

ABDULLAH SANI BIN KIFLI

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Motion No. 20 of 2019)**

Before: Burrell P, Seagroatt and Lunn JJ A.
12th November 2019

Headnote: Sentence; 6 counts of rape of daughter aged 11. Abuse continued for 16 months prior to arrest. Appellant had a previous conviction for an identical offence concerning an elder sister of the victim for which a sentence of 14 years imprisonment had been passed in 2004. Appellant entered pleas of guilty on first day of trial after agreeing Statement of Facts which he had not agreed when the matter was first set down for trial 7 months earlier. Not an early plea of guilty therefore a 20% discount considered appropriate.

Applicant in person
DPP Pg Norsuzanawati binti Pg Haji Abas for Respondent

Cases cited in the judgment

A.I vs Public Prosecutor [2004] 2JCBD 185
MS bin H.I v Public Prosecutor [2005] 2 J CBD 201
R vs Basil Mortimer Bernard [1997] 1 Cr. App R 135

Burrell, P.:

On 8th January 2018 the applicant pleaded guilty to six counts of rape contrary to s.376(2) of the Penal Code. The victim was his daughter who was aged between 11 and 13 when the offences were committed.

He had first entered pleas of guilty to the charges on 1st June 2017 but he had disputed the statement of facts in material respects and so the matter was then remanded pending trial. When he appeared again on 8th January 2018 he withdrew his challenge to the accuracy of the statement of facts and the matter proceeded as a plea of guilty. He was sentenced by Chief Justice Steven Chong on 29th January 2018 to 24 years imprisonment. The Chief Justice had selected a starting point of 30 years which he discounted by 20% to reflect the appellant's late pleas of guilty.

Notice of Appeal

This matter has been listed as a Criminal Motion on the basis that the Notice of Appeal is out of time. It is dated 6 March 2018.

However, we are informed that the applicant signed a Notice of Appeal on 30th January 2018 the day after his sentence. The first written grounds of appeal appear in a letter from prison signed by the applicant and dated 31st August 2019

The filing date on the memorandum is 4th April 2019 and the receipt stamp of the original notice is dated 4th March 2019. No explanation is provided to explain these dates.

In these unusual circumstances we shall refer to the appellant as the applicant but treat the matter as a Criminal Appeal to reflect the fact that his first Notice of Appeal was within time.

The facts

Between January 2016 when his daughter was 11 years old and May 2017 the applicant raped her on a number of occasions. The offences occurred in different places including his place of work, in a bedroom at their house and on a boat which he owned. Violence and threats of violence were commonplace at the times of the offences, in particular she was threatened with serious harm if she told her mother what was happening. Eventually, the girl ran away from home and told her aunt about her father's conduct. The police were informed.

The Applicant

The applicant is now 54 years old. In 2004 he was sentenced to 18 years imprisonment (reduced to 14 years on appeal) and 15 strokes for identical offences involving one of the victim's elder sisters. The present victim is the youngest of 12 siblings. The applicant was released from prison in September 2013. These current offences commenced no later than January 2016 just over 2 years after his release from a 14 years sentence. This is an aggravating feature of the most serious kind. The fact of a full confession to the current offences, at the second opportunity, is the only mitigation in this case. Mercifully the young girl was not required to give evidence against her father.

Sentence

On the question of sentence there are two matters to be considered. First, its length and secondly the appropriate discount for the pleas of guilty.

(i). Length

Having taken into account the number of offences, the gross breach of trust, the age of the daughter, the relationship between them, the applicant's previous convictions and the guideline cases of a similar nature the Chief Justice stated:

“Having regard to the overall criminality of the six offences I am of the view that a starting point sentence of 30 years imprisonment is justified.”

The guideline cases to which he referred were *A.I vs Public Prosecutor [2004] 2JCBD 185* and *MS bin H.I v Public Prosecutor [2005] 2 JCBD 201* in which a starting point of 15 years and 15 strokes was laid down for a single offence of rape of a daughter of tender years.

In the present case we fully agree with the Chief Justice’s starting point of 30 years bearing in mind, in particular, that the applicant commenced re-offending, this time with the youngest of his 12 children, a relatively short time after being released from prison and continued to rape the girl on a number of occasions with attendant violence and threats for a further 16 months before the girl managed to run away and confide in her aunt. But for that we have no doubt that these abhorrent offences would have continued.

On appeal, the applicant raises a further matter which he had not mentioned at first instance and was therefore not considered by the Chief Justice at the time of sentence. In his letter dated 31st August 2019 he states:

“...i’m suffering from stage 3 Eye Cancer and also undergoing treatment at JPMC Hospital which is why I have applied to the court to consider my appeal.”

In her written submission to this court the Deputy Public Prosecutor has brought to our attention ten authorities from various jurisdictions which comment on the issue of when it might be appropriate to invoke judicial mercy and reduce a sentence in the light of an appellant’s medical condition.

It is obvious to state that all such cases are fact sensitive but they are consistent on the matter of principle. The four principles stated in *R vs Basil Mortimer Bernard [1997] 1 Cr. App R 135* are:

1. A medical condition, which at some unspecified future date affect either life expectancy or the prison authorities’ ability to treat the prisoner satisfactorily was not a reason for the Court of Appeal to interfere with an otherwise appropriate sentence, although it might be a matter for the Home Secretary to consider in relation to his powers of release;
2. The fact that an offender had a reduced life expectancy was not generally a reason which should affect sentence;
3. A serious medical condition, even when it was difficult to treat in prison, would not automatically entitle an offender to a lesser sentence than would otherwise be appropriate;
4. An offender’s serious medical condition might enable a court, as an act of mercy in the exceptional circumstances of a particular case, rather than by virtue of any general principle, to impose a lesser sentence than would otherwise be appropriate.

In deciding whether or not exceptional circumstances exist in this case we have been assisted by a medical report from Dr Babu Sukumaran, Consultant medical Oncologist at the Brunei Cancer Centre dated 25th October 2019. Having read that helpful report we conclude that there are no exceptional circumstances in this case which merit a reduction from an otherwise appropriate sentence. In particular, we have in mind that (i) the complaint was originally diagnosed in 2008 when he was in prison and he received treatment when in prison (ii) the disease is currently under control with oral steroids and his overall prognosis is good and (iii) should there be a relapse in the future he will receive the same medical support in prison that he received in 2008.

(ii). Discount for guilty pleas.

On this issue the Chief Justice stated:-

“the defendant deserves some credit for pleading guilty. His guilty plea and admission to the Statement of Facts came late in the day at the commencement of the trial. Nevertheless, N was spared the ordeal of a trial. But this is not a case where the usual one third discount should be given to the defendant for his guilty plea. The public interest warrants a deterrent sentence.

For the foregoing reasons the sentence is 24 years imprisonment on each charge to run concurrently from the date of remand....”

Thus the applicant was given a 20% reduction instead of the usual 33%. In the above extract the Chief Justice noted that *“the public interest warrants a deterrent sentence”*. With this we entirely agree. However it is a factor which is relevant to the calculation of the starting point rather than the discount.

Nevertheless, the Chief Justice also referred to other reasons in this case for a lesser discount. The pleas were not made at the earliest opportunity which meant that the young daughter spent a further 7 months facing the prospect of having to give evidence and re-live the dreadful conduct forced upon her. In fact, the guilty pleas were only entered when the matter was prepared and ready for trial. In such circumstances a reduced discount of 20% is entirely appropriate.

In the result a deterrent sentence was passed. We consider both the length of the sentence and the discount of 20% to be correct.

Appeal dismissed.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A