

HJ R. BIN HJ N.

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Motion No. 26 of 2018)**

Before: Burrell P, Seagroatt and Lunn JJ A.
14th November 2018

Headnote: Sentence – appeal allowed; pleas of guilty, overall sentence of 16 years’ imprisonment for four counts of rape of his 16 years old daughter reduced to 14 years and 8 months’ imprisonment

Applicant in person
DPP Hjh Rozaimah binti Haji Abdul Rahman for Respondent

Cases cited in the Judgment:

A. I. v Public Prosecutor [2004] 2 JCBD 185
A.S.K. v Public Prosecutor [2005] 1 JCBD 234;
Public Prosecutor v Cpl. 6690 M bin T [2005] 1 JCBD
Public Prosecutor v Hamran bin Bakar (Criminal Appeal No. 6 of 2016)

Lunn, JA.:

1. By a Notice of Motion, filed by the applicant’s wife on 30 June 2018, the applicant seeks leave to appeal out of time the total sentence of 16 years and 2 months’ imprisonment imposed on him by the Judicial Commissioner Pg Hajah Rostaina binti Pg Haji Duraman on 5 March 2016, following his pleas of guilty on 29 February 2016 to four charges of rape, contrary to section 376 (1) and one charge of obstructing a public servant from discharging his public function, contrary to section 186 of the Penal Code, Cap. 22 (5th charge).
2. The victim of the rape charges was the applicant’s 16-year-old daughter, referred to by the judge as Ms Y. She was the sixth of his eleven children. The 1st and 2nd charges of rapes occurred on dates unknown in January and February 2015, whereas the 3rd and 4th charges occurred on the same day, namely a date on and between 15 and 17 March 2015. Those offences occurred whilst the applicant, his wife, their 6-month-old son and Ms Y were sleeping in the same bedroom. On each occasion the applicant penetrated Ms Y’s vagina with his penis. On the first occasion, the applicant withdrew his penis from her vagina before ejaculating into his underwear. On the second

occasion, the applicant wore a condom. However, on the third occasion the applicant did not wear a condom and ejaculated inside her vagina. The final act of rape occurred an hour later, but on this occasion the applicant wore a condom.

3. On 30 July 2015, an examination by an obstetrician and gynaecologist of Ms Y at the Tutong Hospital revealed that Ms Y was 16 weeks pregnant. On 1 August 2015, having been advised to do so by a medical social worker at that hospital, the applicant reported the fact that Ms Y, an unmarried teenager, was pregnant to Tutong police station. The applicant said that he did not know how Ms Y had become pregnant. As a result, an investigation was begun by Lance Corporal Hj Aliuddin of the Women and Children Abuse Investigation Unit
4. In the early hours of 29 August 2015, Ms Y miscarried at RIPAS Hospital, which event was reported to Lance Corporal Hj Aliuddin by the head of her Unit later that morning. A few minutes later, Lance Corporal Hj Aliuddin received confirmation of that fact from the applicant, together with information that the body of the foetus was at the Hospital's mortuary. The applicant was told not to remove the body until the police had sight of it. However, having been advised soon afterwards by an attendant at the mortuary to collect the body, the applicant did so. Islamic funeral rites having been performed on the body at Masjid Jame Asr Hassanal Bolkihah, the body was buried in their Muslim burial grounds by one of its officials and the applicant.
4. On 31 August 2015, the applicant consented to Lance Corporal Hj Aliuddin's request that the police exhume the body the following day in order to obtain its DNA. However, in the early morning of 1 September 2015, the applicant exhumed the body himself and reburied it elsewhere in an unmarked grave in those burial grounds. That conduct was the subject of the 5th charge. As a result, the police were unsuccessful in their attempts to exhume the body from its original place of burial on 2 September 2015.
5. On 7 September 2015, during an interview by the police, the applicant admitted that he had exhumed the body and reburied it and that he had done so because, having had caused Ms Y's pregnancy, he was concerned that he would be identified through DNA analysis as the father of the foetus. Having been informed by the applicant of the place of reburial of the body, the body was successfully re-exhumed by police officers on 8 September 2015 and its DNA extracted. Finally, on 21 January 2016 the applicant was identified by DNA analysis as the father of the foetus. On being questioned further by the police, the applicant admitted that he had sexual intercourse with Ms Y on four occasions against her will and without her consent.
6. The applicant accepted that a report of an examination by a psychologist of Ms Y described her as having an IQ of 58, which brought her within the "*intellectual impairment range*", so that she "*might be a risk of being taken advantage by others*".

Reasons for sentence

7. In sentencing the applicant, the judge noted that, having pleaded guilty to all the charges, had saved the victim the ordeal and trauma of having to give evidence. Further, that he was a man of 50 years of age with no previous criminal convictions.
8. Of the aggravating features in the commission of the offences, the judge said that she took into account not only the fact that the applicant had raped his own daughter, but also her age and the degree of her intellectual impairment, which conduct he described as a gross abuse of trust. Further, he noted that the applicant had unprotected sexual intercourse with Ms Y on two occasions and had caused her to become pregnant. In the result, the judge determined that it was necessary to impose a deterrent sentence *“to demonstrate abhorrence to such perverted acts.”*

Starting point for sentence

9. In determining the appropriate starting points to be taken for sentence for the offences of rape the judge adverted to decisions of this Court, and to the reasons given for sentence in the sentencing of defendants in the High Court, in various broadly similar circumstances including (*A. I. v Public Prosecutor* [2004] 2 JCBD 185; *Public Prosecutor v U.M.* [2005] 1 JCBD 190; *A.S.K. v Public Prosecutor* [2005] 1 JCBD 234; *Zainuddin bin Serbini v Public Prosecutor* [2014] 1 TCBD 216 and *Public Prosecutor v Zainuddin bin Serbini* [2013] 1 JCBD 110)
10. The judge noted that the maximum sentence for the offence of rape, contrary to section 376 (1) of the Penal Code, was 30 years imprisonment and punishment by whipping. Nevertheless, the judge acknowledged that, by operation of section 258 of the Criminal Procedure Code, given that the applicant was 50 years of age, the applicant was spared the latter punishment by whipping.

Starting point for sentence

11. In the result, the judge stipulated starting points for sentence of 15, 18, 21 and 24 years' imprisonment respectively for the 1st, 2nd, 3rd and 4th charges.

Discount of sentence

12. Affording the applicant a discount of one-third for his pleas of guilty, the judge sentenced the applicant to 10, 12, 14 and 16 years' imprisonment for the 1st, 2nd, 3rd and 4th charges.
13. Having noted of the 5th charge that an offence contrary to section 186 of the Penal Code was punishable with a sentence of 3 months' imprisonment, together with a maximum fine of \$2,000, the judge said that she took into account the applicant's plea of guilty, that he had no previous criminal convictions and sentenced him to 2 months' imprisonment.

Totality

14. The judge ordered that the sentences of imprisonment imposed in respect of the 1st, 2nd, 3rd and 4th charges be served concurrently with one another, but ordered that those sentences of imprisonment be served consecutively to the sentence of imprisonment imposed in respect of the 5th charge. Accordingly, the judge sentenced the applicant to 16 years and 2 months' imprisonment.

The applicant's submissions

15. In advance of this hearing no explanation was provided to the Court for the fact that the application was made more than 2 years and 2 months out of time. In his home-made submissions the applicant acknowledged that his offences were despicable and, having said that he was remorseful for his conduct, asked for the mercy of the Court to impose a more lenient sentence. He said that his wife and their six children who remained at home were dependent on welfare aid of \$500 a month.

Discussion

16. Before granting an extension of time for an appeal to be heard, this Court must consider (a) the length of the delay and whether or not it is explained satisfactorily and (b) whether the appeal is likely to succeed. It is to be noted that the applicant was unrepresented both at his trial and before this Court. No doubt, having regard to the applicant's family circumstances, raising the fee required to lodge the appeal was itself a significant hurdle to the applicant and his family. Accordingly, we shall consider whether the appeal is likely to succeed.
17. The judge was undoubtedly correct to describe the commission of the offences as a gross breach of trust requiring a deterrent sentence. The applicant took advantage of not only the trust reposed by a 16-year-old child in her father but also her limited intellectual capability. The rape offences occurred over a period of about two months and involved two acts of unprotected sexual intercourse, resulting in the pregnancy of Ms Y.
18. As the judge noted, in *A. I. v Public Prosecutor* this Court said of the then current approach to sentencing that the "*proper sentence after plea for the rape of a daughter of tender years is 10 years and 12 strokes*".
19. In that case, the appellant pleaded guilty to having raped his 15-year-old daughter twice. The judge imposed sentences of 15 years' imprisonment and 15 strokes on each of the two charges to be served concurrently.
20. Of the approach to sentencing for the second offence, this Court said "*it would have been proper to add 2 years to the 10 years sentence imposed for the first offence.*" Those statements imply starting points for sentence of 15 years and 18 years' imprisonment for the first and second offences of rape respectively, and an overall starting point of

18 years' imprisonment. Further, this Court suggested that "*some account*" should be taken of the fact that force was used, noting that the use of parental authority was to be equated with "*minimal force*". However, having noted the increased incidence of such offences, this Court added "*Courts hereafter could properly impose sentences on offences which are committed after today's date at a higher level than that of the current level.*"

21. In the result, this Court quashed the sentences of imprisonment imposed by the judge and substituted sentences of 10 years' imprisonment and 12 strokes and 12 years imprisonment and 12 strokes to be served concurrently for the respective charges.
22. In sentencing the defendant in *Public Prosecutor v Cpl. 6690 M bin T* [2005] 1 JCBD 289 for the rapes of his three daughters, one in 1999 and two in April 2005, when they were respectively 15, 19 and 18 years of age, and the attempted rape of the third daughter in May 2005, the Honourable Chief Justice Dato Seri Paduka Mohammed Saied distinguished the approach to sentencing in incestuous rapes identified in the judgment of this Court in *A. I. v Public Prosecutor* on the basis that the clear distinction was that "*the defendant in the present case flagrantly and callously abused the trust that three young sisters reposed in the man, whom they knew as their father.*"
23. In those circumstances, having taken a starting point for sentence for the three charges of rape of 20 years' imprisonment, and affording the defendant a discount of one-third for his pleas of guilty so that the sentence for each offence was "*a little over 13 years*", the judge sentenced the defendant to 13 years' imprisonment and 13 strokes; 14 years' imprisonment and 13 strokes; and 16 years' imprisonment and 15 strokes for the three charges of rape. In doing so, he said that there ought to be "*some enhancement of sentence*" in respect of subsequent similar offences." All those sentences were ordered to be served concurrently, together with the sentence of 7 years' imprisonment imposed in respect of the charge of attempted rape. In the result, the defendant was sentenced to a total of 16 years' imprisonment with 15 strokes.
24. In *Public Prosecutor v Hamran bin Bakar* (Criminal Appeal No. 6 of 2016), this Court allowed an application for review and increase of sentence by the Public Prosecutor of the total sentence of 14 years' imprisonment imposed on the defendant by Intermediate Court Judge Pg Masni binti Pg Hj Bahar on the defendant's conviction, on his pleas of guilty, to eight charges of rape and one of attempted rape of his three daughters, Ms X, Ms Y and Ms Z. This Court increased the total sentence imposed on the defendant to 16 years' imprisonment.
25. In 2002/2003, the defendant raped Ms X violently on four occasions when she was aged 13 and 14 years. On two occasions, he did so having taken her in his car to quiet place where, having left her alone in the car, he returned pretending to be a stranger. On the third occasion, he burst into the family home and, having pushed aside her younger brother, raped her violently. On the fourth occasion, he raped her in his car, telling her that he needed to do so to ward off evil spirits.

26. Then, in February 2016, when Ms X was 26 years of age, having driven her to a quiet location he raped her twice, having persuaded her that the sexual acts were required to ward off evil spirits.
27. In 2014, the defendant attempted to rape Ms Y, then 15 years of age. However, she resisted and sexual intercourse did not take place. In 2015, the defendant raped Ms Z, when she was 16 years of age, on two occasions having driven her to a quiet location. On the second occasion, he did so notwithstanding her screaming.
28. This Court approved of the starting point for sentence taken by the judge in respect of the 2002/2003 rapes of Ms X of 18 years' imprisonment for the first offence, enhanced by an accumulative additional sentence of one year's imprisonment for each successive offence, so that the starting points taken for sentence were 18 years, 19 years, 20 years and 21 years' imprisonment respectively for the 1st, 2nd, 3rd and 4th charges.
29. Similarly, in respect of the offences committed in the period 2014-2016, this Court said that the starting points identified by the judge were well merited: namely, 10 years' imprisonment for the attempted rape of Ms Y, when she was 15 years of age; 18 years' imprisonment for each of the two rapes of Ms Z, when she was 16 years of age; and 21 years' imprisonment for each of the two rapes of Ms X, when she was 26 years of age. This Court noted that no strokes were imposed on the defendant, pursuant to section 258 of the Criminal Procedure Code, given that the defendant was over 50 years of age.
30. This Court said that the judge had correctly discounted the starting points taken for sentence by one-third to reflect the defendant's pleas of guilty, which had saved the three victims having to give evidence. However, the Court went on to note that the crux of the prosecution appeal lay in the judge's order that, having regard to "*the overall criminality*", all the sentences of imprisonment be served concurrently and, in particular, that the total sentences imposed on the defendant did not reflect the overall criminality involved in a grave and serious series of rapes on the young daughters.
31. Having noted that the maximum sentence for an offence of rape, contrary to section 376 (2) of the Penal Code was 30 years' imprisonment with at least 12 strokes, this Court went on to observe that: (page 4)

"Offences of this nature are disturbingly frequent in this jurisdiction. The need for deterrent sentences is plain."

Unfortunately, that observation echoed a similar statement made 12 years earlier by this Court in *A. I. v Public Prosecutor*.

32. Of the gravity of the offence of rape committed by a father on young daughters, this Court cited with approval the observations of the sentencing judge in *A. I. v Public Prosecutor*, namely: (page 4)

“The position of superiority of the father vis-à-vis his daughter-victims was such that the daughters, being scared as obviously they had been, had no option to succumb to his despicable desire which in the circumstances of this case seem to have been insatiable.

Closely aligned to this position of superiority is the element of abuse of trust that such inexperienced girls of vulnerable age, repose in their elders, particularly the father, flagrant and callous abuse of trust by the father aggravates this kind of offence.”

33. In the result, Court said that the appropriate starting point to be taken to reflect the overall conduct of the defendant was 25 years’ imprisonment, which would normally have resulted in a sentence of 16 years and 8 months’ imprisonment but, having regard to the fact that the application was for an increase of sentence, the Court said that it was satisfied that the total appropriate sentence to be imposed on the defendant was 16 years’ imprisonment.
34. In the course of the judgment, this Court adverted to the fact that the Public Prosecutor had drawn to its attention a number of previous decisions. Of that, the Court said: (page 4)

“We have considered them with a degree of caution as no two case are the same. Rape cases in particular are highly fact sensitive. There is no doubt that they can be of value to a sentencing court, but primarily for comparative purposes only.”

35. Mindful of those considerations, nevertheless it is to be noted that the applicant is to be sentenced for four rapes of one victim aged 16 years, rather than eight rapes and one attempted rape involving three victims, two of whom were first raped when 13 and 16 years of age respectively, for which the defendant was sentenced in *Public Prosecutor v Hamran bin Bakar*. Furthermore, the applicant inflicted no force on Ms Y, over and above the utilisation of parental authority on a young daughter, which is to be equated with minimal force, and the offences were committed over a period of about two months. Whereas, by contrast in *Public Prosecutor v Hamran bin Bakar* the defendant repeatedly raped Ms X violently and the overall offences were committed in a period of 8 years. On the other hand, the applicant subjected Ms Y to unprotected sexual intercourse on two occasions, in consequence of which she became pregnant. Moreover, having regard to her mental capacity, she was obviously most vulnerable and the applicant’s breach of trust accurately described by the judge as “gross”.
35. We are satisfied that the judge was correct to stipulate a starting point for sentence of 15 years’ imprisonment for the 1st charge and to enhance that starting points to reflect the aggravating factor of the commission of the second offence by 3 years’ imprisonment to 18 years imprisonment. That approach accorded with the statements made by this Court in respect of an enhanced sentence for a second offence in *A. I. v Public Prosecutor*. However, obviously the Court was not suggesting that each such subsequent offence is to be visited with an enhanced starting point for sentence of 3 years’ imprisonment. Particular care must be had to the circumstances

of the commission of the subsequent offences in determining the level of enhancement of sentence for those offences and to considerations of the appropriate totality of sentence.

36. Highly relevant to those considerations in the instant case is the fact that the rapes the subject of the 3rd and 4th charges were of the same victim, occurred at the same place and on the same night, within about an hour of one another. Although, entirely properly, those offences were the subject of separate charges, nevertheless they were clearly one unfolding event. The fact that in the rape the subject of the 3rd charge the applicant subjected the victim to unprotected sexual intercourse and chose to ejaculate within Ms Y's vagina was clearly a serious factor in aggravation of the commission of the offence. We are satisfied that the judge was correct to stipulate a starting point for sentence of 21 years' imprisonment. However, having regard to the fact that the rape the subject of the 4th charge was of the same victim, at the same place about one hour later and that the applicant did not inflict unprotected sexual intercourse on Ms Y again, we are satisfied that the judge fell into error in enhancing the starting point taken for sentence by a further 3 years' imprisonment to 24 years' imprisonment. With respect, in our judgment the appropriate starting point for sentence for the 4th charge was 22 years' imprisonment.
36. We are satisfied that the judge was correct to afford the applicant a discount of one-third from the starting points taken for sentence to reflect his pleas of guilty. It follows that the appropriate sentence to be imposed in respect of the 4th charge is 14 years and 8 month's imprisonment.
37. We are satisfied that in respect of the 5th charge the judge was correct to impose a sentence of 2 months' imprisonment, ordered to be served consecutively to the other sentences of imprisonment.

Conclusion

38. Accordingly, we allow the application for leave to appeal against sentence out of time and, treating the hearing of the application as the hearing of the appeal, we allow the appeal and quash the sentence of 16 years' imprisonment imposed in respect of the 4th charge. In its place, we substitute a sentence of 14 years and 8 months' imprisonment. We make no other orders.
39. In the result, the total sentence imposed on the applicant is 14 years and 10 months' imprisonment.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A