

A.I.

AND

Public Prosecutor

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 8 of 2004)

Cons, P.; Power, and Hayati, JJ.A.
4th December, 2004.

Appellant pleaded not guilty to two counts of rape of a fifteen year old daughter. Some, but not excessive force, was used in one offence. Sentenced to 15 years and 15 strokes on each charge – Sentences concurrent. Appeal against sentences on ground excessive and wrong in principle. An examination of Brunei cases threw up a level of sentences for offences of this kind of 10 years and 12 strokes The Court of Appeal was satisfied that the sentences imposed were out of line with and varied them to ones of 10 years and 12 strokes for the first, 12 years and 12 strokes for the second and ordered sentences to be concurrent.

Court noted the desirability of Judges in all cases indicating what their starting point for sentence after trial would be and the discount which they considered would be appropriate for plea and mitigation.

Hj Nabil Daraina PUKDPSSU Hj Badaruddin and Suhana bte Hj Sudin (Deputy Public Prosecutors) for Public Prosecutor.
Defendant in person.

Cases cited in the judgment:

Harun v Public Prosecutor [Suit No. 10 of 2004]
Hj Junaidi v Public Prosecutor [Criminal Appeal No. 18 of 2001]
Langgar v Public Prosecutor [1993] JCBD 329
Public Prosecutor v A.S. [Criminal Trial 19 of 2004]
Public Prosecutor v Shahjehan [2000] 1 JCBD 202
Public Prosecutor v Mesdi bin Hussain [2004] 4 S.L.R 912
Sahrin bin Karim v Pendakwa Raya [2000] MLJ 130

Power, J.A.:

The Appellant pleaded guilty to two counts of rape. At the time of the offences, 15th and 22nd September 2002, he was living in a flat in Muara with his wife and 10 children. The victim, aged 15 years at the time, was his eldest daughter.

On the first occasion the Appellant entered her bedroom at about 9 pm, forcefully undressed her, put on a condom and then raped her. He then threatened her saying that she was not to tell her mother.

On the second occasion, a week later, the victim was taking a shower. After a knock she opened the bathroom door thinking it was her sister. Her father then forced his way in, carried her to the bathtub and placed her on top of it and, then, despite her struggles raped her. A bottle was accidentally knocked over and the Appellant, panicking, rushed out of the bathroom. The younger sister told her mother of the incident and the victim then admitted the events to the mother who took her to the police station on the following day.

When sentencing Chong, J. noted the Appellant's plea that he was "not in a proper frame of mind" when he committed the offences and that he was having family and work difficulties. He also noted that the wife had written a letter saying that she forgave the Appellant for his "mistake".

The Judge stated that the only strong mitigating factor was the Appellant's plea which spared the victim the ordeal of giving evidence.

He referred to the public repugnance occasioned by an offence of this nature, to the gross breach of trust and to the fact that the offence was repeated. He took into account the possibility of Post Traumatic Stress Disorder noting the Specialist Psychiatrist's opinion that, although presently there were "no obvious psychological consequences of the traumatic experiences", Post Traumatic Disorder Stress can manifest itself up to 25 years after the event.

He referred to *Public Prosecutor v Shahjehan* [2000] 1 JCBD 202 in which Hayati, J. sentenced an offender on two charges of rape of his 13 year old daughter with 3 similar offences to be taken into account to 10 years and 12 strokes on each charge to run concurrently.

Chong, J. sentenced the Appellant to 15 years and 15 strokes on each charge with the sentences to be concurrent.

The Appellant before us submits that the sentences are manifestly excessive and pleads the hardship being suffered by his wife and children who presently rely on relatives for accommodation.

Mr Daraina, who appeared on the first day for the Public Prosecutor, referred us to 3 authorities – one Singaporean, one Malaysian and one earlier decision of Chong, J. himself.

The Singapore case was *Public Prosecutor v Mesdi bin Hussain* [2004] 4 S.L.R 912. It involved 3 offences of rape of a 13 year old daughter. In each offence the victim was overawed by the authority of her father. A medical report revealed that she was mildly retarded and was suffering stress symptoms in consequence of the rapes. The offender was sentenced overall to 24 years imprisonment and 24 strokes.

In the Malaysian case *Sahrin bin Karim v Pendakwa Raya* [2000] MLJ 130 a father was sentenced to 15 years and 10 strokes for the rape of 18 year old daughter as a result of which a child was born.

In the *Public Prosecutor v A.S.* [Criminal Trial 19 of 2004] Chong, J. after plea sentenced a father to 15 years and 15 strokes for the rape of a 14 year old daughter and to 3 years and 3 strokes for outraging the modesty of a 13 year old daughter with sentences consecutive and strokes cumulative – 18 years and 18 strokes overall.

At the end of the hearing on the first day the Court sought evidence as to the prevalence of offences of this kind and as to the level of sentences that have been imposed in Brunei. The matter was then adjourned until today.

Statistics have now been handed up to us which show that from 1998 to 2001 convictions for the offence of rape declined – there were 12 in 1998, 10 in 1999, 9 in 2000 and 7 in 2001. However, they then rose, there being 10 in 2002, 20 in 2003 and 19 from January to September 2004. Sexual offences involving family members rose from 2 in 2003 to 7 in January to September 2004.

There has clearly been a rise in convictions of this kind in the last 2 years.

We note also, although we cannot take it into account that there are presently 3 rape charges and one charge of outraging modesty awaiting trial – all involving a father and daughter.

Given the above, 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.

It falls to us, however, to decide whether the sentences imposed in the present case were within the current sentencing level in Brunei or were wrong in principle or manifestly excessive.

Offences of rape are dealt with under s.376(1) of the Penal Code and are punishable under s.376(2) with a mandatory minimum sentence of 8 years and not less than 12 strokes.

There are 4 Brunei cases of importance when determining the current level of sentence.

In *Langgar v Public Prosecutor* [1993] JCBD 329 the Court of Appeal did not disturb an overall sentence after trial of 10 years and 12 strokes for 2 rapes of a fifteen year old stepdaughter in the first of which force was used.

In *Hj Junaidi v Public Prosecutor* [Criminal Appeal No. 18 of 2001], the Court of Appeal on 17th April 2002 was satisfied that, after plea, a sentence of 10 years and 12

strokes for one rape of a “mildly intellectually defective” 12 year old stepdaughter was “very proper”.

Chong, J. in his judgment in the present case referred to the sentence imposed by Hayati, J. in *Shahjehan’s* case where after plea she imposed a sentence of 10 years and 12 strokes on each of two charges of a rape of a 13 year old daughter with the sentences to be concurrent.

In *Harun v Public Prosecutor* [Suit No. 10 of 2004] the Defendant pleaded not guilty to rape of his stepdaughter aged 13 years and 9 months. He was after trial before the Chief Justice sentenced to imprisonment for 15 years and 15 strokes. Clearly the Chief Justice considered this sentence the proper starting point for conviction of rape of a family member after a plea of not guilty.

We are satisfied that the present level of sentencing in Brunei indicates that a proper sentence after plea for the rape of a daughter of tender years is 10 years and 12 strokes.

This indicates a starting point after trial of 15 years. We are satisfied that if the offence is repeated it should properly attract an increased sentence and that some account when sentencing should be taken of the fact that force was used. We see, however, little difference between the use of minimal force and the use by the father of his parental authority to overbear the victim. We are satisfied that for the second offence it would have been proper to add 2 years to the 10 year sentence imposed for the first offence.

The overall sentence imposed was we are satisfied out of line with the present level of sentencing. We order that the sentences be quashed and impose in place thereof a sentence of 10 years and 12 strokes for the first offence and 12 years and 12 strokes for the second offence and order that the sentences be concurrent making the overall sentence one of 12 years and 12 strokes. This indicates that, in our view, the proper overall starting point would have been 18 years.

We wish to add that we would be assisted in appeals against sentence, even in cases where mandatory minimum sentences apply, if Judges would set out their starting point and then indicate the discount which they would give for plea and mitigating circumstances. The normal discount for plea is, of course, one third. If the discount which the Judge considers appropriate would bring the sentence below the mandatory minimum sentence, then the Judge has no option but to impose that minimum. Nevertheless, an indication of the starting point for sentence is valuable both for the sentencer and for the Court of Appeal as it focuses the mind of the Court upon the overall gravity of the offence and the weight that has been given, in terms of years of imprisonment, to the plea and to other mitigating factors.