IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 19

Court of Appeal / Criminal Appeal No 39 of 2022

Between

CJH

… *Appellant*

And

Public Prosecutor

… *Respondent*

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing — Appeal]

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CJH
v
Public Prosecutor

[2023] SGCA 19

Court of Appeal — Criminal Appeal No 39 of 2022
Sundaresh Menon CJ, Judith Prakash JCA and Tay Yong Kwang JCA
6 July 2023

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Tay Yong Kwang JCA (delivering the judgment of the court *ex tempore*):

1 The appellant, a Singapore citizen, is now 21 years old. While he was between 15 and 18 years old, he committed various sexual offences against his biological sister who was then between nine and 12 years old. We will refer to her as "V". All the sexual offences took place in their family home.

2 Before the High Court, the appellant pleaded guilty to the following three charges:

(a) in 2017, the appellant penetrated with his penis V's anus (the appellant was 15 years old and V was 9 years old);

(b) in 2018, the appellant penetrated with his penis V's vagina (the appellant was about 15-16 years old and V was 9 years old); and

(c) in 2019, the appellant penetrated with his penis V's mouth (the appellant was 17 years old and V was 11 years old).

Each of these three charges constituted an offence under s 376A(1)(*a*) which is punishable under s 376A(3) of the Penal Code (Cap 224, 2008 Rev Ed) before the 2019 amendments to the Penal Code came into operation. The punishment provided in this provision for an offence against a person under 14 years of age is imprisonment of up to 20 years and a liability to fine or to caning.

3 The appellant admitted to the offences in three other charges of penile-vaginal penetration and two other charges of penile-anal penetration which took place between 2017 and 2020. He also admitted to one charge of possessing obscene films in his mobile phone in November 2020. With his consent, these six charges were taken into consideration for the purposes of sentencing.

4 The trial Judge applied the sentencing framework in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Ng Kean Meng Terence*") to the penile-vaginal penetration charge and the sentencing framework in *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 ("*Pram Nair*") to the other two charges. We agree with this approach which also accords with the views expressed by the High Court in *ABC v Public Prosecutor* [2022] SGHC 244.

5 In relation to the penile-vaginal penetration charge, the trial Judge considered that there were 5 aggravating factors:

(a) V's extreme youth;

(b) the severe breach of trust in a familial context;

(c) the prolonged period of offending which lasted over three years;

(d) the severe harm caused to V; and

(e) V's possible exposure to sexually transmitted diseases because the appellant did not use a condom during the sexual offences.

6 The trial Judge also took into account the following offender-specific factors:

(a) the charges taken into consideration for sentencing;

(b) the guilty plea; and

(c) the appellant's relative youth.

7 After a detailed consideration of all the relevant facts, the trial Judge concluded that the three offences which the appellant had pleaded guilty to fell within band 2 of the respective sentencing frameworks. Applying the *Ng Kean Meng Terence* sentencing framework and taking all the aggravating and the mitigating factors into account, the trial Judge reduced the sentence for the penile-vaginal charge from the indicative starting position of 15 years' imprisonment and 12 strokes of the cane to ten years' imprisonment and 8 strokes of the cane. This was largely due to the mitigating circumstances set out in the last two of the offender-specific factors mentioned above (at [6]).

8 For the two other charges, the trial Judge applied the *Pram Nair* sentencing framework and arrived at an indicative starting point of 13 years' imprisonment and eight strokes of the cane. Again bearing in mind all the aggravating and the mitigating factors, she then calibrated the indicative starting point downwards to arrive at a final sentence of eight years' imprisonment and four strokes of the cane for each of these two charges.

Version No 1: 06 Jul 2023 (15:44 hrs)

9 Agreeing with the prosecution, the trial Judge ordered the imprisonment terms for the first two charges to run consecutively. That resulted in an aggregate sentence of 18 years' imprisonment and 16 strokes of the cane, with the imprisonment term backdated to the date of the appellant's arrest on 11 November 2020.

10 Before us, the Public Defender's Office ("PDO"), which has taken over as defence counsel for the appellant, appeals against the individual sentences as well as the aggregate sentence imposed. The PDO argues that the trial Judge was incorrect in finding that the period of offending amounted to an offence-specific aggravating factor and in finding that there was severe harm caused to V. The PDO also submits that the sentences (the imprisonment as well as the caning) were manifestly excessive having regard to rehabilitation being a sentencing consideration (due to the age of the appellant at the time of the offences and at the time of sentencing) and having regard to both limbs of the totality principle.

11 The PDO argues that an aggregate sentence of 13 years' imprisonment and eight strokes of the cane would balance the need for deterrence while simultaneously enabling the appellant's rehabilitation, restoration and reintegration. It submits that the sentence for the penile-vaginal charge should be adjusted to nine years' imprisonment and six strokes of the cane. In respect of the other two charges, it submits that the sentence ought to be six years' imprisonment and four strokes of the cane. Agreeing with the trial Judge that the sentences for the first and the second charges should run consecutively, the PDO arrives at an indicative aggregate of 15 years' imprisonment and 14 strokes of the cane. Taking the totality principle into account, the PDO proposes a downward adjustment of about 10% to 15% to arrive somehow at the final aggregate sentence of 13 years' imprisonment and eight strokes of the cane.

Version No 1: 06 Jul 2023 (15:44 hrs)

12 The Prosecution submits that the trial Judge identified the relevant factors correctly in situating this case within band 2 of the respective sentencing frameworks. The trial Judge considered the appellant's young age and rehabilitative prospects before applying a very significant downward calibration of the individual sentences. The Prosecution argues that the aggregate sentence does not offend the totality principle and that it is warranted to give effect to the sentencing principles of deterrence and retribution. The Prosecution therefore submits that the appeal should be dismissed.

13 The PDO contends that the period of offending should not be treated as an independent aggravating factor as it would have been accounted for in the number of charges faced by the appellant and the resulting aggregate sentence imposed. It submits that a long period of offending could be an offence-specific aggravating factor only where a single charge discloses a long period of offending such as where the charge is an amalgamated one.

14 We disagree with this contention. The fact that offences took place over a long period of time has been accepted as an aggravating factor by this court (see for example *Ng Kean Meng Terence* at [55]). This is the case whether there are multiple charges or whether there is one amalgamated charge (which cannot extend beyond 12 months of offending in any case pursuant to s 124(5)(*d*) of the Criminal Procedure Code 2010 (2020 Rev Ed)). The fact that separate offences are committed over such a prolonged period reflects the persistence of criminal tendencies and indicates that even with the passage of time, there has been no evidence of reflection or remorse. This is a distinct consideration from the fact that offending behaviour is repeated on several occasions.

15 The PDO also contends that the trial Judge was wrong when she took into account the element of severe harm. It argues that there was no evidence of

Version No 1: 06 Jul 2023 (15:44 hrs)

pregnancy, transmission of a serious disease or the presence of a psychiatric illness. There was also no evidence of any injury. The PDO submits further that the medical reports on V do not show "severe or considerable harm over and above what is often associated with an offence of rape, such that this would constitute a separate aggravating factor" (see the PDO's submissions at para 34). In the report dated 7 January 2021 by the Child Guidance Clinic, it was stated that following the offences, V felt angry and sad for what the appellant had done to her but had no more of these feelings during the past two months. The report also stated that V had no other adverse psychological effects.

16 In our view, harm is not limited to specific categories such as pregnancy or a specific psychiatric illness that is a consequence of the offence. While a court may not take into account facts that are part and parcel of the offence itself, there is no reason to exclude the type of harm and suffering that may be experienced by a victim just because many victims in a similar position would also experience such harm. In this case, it is difficult to suggest that there was no severe harm when V was so young during the time of the offences. As the trial Judge noted, having suffered pain and alarm, V retreated into a position of not resisting the appellant's assaults because she felt it was pointless to resist as the appellant was stronger than her and there was no one else present in the family home on those occasions. In any case, even if we disregard this factor of severe harm, there would still be four aggravating factors which would put this case firmly in the middle of band 2 for both sentencing frameworks. Overall, considering the totality of the offences, we do not think that the indicative starting points used by the trial Judge were excessive at all.

17 The only point that causes us some concern is the relative youth of the appellant. He was between 15 and 17 years in age at the time of the offences in

Version No 1: 06 Jul 2023 (15:44 hrs)

the three charges in issue. The trial Judge took this factor into account and reduced the indicative starting points by a third or more.

18 In the case of *Muhammad Anddy Faizul bin Mohd Eskah v Public Prosecutor* [2020] SGCA 113, cited by the trial Judge, the accused there committed various sexual offences involving 19 victims. He was approaching 16 years of age at the time of the earliest offence and was 18 years old by the time of the last offence. He pleaded guilty to nine charges with another 59 charges taken into consideration for the purpose of sentencing. The High Court there sentenced the accused to a total of 22 years' imprisonment and 24 strokes of the cane. Three of the nine sentences were ordered to run consecutively. The accused appealed against his sentence.

19 The Court of Appeal, in an *ex tempore* judgment, found little reason to disagree with the High Court's decision on sentence. It was clear to the Court of Appeal that the accused's mitigating factors and the totality principle had been given sufficient consideration. The Court of Appeal also noted that the accused re-offended while he was on bail. The Court of Appeal concluded that with the number of victims involved and the range and number of offences, the imposition of three consecutive sentences properly reflected the accused's culpability.

20 In the present appeal, the appellant was in a similar age range as the accused in the above cited case. However, there is one victim, compared with 19 victims and there is a total of nine charges, compared with the 68 charges in the above case. It may be fairly argued, based on the second limb of the totality principle, that an offender aged between 15 and 17 at the time of the offences and aged 20 at the time of the proceedings in the High Court might reasonably feel that a total imprisonment term of 18 years is a crushing one. This is because

Version No 1: 06 Jul 2023 (15:44 hrs)

the total imprisonment term represents almost his whole life up to that point. Further, in respect of caning, we are of the view that the total of 16 strokes ordered by the trial Judge is entirely justified and is correct on the facts before the court. Coupled with the 16 strokes of the cane that this young man will be receiving, we are of the view that the aggregate imprisonment term of 18 years is a crushing one for the appellant.

21 We therefore reduce the sentences for the penile-anal and the penile-oral charges from eight years' imprisonment and four strokes to six years' imprisonment and four strokes for each of these two charges. The sentence of ten years' imprisonment and eight strokes imposed by the trial Judge for the penile-vaginal charge is to stand. The imprisonment terms for the penile-vaginal charge and the penile-anal charge are to run consecutively with effect from 11 November 2020. The appellant's aggregate sentence is therefore 16 years' imprisonment and 16 strokes of the cane.

22 We allow the appeal against sentence only to the extent explained above.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

Version No 1: 06 Jul 2023 (15:44 hrs)

Wong Kok Weng, Ryan David Lim and Muhammad Taufiq bin Suraidi (Public Defender's Office) for the appellant;
Selene Yap Wan Ting and Michelle Tay Xin Ying (Attorney-General's Chambers) for the respondent;
