and prejudiced, as there is no material to show how the law was applied; and
- Absence of grounds of judgment can render a conviction unsafe and cause miscarriage of justice.



[18] The appellant has argued, that the violation of section 319 of the CPC is a central pillar of this appeal, as the High Court had failed to follow statutory procedure which has resulted in a substantial miscarriage of justice.

The Mandatory Nature of Section 319

[19] The appellant emphasizes that section 319 is not merely a suggestion but a legal requirement.

- Section 319(1) requires a judge to certify his/her judgment or order to the lower court.
- Section 319(2) specifically states that when an appeal is allowed, the certificate **shall** state the grounds upon which the appeal was allowed or the Magistrate's decision was varied.
- This procedure ensures there is a clear record of why a lower court's decision was overturned, allowing for further review and ensuring the trial process remains transparent.

Why This is the Bane of the Case?

[20] The appellant argues that the absence of this certificate and the accompanying grounds of judgment created a blind spot for all subsequent proceedings:

- The appellant was forced to enter a defence against a charge for which he was initially acquitted, without ever being told why the first acquittal was considered wrong;



- Because HCJ 1 did not provide reasons, HCJ 2 proceeded to convict the appellant without knowing the basis on which the first judge had interfered with the Magistrate's findings on witness credibility; and
- The appellant contends that this procedural failure compromised his rights under Article 5 of the Federal Constitution, to *wit* his personal liberty, as he was deprived of the right to know the grounds of a decision made against him.

The Albakhar Case

[21] To illustrate how the law should have been applied, the appellant points to ***Albakhar v. PP*** (1960) MLJ 247. In that case, the judge explicitly stated that he was providing written grounds for allowing an appeal in compliance with the provisions of section 319 of the CPC. The appellant argues that this standard of compliance was completely ignored in the present case.

At the Court of Appeal

[22] Because of these gaps, the appellant argues that the conviction is not safe. It is urged before us to exercise our powers under section 60(1) of the Courts of Judicature Act (CJA/Act 91) to set aside the conviction and sentence due to these systemic procedural failures. The appellant's arguments may be summarized as follows:

- The Appellant contends that HCJ 2 had no valid reason to interfere with the Magistrate's findings on the credibility of the prosecution's witnesses;



- It is also argued that HCJ 2 convicted the Appellant and sentenced him to 18 months imprisonment without the opportunity to review the reasoning of HCJ 1 or the original grounds of the Magistrate's acquittal; and
- The Appellant maintains he has been severely prejudiced because he remains unaware of why his initial acquittal was overturned, as no written reasons or section 319 certificate were ever provided.

[23] Based on the above arguments, the Appellant requests that the Court of Appeal grant the following relief:

- That the appeal against the High Court's decision be granted;
- The conviction under section 354 of the Penal Code be overturned; and
- The 18-month prison sentence imposed by the High Court be quashed.

Analysis and Findings

[24] In considering the petition of appeal and in particular the issues raised by the appellant's counsel during submissions, we are guided by the principle that in a criminal appeal, the duty of the appellate court is to consider whether the conviction is right. This court in ***Mohd Johi Said & Anor v. PP*** [2005] 1 CLJ 389; [2005] 5 MLJ 409; [2004] 6 AMR 825 reiterated the principle that the correct approach is not to consider whether the decision is wrong but whether the conviction is safe.



[25] HCJ 2 when convicting the appellant had identified several plainly wrong errors in the Magistrate's judgment:

- The appellant had produced a self-printed office sketch (D4) to argue the office was an open space. The High Court ruled this inadmissible under section 90A (7) of the Evidence Act 1950 (EA/Act 56), which prohibits computer-produced documents from being admitted if the accused was directly involved in their production;
- The High Court's decision to overturn the acquittal hinged heavily on the misapplication of section 90A EA. Section 90A was designed to update the law for the electronic age, allowing computer-printed documents to be admitted without the need to call the specific person who keyed in the data, provided it was done in the ordinary course of business. The court emphasized that the seven subsections of section 90A must be read together as a whole, not in isolation. Subsection 90A (7) is the gatekeeper clause. It states that a computer document is inadmissible in criminal proceedings if the accused person was responsible for managing the computer or was directly/indirectly involved in producing that document. Because the respondent admitted to printing the office sketch, exhibit D4 himself from his own computer, the document fell strictly under the prohibition of section 90A (7). The court clarified that even if the prosecution did not object to the document initially, wrongful admission of evidence does not make it legal. It remains inadmissible, and the court must disregard any factual findings based on it;



- The prosecution argued that discrepancies between the victim SP2's police report and her testimony, regarding how many times the respondent left the room were minor. The High Court agreed, stating that such minor inconsistencies did not destroy her overall credibility regarding the use of criminal force; and
- The Magistrate had doubted the victim because a witness, SD2 claimed she did not appear distressed immediately after. The High Court found the Magistrate failed to consider that the victim reported the incident at the earliest reasonable opportunity to others, which supported her story.

The Earliest Reasonable Opportunity Rule

[26] In sexual offences cases, the courts look for whether a victim made a complaint within the earliest reasonable opportunity (see section 8 Illustration (j) Evidence Act, 1950). The High Court found the Magistrate had failed to properly weigh the following apparent facts:

- On the very day of the incident, SP2 told her colleague (SP3) and her sister (SP4) what had happened;
- She discussed the matter with her father before filing formal police report the next day;
- The High Court ruled that this timeline constitutes reporting or complaining at the earliest reasonable opportunity, which serves as strong corroborative evidence of her consistency.



[27] The credibility of the complainant is intrinsically linked to the timing of her reporting. While the CPC prescribes no rigid deadline for a first information report (FIR) under section 107, the courts prioritize reports made at the earliest reasonable opportunity. Such promptness serves as safeguard against fabrication, ensuring the account remains a natural effusion of the mind. (See *Tan Cheng Kooi v PP* [1972] 2 MLJ 115).

[28] The evidentiary significance of timely reporting is three-fold:

- Under section 157 of the EA, a report made contemporaneously with the incident serves to corroborate the victim's oral testimony. (See *PP v Mohamad Musa Amarullah* [2002] 1 MLJ 561).
- The act of reporting promptly is admissible under section 8 of the EA as relevant conduct, which reinforces the reliability of the witness's version of events. (See *Aziz bin Muhamad Din* [1996] 5 MLJ 473)
- Where a statement is made with extreme spontaneity, it may form part of the transaction itself under section 6 of the EA as *res gestae*, carrying high evidentiary weight due to the absence of concoction.

[29] Ultimately, the immediacy of the reporting by the complainant is a vital barometer of truthfulness, reducing the likelihood of a calculated lie and strengthening the case of the prosecution.



Rebutting the Lack of Distress Argument

[30] The defence relied heavily on the testimony of a counter staff member (SD2), who claimed SP2 did not look anxious or panicked when she handed over a receipt after leaving the respondent's office.

- The magistrate used this calm demeanour to create reasonable doubt about the assault.
- The High Court found the Magistrate focused exclusively on the defence witness (SD2) and ignored the testimony of SP2, SP3, and SP4 regarding the victim's actual state and immediate disclosures.
- The court noted that SP2 was shocked and stunned (*terkejut dan tergamam*) during the act. The High Court determined that a victim's outward appearance to a third party (SD2) does not override the positive evidence of the assault provided by multiple prosecution witnesses.

Impact of Minor Discrepancies

[31] The defence pointed out that SP2's police report and her court testimony differed regarding how many times the respondent moved in and out of the room.

- The High Court ruled these were minor discrepancies in the recollection of a traumatic event.
- Both her report and her testimony remained positive and consistent on the central fact, that the respondent fondled her and kissed her.



- Citing ***PP v. Datuk Haji Harun Haji Idris*** [1997] 1 MLJ 15, the court noted that if witnesses were perfectly consistent in every tiny detail, it might actually suggest the story was fabricated.

The Question of Law

[32] The critical question for this Court is whether HCJ 1, when reversing a Magistrate's acquittal and ordering defence to be called, is required to provide a written judgment or reasons for judgment at that interlocutory stage.

The Procedural Challenge: Absence of Grounds of Judgment

[33] A primary contention raised by the appellant before us is the absence of a written judgment by HCJ 1 when the appeal against the initial acquittal was allowed and the appellant was ordered to enter on his defence.

[34] In our considered view, the absence of grounds of judgment at that stage of the trial is not unjustified in law. When a High Court Judge, sitting in its appellate capacity, reverses an order of acquittal and directs that the defence be called, it is a settled understanding in law that the Judge has scrutinized the records of appeal and found the evidence sufficient to meet the *prima facie* threshold.

[35] The act of calling for defence is a continuation of the trial process. There is no statutory or mandatory requirement for a full, reasoned judgment at this interlocutory stage. The decision itself serves as a judicial determination that the evidence available on record, when considered in its totality, is sufficiently cogent to require the appellant to answer the preferred charge.



[36] There is no statutory provision requiring HCJ 1 to expressly record his reason before calling the accused to enter his defence or to state his findings on the credibility of the main prosecution witnesses. In an uncomplicated case, like the present, it is not obligatory or even necessary to do so. In law, by ordering the accused to enter his defence, it could be concluded that HCJ 1 on maximum evaluation of the evidence, was satisfied that the prosecution had, at the close of prosecution's case, established a *prima facie* case, which if unrebutted, would warrant a conviction of the appellant. To arrive at such a conclusion, it is inherent that HCJ 1 had considered all the evidence adduced by the prosecution as tested in cross-examination, on a *prima facie* basis. (See ***Junaidi bin Abdullah v PP*** [1993] 3 MLJ 217).

[37] Further, recently in the case of ***Sathya Veloo v PP*** [2022] MLJU 817, His Lordship Abdul Rahman Sebeli FCJ (later CJSS), delivering judgement for the Federal Court, held that there is no requirement in section 180 CPC (its equivalent section 173 (h) CPC for subordinate court trials) that when calling for the accused to enter on his defence, the trial judge must inform him verbally or in writing of the reason or reasons why he is calling for him to enter on his defence. What is required of the trial judge is to be satisfied that the prosecution has adduced credible evidence to prove each ingredient of the offence charged.



[38] Therefore, we are of the view that mere failure or omission on the part of HCJ 1 to record his grounds for his findings on credibility of witnesses is insufficient *per se* for allowing this appeal, particularly when considered in the light of the provision of section 60 of the CJA read together with section 422 of the CPC, as the omission has not occasioned a failure of justice or prejudice to the appellant.

Evaluation of the Merits

[39] Regarding the findings of fact, the High Court correctly found that the discrepancies between the victim's (SP2) testimony and her police report (P2) were not material. Specifically:

- The variation in the number of times the Appellant entered or exited the room does not negate the core allegation of criminal force; and
- The High Court was right to hold that the Magistrate erred by revisiting the *prima facie* findings during the defence stage in a manner that contradicted HCJ 1's earlier determination of a proven *prima facie* case.

Probability and the Physical Scene

[40] The Magistrate's conclusion that the assault was unreasonable due to the open nature of the office, as stated by SD2, fails to account for the obstructive nature of office furniture and partitions mentioned in the records, in particular evidence of SP5. Furthermore, a victim's lack of immediate visible distress, as noted by SD2 is not a legally sound basis to reject the direct testimony of a victim of sexual assault, as reactions to such trauma are varied and subjective.



Section 319 CPC

[41] Section 319 of the CPC has to be read in sync with section 316 of the CPC, as it does not operate in isolation. Construing section 316 of the CPC, when the appeal against the order of acquittal was before HCJ 1, he has the liberty to decide, if there are no sufficient grounds for interfering, which would warrant a dismissal of the appeal, or if there are sufficient grounds for interfering, to reverse the order of acquittal, as in the present case, and order that the appellant enter on his defence. That provision does not state that the reversal has to be with reasons. Once the reversal takes place, like in the present case, the case is remitted to the Magistrate's Court for continuation of trial at the defence stage and it is the duty of the magistrate to conduct the trial, as if he was the one who had ordered the accused to enter on his defence. He is not at liberty to revisit the case of the prosecution at the *prima facie* stage.

[42] Implicitly the decision by HCJ 1 denotes that the ingredients of the offence as required under section 354 of the Penal Code have been proven by the prosecution. Further, it is also understood that HCJ 1 had analysed the evidence proffered in the case of prosecution and arrived at the conclusion that:

- A *prima facie* case has been made out against the accused on the preferred charge under section 354 of the Penal Code;
- Prosecution has offered credible evidence to prove each and every ingredient of the offence as required under the law;
- Credibility of the prosecution witnesses (PWs) is intact, more so after maximum evaluation of their evidence;



- Their credibility is also intact after cross-examination by the accused *via* his counsel;
- Hence, the evidence proffered by the prosecution through the PWs is reliable;
- There has been maximum evaluation and careful analysis of the credibility and reliability of PWs and their evidence in its entirety, including evidence favouring the defence elicited during cross-examination of the PWs, thus disturbing the findings and conclusion arrived at by the Magistrate;
- It is for the accused to state his defence, in order to raise a reasonable doubt in the case of the prosecution and his guilt; and
- However, the burden of proof on the prosecution remains unaltered. At the conclusion of trial, it must have proven its case beyond reasonable doubt. (See: *Woolmington v DPP* (1935) AC 462).

[43] Henceforward, duty of the Magistrate is to lawfully comply with the decision made by HCJ 1 and to continue with the case of the accused, as if he as the trial judge, had ordered for the accused to enter on his defence to the charge under section 354 of the Penal Code. When doing so, the Magistrate is duty bound to hear the evidence adduced by the accused and his witnesses in order to support his defence. In support, reference is made to the decision of the COA in the case of ***PP v Sanin bin Othman*** [2010] MLJU 1283 where it was decided that:



“When defence is directed to be called by an appeal court the trial judge must accept that a prima facie case has been proven. It is as if the defence was called by the learned judge himself (Saad Abbas & Anor v PP [1998] 4 CLJ 575). Only after he has gauged the total evidence adduced, inclusive of all the evidence adduced at the prosecution’s stage, and tested as against the defence evidence may the fate of the accused person be decided by the court. In short there will be a maximum evaluation of the whole evidence at the close of the defence.”

[44] Relating back to section 319 of the CPC, once HCJ 1 reverses the order of acquittal, the order is transmitted to the Magistrate’s Court for continuation of trial, and this had taken place as the trial had proceeded to the defence stage, until conclusion of trial and ultimately the appellant was acquitted. The certificate mentioned in that provision is not something abstract or has to be in a certain form, but it is only a notification to the Magistrate that the High Court had ordered for defence to be called and for him to continue with the trial unhindered. Nowhere in section 316 of the CPC, it is stated that the order of reversal of HCJ 1 must be accompanied with reasons. Likewise, section 319 (2) CPC, has to be read in sync with the authorities referred to above, which are decisions made by the apex Court, especially when the reversal order made by HCJ 1 pertains to the intermediate stage of the criminal trial.



Sentence

- [45] HCJ 2 had found that the prosecution proved the case beyond a reasonable doubt and convicted the respondent. The court had rejected a request for a conditional discharge under section 173A CPC, noting that section 354 is a serious offence punishable up to 10 years. While noting the respondent's age 55 years, his 28-year career at SSM, and the 12-year delay since the incident, the court emphasized that public interest in sexual offence cases outweighs personal hardship. The respondent was granted a stay of execution pending further appeal, subject to a RM20,000 bond, surrendering his passport, and reporting bi-weekly to a police station.
- [46] In determining the 18-month prison sentence, the court balanced judicial principles with the specific circumstances as alluded to above, as well as that he is a first-time offender. The court noted the respondent's claim that he had been physically assaulted by the victim's father following the incident.
- [47] Under section 52B of the Penal Code, any offence punishable by 10 years imprisonment is serious and section 354 of the Penal Code fits this, barring conditional discharge under section 173A of the CPC. Following the authority *PP v Loo Choon Fatt*, [1976] 2 MLJ 256, the court ruled that the public interest in punishing sexual crimes must outweigh the personal hardships of the respondent. The court acknowledged the 12-year gap since the incident and 8 years before charges were filed. This justified a shorter sentence than usual, as the long legal battle was considered a form of



punishment itself. The court held that a custodial sentence was necessary to serve as a lesson to both the appellant and society.

Conclusion

[48] We find no appealable error in the High Court's intervention. The High Court was entitled to correct the Magistrate's failure to properly appreciate the evidence and the credibility of the prosecution's witnesses. In this regard, it would be most appropriate to quote the dictum of His Lordship Steve Shim CJSS (as he was then), from the case of ***Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors*** (2004) 4 CLJ 309 at page 320:

... the central feature of appellate intervention, i.e. to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal (both HCJ 1 and HCJ 2 in the present case) was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole of any part of the evidence placed before him.

The Court of Appeal further reiterated the principle central to appellate intervention, i.e. that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal ...



[46] In the same case at the Court of Appeal, reported at [2003] 2 MLJ 97 at page 116, it was decided by His Lordship Gopal Sri Ram JCA (as he was then) that a trial judge when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. He must also test the evidence of a particular witness against the probabilities of the case. Emphatically, His Lordship had decided that a trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal and it does not matter whether the issue for decision is one that arises in a civil or criminal case, as the approach to judicial appreciation of evidence is the same. So, is the situation in the present case, premised on the analysis and findings made by the magistrate, as elaborated above, there has not been proper judicial appreciation of evidence and the ultimate fact that the modesty of the victim was in fact outraged by the appellant was rendered the least of consideration as opposed to the immaterial inconsistencies that had sprung during the trial.

[47] In conclusion, in the light of the foregoing analysis and reasons, we found upon the totality of the evidence, that the conviction of the appellant by the High Court is safe. The learned High Court Judge had considered and appreciated all of the evidence that was before the Magistrate Court in finding that the appellant had failed to raise any reasonable doubt as to his guilt. The High Court was thus correct in concluding that the prosecution had proved its case beyond reasonable doubt and the appellant guilty as charged for an offence under section 354 of the Penal Code.



[48] There being no appealable error warranting appellate intervention, we unanimously dismiss the appeal and affirm the appellant's conviction and sentence of 18 months' imprisonment as pronounced by the High Court.

K M Muniandy

Muniandy Kannyappan

Judge

Court of Appeal

Putrajaya.

Dated: **1 March 2026**

Legal Representation

(for the Appellant):

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(Ruj Kami: RB/RG/AS/CR 239/006/23 (B))

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