BWM *v* Public Prosecutor

[2021] SGCA 83

Case Number	: Criminal Appeal No 4 of 2021
Decision Date	: 16 August 2021
Tribunal/Court	: Court of Appeal
Coram	: Tay Yong Kwang JCA; Belinda Ang Saw Ean JAD; Chao Hick Tin SJ
Counsel Name(s)	: Ramesh Chandr Tiwary (Ramesh Tiwary) for the appellant; Kavita Uthrapathy and Angela Ang (Attorney-General's Chambers) for the respondent.
Parties	: BWM — Public Prosecutor

Criminal Procedure and Sentencing – Sentencing – Sexual offences

16 August 2021

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

Introduction

1 The appellant is a male Singaporean, presently 38 years old. He was the boyfriend of the victim's elder sister and they got married subsequently in November 2009. After the incidents set out in the charges below came to light, the said sister filed for divorce. The divorce was finalised in December 2015.

2 The victim is a male Singaporean. He is now 23 years old. At the time of the offences, he was between 10 and 14 years in age. He resided with his elder sister at all material times.

The Charges and Statement of Facts

3 In the High Court, the appellant pleaded guilty to two charges of sexual assault by penetration, an offence under s 376(1)(*a*) punishable under s 376(4)(*b*) of the Penal Code (Cap 224, 2008 Rev Ed) (the "Penal Code"). For the first offence, sometime in 2008, at a public swimming complex, the appellant used his penis to penetrate the victim's anus while they were in the shower together. The victim was then 10 years old. For the second offence, sometime in 2011, in their family apartment, the appellant used his penis to penetrate the victim's anus. No one else was in the apartment at that time. Before committing the offence, the appellant used his mobile phone to check his then-wife's location and upon confirming that she was a distance away from the apartment, he asked the victim to stand at the apartment's main door and to keep an eye on the peep-hole in order to alert the appellant if his then-wife and her parents returned home. He then proceeded to penetrate the victim from behind in a standing position.

4 Three other charges were taken into consideration for sentencing. The first concerned an outrage of modesty in 2008 when the appellant used his penis to rub against the victim's anus while they were sleeping together on a mattress in the living room of the victim's former family apartment. The appellant had stayed over because he was going out with the victim's family early the next morning. The other two charges concerned penile-anal penetration in the family apartment when the victim was 12 and 14 years old respectively.

5 In all five offences, the victim did not consent to the sexual acts. He was afraid that if he revealed the incidents, his parents would scold him for what had happened or that the appellant would break up with his sister.

6 In 2012, after watching an episode of Crime Watch on television featuring an adult assaulting a young boy sexually, the victim eventually revealed to his mother the sexual acts committed by the appellant against him. The victim's parents informed the appellant's then-wife. When she confronted the appellant about the victim's allegations, he admitted that he had sodomised the victim on a number of occasions at various locations. Thereafter, she filed for divorce and made a police report on 17 November 2014.

7 After the appellant was called up by the police for the recording of his statement, he became uncontactable and avoided attempts by the police to reach him. He was finally arrested about four years later on 4 December 2018. By then, the appellant had re-married and was father to a child.

8 The appellant was assessed by the Institute of Mental Health. He was found to have suffered an adjustment disorder due to the breakdown of his first marriage. It was also possible that he suffered from paedophilic disorder. However, there was no contributory link between his psychiatric conditions and the offences.

The Punishment Provision

9 Under s 376(4)(*b*) of the Penal Code, the punishment for the two charges to which the appellant pleaded guilty is imprisonment for not less than 8 years and not more than 20 years. In addition, there is mandatory caning of not less than 12 strokes.

The High Court's Decision

10 In the High Court, the Prosecution submitted that the appellant should be imprisoned for at least 10 years and given 12 strokes of the cane for each of the two charges to which he had pleaded guilty. It submitted further that both imprisonment terms should run consecutively to arrive at an aggregate sentence of 20 years' imprisonment and 24 strokes of the cane. The Prosecution highlighted that the victim was a young boy, the appellant had abused his position of trust and authority, there was an element of premeditation and the offences took place over a period of about four years.

11 The Defence argued that the sentences should be 8 years' imprisonment and 12 strokes of the cane for the first offence and 10 years' imprisonment and 12 strokes of the cane for the second offence. It submitted that there was no abuse of trust in the first offence (in 2008) because the appellant was only the boyfriend and not the husband of the victim's sister at that time (as their marriage was in November 2009). The Defence also highlighted the appellant's guilty plea and the absence of any criminal record.

12 Using the sentencing framework set out in the Court of Appeal's decision in *Pram Nair v PP* [2017] 2 SLR 1015 and guided by the Court of Appeal's observations in *BPH v PP and another appeal* [2019] 2 SLR 764, the trial Judge considered the victim's age at the time of the offences, the fact that the appellant was the boyfriend and later the husband of the victim's elder sister and the period of the offending conduct as aggravating factors. He also took into consideration the guilty plea as an offender-specific mitigating factor. The trial Judge did not accept the Defence's argument that there was no abuse of trust in the first offence because the appellant was only the boyfriend of the victim's sister at that time. In his view, it was the substance of the relationship between the victim and the appellant that was relevant in determining if a position of trust existed. It was clear to him from the facts set out in the Statement of Facts that it was the position of trust that the appellant occupied which allowed him to commit the first offence.

13 Accordingly, the trial Judge imposed a sentence of 10 years' imprisonment and 12 strokes of the cane for each of the two charges. He ordered the sentences to run consecutively, resulting in an aggregate of 20 years' imprisonment and the maximum of 24 strokes of the cane. He also backdated the imprisonment to commence from 5 December 2018, the date of remand. The trial Judge did not accept the Defence's contention that consecutive imprisonment terms would breach the totality principle. In his view, failing to order consecutive imprisonment terms would mean effectively that the appellant would be punished for only one of the five offences that he faced (including the three offences taken into consideration) and would ignore the extent of the offending conduct which lasted about four years. He did not think that the aggregate sentence was a crushing one, having regard to the appellant's age and the availability of remission for good behaviour.

Our Decision

14 We make a quick observation on the point made by the trial Judge that concurrent sentences would mean effectively that the appellant would be punished for only one of the five offences that he faced. That is true where the imprisonment is concerned. However, caning would be cumulative in any event.

15 The appellant appealed against sentence. The present counsel for the appellant, Mr Ramesh Tiwary, now accepts that the sentences should run consecutively but submits that both sentences should be for the mandatory minimum of 8 years and 12 strokes of the cane so that the aggregate sentence is 16 years and 24 strokes of the cane. He relies on *PP v BOX* [2021] SGHC 147, a very recent judgment delivered by another High Court Judge on 30 June 2021. Mr Ramesh Tiwary was also the Defence Counsel in that case.

16 In *PP v BOX*, there were 2 young sisters under 14 years of age involved as victims. The accused there was in a relationship with the victims' mother and he had asked the victims to address him as "daddy". The older sister was the victim of two offences of penis into mouth penetration in 2012 when she was about 11 years old. There were also two outrage of modesty charges (one against the older sister and the other against the younger sister). Five other charges (all relating to sexual offences) were taken into consideration.

17 The Prosecution in that case asked for an aggregate sentence of at least 17 years' imprisonment and 24 strokes of the cane. The Prosecution suggested the following minimum terms for the four charges: 10 years' imprisonment and 12 strokes of the cane for the first penetration charge, 12 years' imprisonment for the second penetration charge, three years' imprisonment and three strokes of the cane for the first outrage of modesty charge and two years' imprisonment and three strokes of the cane for the second outrage of modesty charge. The Defence there submitted that only two of the sentences should be consecutive and that the global sentence should be 14 to 15 years' imprisonment and 24 strokes of the cane.

18 After considering the relevant sentencing principles and the facts, the Judge in that case accepted the Prosecution's submissions on the sentences for the two penetration charges. However, she imposed two and a half years' imprisonment and three strokes of the cane for each of the two outrage of modesty charges. She then ordered the sentences for the second penetration charge and for both outrage of modesty charges to run consecutively, resulting in an aggregate sentence of 17 years' imprisonment and 24 strokes of the cane. She also backdated the imprisonment to the date of remand.

19 We understand that the accused in *PP v BOX* has appealed against sentence so we shall keep our comments on that case to only what is needed for the present appeal. While the individual

sentences in that case appear consistent with the sentencing trend for penetration cases, the aggregate appears to have been influenced heavily by the Prosecution's call for a total of 17 years' imprisonment and 24 strokes of the cane. Even so, the Prosecution's position on the aggregate sentence in that case was qualified by the phrase "at least". There were five other charges taken into consideration in that case and all were related to sexual offences. Accordingly, we think the decision in *PP v BOX* would not be wrong even if the Judge there had ordered the sentences for the two penetration charges to run consecutively.

20 Coming back to the present appeal, we think the trial Judge here was correct in rejecting the subtle distinction that the former Defence Counsel sought to make concerning the relationship between the appellant and the victim for the first penetration charge. The trial Judge was correct to have considered the substance of the relationship between the appellant and the victim in determining whether a position of trust existed and he concluded correctly that there was a lot of trust reposed in the appellant by the victim, the victim's sister and their parents. The victim did not tell anyone about the sexual abuse because he was afraid that his parents would scold him for what had happened or that the appellant would break up with the victim's sister, with whom the victim shared a very close relationship.

21 While the trial Judge was also correct in taking into consideration the appellant's guilty plea as a mitigating factor, we must not forget that the appellant went into hiding after the police report was made against him and he avoided attempts by the police to reach him. The police managed to arrest him only about four years later on 4 December 2018. In the meantime, after the victim's sister had divorced the appellant, he remarried and had a child with his second wife. The plea of remorse would have greater mitigating force if the appellant had surrendered himself and sooner instead of being arrested after about four years. Similarly, the mitigating value of the appellant's admission of his criminal conduct upon confrontation by his former wife was practically erased by his disappearance for those years.

22 While the Institute of Mental Health psychiatric report assessed the appellant to have suffered from an adjustment disorder as a result of the breakdown of his first marriage, there was clearly no contributory link between his mental condition and the offences. The offences predated the marital breakdown and, as pointed out earlier, the appellant carried on with his life nevertheless and remarried.

23 On their own, the two penetration charges attract mandatory minimum sentences of 8 years' imprisonment and 12 strokes of the cane each. There were three charges taken into consideration, two of which also involved penile-anal penetration although in the last charge, the victim had just turned 14 that year. Moreover, as seen at [3] above, to facilitate the commission of the second penetration offence, the appellant was careful to ensure that the victim's sister and parents would not return to the apartment suddenly and catch him in the act. The appellant checked the location of his then-wife through his mobile phone and then instructed his young brother-in-law to be the look-out while the appellant sodomised him. Ordering only the mandatory minimum sentences for such calculative conduct would be patently wrong.

24 In all these circumstances, the individual and the collective sentences are clearly appropriate in principle and in quantum. We therefore dismiss the appeal against sentence.

Backdating of imprisonment sentences

25 Finally, we think that in the absence of special reasons, imprisonment terms should be backdated to the date of arrest rather than the date of remand for cases where the accused person

remains in custody after arrest. The date of arrest is highlighted as a factor when the court considers when a sentence of imprisonment is to take effect (s 318(5)(*a*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed)). Although the trial Judge in this case backdated the imprisonment term to the date of remand (5 December 2018), that is only one day later than the date of arrest. In the light of the entire situation as discussed above, including the fact that this issue was not raised on appeal, we do not see any need to make this very fine adjustment in favour of the appellant.