Public Prosecutor v Wong Siu Fai
[2002] SGHC 107

Case Number : CC 26/2002

Decision Date : 16 May 2002

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Ravneet Kaur (Attorney General's Chambers) for the public prosecutor; Gerald Martin Wee (Bogaars & Din) for the accused

Parties : Public Prosecutor — Wong Siu Fai

Criminal Procedure and Sentencing – Sentencing – Whether proper to charge accused on two different charges arising from same incident – Whether to treat the two charges as single offence for purposes of sentencing – Factors to be considered and balance against – Whether to backdate sentence on account of time already served – ss 354 & 377 Penal Code (Cap 224)

Judgment

GROUNDS OF DECISION

1. The accused is a 36 year old man who pleaded guilty to two charges of sexual offences. The first was a charge under s 354 of the Penal Code, Ch 224 relating to the use of criminal force to outrage the modesty of a five year old boy. The second was under s 377 of the same Code for having carnal intercourse against the order of nature, namely, in this case, performing fellatio on the boy. Both offences took place at the same place, same day, same time and on the same victim. The offences took place on 5 June 2001 at 3am in the flat belonging to the boy's parents. The accused was a friend of the tenant of the boy's parents. He had gone there to visit the friend and stayed over for the night. He slept in the living room. The boy and his 7-year old sister slept in their own room on a double-decker bed where the girl slept on the upper deck. At 3am the accused entered the children's room and the offences were committed in the way described in the statement of facts which the accused admitted as follows:

> "10. The victim was wearing a pair of shorts without any underwear. The accused pulled down the shorts to the victim's thighs. The accused then used his hands to touch and rub the victim's penis. The accused told the victim he was doing some exercise. After a while the accused stopped.
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> 11. Thereafter the accused bent his head down and began to suck the victim's penis. After sucking the penis, the accused pulled the victim's shorts back up and left the bedroom. The victim felt pain at his penis."

2. The deed was discovered when the boy's sister awoke and began to cry when she could not find her mother (the family had just taken the children back from a holiday chalet where they had been spending a few days holiday). When the accused heard the crying girl he returned to the children's room and brought the girl to her parents' room. The girl's father then brought her back to the children's room and there found his son "in a crouching position on his bed". The boy then related what happened to his parents who lodged a police report leading to the arrest of the accused and the current proceedings before me.

3. The case itself is not complex, but it posed some important questions as to how the accused ought to be sentenced. He was charged on two different charges arising from the same incident. Generally,

and in principle, there is nothing wrong with that if the facts indicate that in the course of a single transaction distinctly different offences were committed and s 170 of the Criminal Procedure Code Ch 68 bears this out.

4. A critical examination of all the materials including the nature of the offence, and the circumstances of the offender and his victim must follow after the presentation of the facts and circumstances of the case so that the court, in punishing the offender, neither falls short nor applies in excess. The court's duty can only be discharged in the fairest possible way by taking into account the matters that I have averted to above - however laborious or mundane the effort. I now revert to the present case in which the accused is charged with two offences committed within the same minute. I think that it may be as inappropriate to fill a single charge with two offences such that the accused does not know which it is that he has to meet (a procedural irregularity known commonly as *duplicity*) as it is to create two charges from what is essentially a single offence. I am not here referring to cases in which multiple different offences are committed in the course of a single transaction (for example, the abduction, assault and rape of a victim in the course of a kidnapping) in which the law provides an adequate means of ensuring that the crimes are properly dealt with but with cases such as the present which appears to be a unitary offence. Where the line is to be drawn between these two types of cases depends on the facts and evidence in each case. Where a robber relieves a man of $10 from his left pocket, and then $10 from his right, should he be charged on a single charge of robbing the man of $20 or two charges of robbery of $10 each? Similarly, should a man who beats another a hundred times with a stick on a single occasion be charged on a single count of assault, or a hundred charges of assault? If it forms part of the same incident little distinction can be made to say that the offender paused for breath between each blow. That is not to say that the court will ignore the gravity of the crime. The number of blows and the severity of each blow will be counted in the assessment of all the circumstances of the case and reflected in the severity of the sentence, passed in accordance with established sentencing principles. If what was done was in fact a single offence it will be unfair to leave the offender instead, with a record for having committed *two* offences, a small matter that no one else may care about other than the offender himself. Fairness to the offender in this regard does not affect the punishment he deserves or of justice to his victim. It belongs to that meager portion of the case from the situation of the offender that, nevertheless, must not be occluded from judicial reflection.

5. It is the specific facts of the case that determine whether an act is more a unitary offence or a multiple one for the purposes of sentencing. The unitary nature of the offence is apparent where the acts are so closely related in time, motion and space. On the facts before me, I am of the view that the two acts are sufficiently close as to constitute a unitary offence for the purpose of sentencing. The two acts complained of took place at virtually the same time (as can be seen from the charges). The part of the victim's body violated by the accused is the same. In the circumstances, in view of what I have stated above, the two charges ought to be considered as part of a single offence for the purposes of sentencing.

6. The age of the child, the sex of the child, the manner and duration in which the offence was committed are further matters to be considered. The resilience of a child is sometimes overlooked when the tender psyche of a child becomes the focal point of concern. These are all matters of fact upon which the court must do its best to apportion, based, of course, on what is known before him, eschewing speculations, and avoiding generalizations as far as possible. In sentencing the accused on the two charges that he had pleaded guilty to, I am taking into account a previous conviction of the accused on a charge for outraging modesty and for which he was fined $4,000. There can be no inclination towards leniency on account of his being a first offender because he is not, and so a more severe punishment reserved for a repeat offender must be contemplated. I am grateful to Mr. Wee for the authorities that he had given me in the course of his mitigation speech. I am also grateful to the

DPP Miss Ravneet for her helpful submission on sentencing. *Adam bin Darsin v PP* [2001] 2 SLR 412 is indeed an appropriate case to begin consideration of sentencing in a case such as the present. I need only bear in mind that in the *Adam* case the accused committed a series of offences and pleaded guilty to eight with 15 others taken into account. The victims were boys in their teens and therefore much older than the victim in the present case. The Court of Appeal in *Adam* also reminds us that the overall gravity of the criminal conduct must be taken into account. The court also laid down the standard of 5 years imprisonment as a starting point for fellatio. Bearing in mind that criminal cases always vary because no two offenders nor their victims, nor the circumstances, are alike, any sentencing guideline from a superior court must always be regarded as a most important factor especially in connecting all the broad clusters of similarities, but must not be taken as an indication that having done so, the individual facts and circumstances of the case need no longer be studied with the view to either varying upwards or downwards from the norm. In sentencing the accused the circumstances and nature of his previous conviction six years ago, and his intoxicated state in that case and this, though of no exculpatory value in my view, is, nonetheless, indicative of an absence of a planned *modus operandi* and have been taken into account. They are given their due weight, balanced against the circumstances and age of the victim.

7. In this case, in view of the fact that the conduct of the accused was encapsulated within the same incident taking no more than a minute apart, and having taken into account the facts including those forming the matrix of the first charge, I am sentencing the accused to one day's imprisonment in respect of the first charge and 6 years' imprisonment in respect of the second charge. The sentence of imprisonment in respect of the first charge shall run concurrently with that of the second charge and shall commence with effect from today. I am not backdating the sentence in this case because I am of the opinion that the 5 months' imprisonment already served should be part of the punishment given the circumstances of this case.

Sgd:

Choo Han Teck
Judicial Commissioner