

IN THE COURT OF APPEAL OF BRUNEI DARUSSALAM
HOLDEN AT BANDAR SERI BEGAWAN
Criminal Appeal No 7 of 2005

Between

MOHAMMAD SHABANA BIN HJ. IDRIS

Appellant

And

PUBLIC PROSECUTOR

Respondent

Headnote: *The perception that there has been an increase in offences of incestuous rape since Ahmad Ebrahim v PP (Criminal Appeal 8 of 2004) was decided in December 2004 is not supported by the up to date statistics. Higher sentences passed on the basis of such increase are not justified. The guideline of a starting point of 15 years reduced to 10 after plea affirmed. Guidelines are to be followed unless sound reasons are given for departing from them.*

Appeal allowed. Sentence of 16 years imprisonment and 12 strokes reduced to 13 years and 12 strokes.

Before: Cons, P.; Power and Mortimer, JJ.A.

Date of Hearing: 19 and 23 November 2005

Judgment: 1 December 2005

Mortimer JA.:

On 12 March 2005, before Stephen Chong J, the Appellant pleaded guilty to 2 counts of rape on his 12 year old daughter and asked for 3 further similar offences to be taken into account. He was sentenced under S.376(2) of the Penal Code to 16 years' imprisonment and 12 strokes on charge 1 and to 12 years' imprisonment and 12 strokes on charge 2. The sentences were ordered to be concurrent, making 16 years and 12 strokes in all. He appeals against these sentences on the grounds that they are manifestly excessive.

The Facts

The Appellant is the unemployed father of 7 children. On 13 November 2004, his wife, who is the bread-winner of the family, was at work. Four of the children had gone to the mosque for Tarrawih prayers, leaving the Appellant at home with the other 3 children, 1 of whom was the 12 year old victim. She was in the kitchen of the home, when the Appellant came in, locked the door, pushed her to the floor, and, using a condom, raped her. He warned her not to tell anyone.

The second offence took place on 3 February 2005. It was an almost exactly similar offence, save that it took place in the bathroom, where the victim was about to take a shower. Again, the Appellant warned her not to disclose what he had done. The similar offences, which he asked to be taken into account, took place on 3 January, 30 and 31 December, 2004.

The Sentences

In passing sentence, the Judge cited the guidelines of this Court in Ahmad Ebrahim v PP (Criminal Appeal 8 of 2004) set on 4 December 2004. He took into account the pleas of guilt.

Also he gave weight to the aggravating features which he noted as: the breach of trust in raping his own daughter, the repetition of the offence and the victim's age of only 12.

Applying the observations of this court in Ebrahim's case his starting point was 23 years reduced to 16 with 12 strokes on the first charge and 18 years reduced to 12 with 12 strokes on the second charge. He sentenced accordingly ordering them to run concurrently.

Ahmad Ebrahim v PP (Criminal Appeal 8 of 2004)

In Ebrahim's case this court was shown statistics indicating a rise in convictions for this type of offence over the previous 2 years. With this in mind, and having considered the level of sentences passed in a number of similar cases, the court set a guideline of a starting point of 15 years after trial reduced to 10 years after guilty plea for an isolated offence of rape of a daughter of tender years.

The guideline applies to offences committed before 4 December 2004. Given that the Court was told that there were 3 offences of rape and one of outraging modesty awaiting trial, for offences thereafter it said,

"...courts hereafter could properly impose sentences on offences which are committed after today's date at a level higher than that of the current sentencing level."

In the present appeal the first offence involved was committed before 4 December 2004. The second offence and those taken into consideration took place after. It follows that the guideline does not apply to the last offence. There is some confusion as to whether for offences after 4 December 2004 a higher sentence is warranted, and if so, what level of higher sentence is appropriate.

So that we could be informed whether there has been a continuing increase in convictions for this type of offence we adjourned the appeal to allow the relevant statistics to be obtained. The Public Prosecutor has helpfully provided them for our consideration.

The Statistics

3 sets of relevant statistics have been put before us. The first sets out the numbers of all types of rape which have been reported to the police in the years 2001 to date. There is no breakdown of how many of these reported incidents were either prosecuted or convicted.

These show: 7 reports in 2001; 10 in 2002; 20 in 2003; 21 in 2004; and 23 to date in 2005.

More relevantly we have the figures for convictions of incestuous rape, usually by father of daughter. These show 2 convictions in 2002; 1 in 2003; 4 in 2004; and 2 to date in 2005. Additionally in 2004, 4 were awaiting trial and in 2005, 4 were under investigation. The figures do not show whether any of those 4 awaiting trial in 2004 were repeated in the 2 tried in 2005, but it is likely.

The third set shows the number of reports of outraging modesty. These show 15 in 2001; 19 in 2002; 27 in 2003; 30 in 2004; and only 12 to date in 2005.

The figures provided for reported cases may indicate a trend, but obviously must be approached with great care. At most they are of marginal assistance. The figures for reported cases of outraging modesty are of less relevance.

In summary, the statistics for reported offences of rape and outraging modesty do not provide any sound indication of an increase in either type of offence. Those for outraging modesty on their face indicate a substantial drop, but the time frame may be too short to establish a trend.

The figures for convictions of incestuous rape and the numbers awaiting trial in 2004 do indicate an increase in the commission of such offences up to that time. However, the figures for 2005, the relevant ones for our consideration, far from indicating an increase, suggest the reverse. Again, however, the time frame is too short to indicate a trend.

Our conclusion therefore, is that there is no information put before us, which could be a proper foundation for saying that since Ebrahim's case was heard, there has been any continuing increase in the incidence of incestuous rape by fathers of daughters. If there is a public perception that these offences are on the increase, such perception is not supported by the available statistics.

Before leaving these statistics, we should mention one other matter. During her submissions on behalf of the Public Prosecutor, DPP Norhafizah, readily conceded that increased awareness in the general population, and publicity of, child abuse cases here and elsewhere may have led to more cases of this type being reported and prosecuted than before the increase. This could have led to an increase in reports and prosecutions without a corresponding increase in the commission of offences. All these factors underline the need for care in drawing conclusions on trends from short term statistics.

The Guidelines

In these circumstances, there can be no sound reason for increasing the level of sentences in Ebrahim's case. Such an increase cannot be justified on the basis that this type of incestuous rape has increased since the judgment in that case. Happily, the statistics tend to demonstrate that these offences, extremely serious though they are, are neither prevalent, nor increasing in number. Consequently, the indication in Ebrahim's case that courts dealing with cases committed after 4 December 2004 could properly impose sentences at a higher level than the guideline can no longer be regarded as valid and this indication should not be followed.

For these reasons, we affirm the guidelines in Ebrahim's case. For an isolated rape of a daughter of tender years, the starting point should be 15 years and 15 strokes, reduced to 10 years and 12 strokes after Plea.

The Present Appeal

The appellant addressed us. Without belittling the seriousness of the offences he contends that the total sentence is excessive. He points to the disastrous effect on his wife and family which is greater than usual because his wife, a convert to Islam, is not Bruneian. He urges his true remorse evidenced by his guilty pleas. His wife also asked to be heard. She describes 'the unbearable pain' inflicted by the appellant upon her and the family and

gives a moving account of her predicament. In spite of this she has forgiven him as she is convinced of his 'repentance'.

Regrettably these are the inevitable consequences of this crime even if more marked in the particular circumstances. We accept his remorse as he has never sought to deny his full responsibility. Accordingly, he is entitled to a full discount from the proper starting point for his pleas. We were impressed by his wife's sincerity.

Following Ebrahim's case, the Judge sentenced the Appellant on the basis of a rise in offences of this nature and aggravating features of the offences themselves. He noted the repetition and the fact that the victim was only 12 years old. Unknown to the judge it is now clear that a special deterrent element for a continuing increase in the prevalence of the offence is not justified.

In any event, for the first offence, the Judge ought to have followed the guidelines in Ebrahim as at that time it was an isolated offence of rape of a daughter of tender years. We do not think that the age of this victim sufficiently distinguishes the case from Ebrahim as would the age of an even younger victim. For the second offence, an increase was justified, for it was a repetition. Finally, it is necessary to consider the totality of the sentences to reflect the overall criminality, giving some weight to the offences being taken into account as well as to the mitigating circumstances to which we have referred. These are of more weight than is usual.

Conclusion

Bearing all these matters in mind, the judge's increase of the guideline to a starting point of 23 years either for the individual offence, or for the total criminality, is not justified. This resulted in a sentence, which was excessive, even for abhorrent offences such as these.

In the circumstances, we allow the Appeal and substitute the following sentences. On the first offence, taking a starting point of 15 years under the guideline, we reduce sentence to 10 years for the plea. For the second offence, an increase is justified for the repetition. We take a starting point of 18 years, reduced to 12 years.

Then, taking into account totality for the criminality involved, including the 3 other offences taken into account and the mitigation to which we have referred, we order one year of the sentence on the first offence to run consecutively to the sentence on the second offence, otherwise the sentences to be concurrent, making a total sentence of 13 years and 12 strokes in all.

Guidelines

Before we leave this matter we notice some confusion both at the Bar and on the Bench as to how guideline cases of this court should be approached. We emphasise the importance of guidelines laid down by this court and the proper approach to them by sentencers.

Guidelines are to improve the uniformity of sentences for similar offences. This enhances justice between defendants. Also, they are intended to ease the burden on judges. They are not mandatory sentences but as guidelines they must be followed. Similar offences

vary in their gravity as do the mitigating features, therefore judges may and often must, depart from them. However, when they do so it is incumbent upon them to start with the guideline and then give reasons for departing from them, whether they are passing a higher or lower sentence.

CONS, P

MORTIMER, JA

POWER, JA