

Md Shab Ali
AND
Public Prosecutor

(Court of Appeal of Brunei Darussalam)
(Criminal Motion No. 26 of 2024)

Steven Chong, C.J., Lunn and Woolley, JJA

Date of Hearing: 12 June 2025.

Date of Judgment: 18 June 2025

Criminal law – Rape – s. 376(2)(b), Penal Code, Cap. 22. Single charge.

Victim under the age of 14 – Sentence – Judge erred in taking the maximum sentence of 30 years’ imprisonment as starting point and discounting sentence for plea of guilty by only one sixth, on basis evidence was ‘overwhelming’ and imposing a sentence of 25 years’ imprisonment, with 20 strokes. Sentence of 25 years’ imprisonment quashed.

Appropriate starting point -20 years’ imprisonment. Discount for early plea of guilty: Judge’s assessment evidence was ‘overwhelming’ irrelevant to discount. Appellant entitled to full one-third discount.

Sentence of 13 years 4 months’ imprisonment imposed on Appellant.

Applicant In Person.

DPP Hjh Rozaimah Hj Abd Rahman for the Public Prosecutor.

Cases cited:

Abdul Sani Bin Kefli v Public Prosecutor [Criminal Motion No. 20 of 2019]

Y Bin HG v Public Prosecutor [Criminal Appeal No. 16 of 2018]

Public Prosecutor v Khairul Bin Haji Dagang [Criminal Trial No. 8 of 2017]

Hj R Bin Hj N v Public Prosecutor [Criminal Motion No. 26 of 2018]

Public Prosecutor v Mohammad Nazrol Bin Hj Siawang@Hj Ibrahim [Criminal Trial No. 8 of 2018]

A.I. v Public Prosecutor [2004] 11 JCBD 185.

Zainuddin bin Sarbini v Public Prosecutor [2024] JCBD 216

Public Prosecutor v Mohammad Nazrol bin Hj Siawang @ Ibrahim (Criminal Trial No. 8 of 2014)

AHF Bin AU v Public Prosecutor [Criminal Appeal No. 10 of 2023]

Lunn, J.A.:

1. The Applicant seeks an extension of time to appeal against the sentence of 25 years' imprisonment and 20 strokes imposed on him by the High Court on 28 December 2021.

Introduction

2. On 4 December 2021, the Applicant was arraigned on a single charge of rape, contrary to section 376(2)(b) of the Penal Code, Cap. 22, of a victim, hereinafter referred to as Ms. X, aged 12 years at the time of the offence. In response to the Applicant disputing the charge, on the basis that sexual intercourse had occurred with Ms. X's consent, the Judge entered a plea of not guilty and adjourned the proceedings.

3. At a hearing on 21 December 2021, having been informed by the Judge that in law the issue of consent is not a defence in cases where the victim is under the age of 14 years, the Applicant pleaded guilty to the charge and accepted the Statement of Facts as the basis of the Court accepting the plea. Thereafter, the Judge imposed a sentence of 25 years' imprisonment and 20 strokes.

The facts

4. The Applicant, a 39-year-old Bangladeshi, was employed as a waste collector. On 14 July 2021, between 10:00 a.m. and 11:00 a.m., the victim's grandfather, Mr. L, noticed that his granddaughter Ms. X, was missing at the time that he was to take her to school. After an unsuccessful search inside the house, Mr. L proceeded to search the surrounding area and discovered Ms. X lying on the ground, with the Applicant positioned on top of her, in the compound of the house near the gate of their residence. Ms. X was in her school uniform, with her underwear pulled down. The Applicant's trousers and underwear were likewise lowered to his knees. Mr. L shouted for assistance from the domestic maid, which alerted the Applicant and caused him to flee the scene immediately.

5. A report was made to the police that day and the Applicant was arrested on 22 July 2021. During investigations, Ms. X said that she recognized the Applicant to be a person who had been collecting waste from their residence on many occasions. On one such occasion, he had squeezed her breast, an incident she did not report. Of the circumstances of the rape, Ms. X said that the Applicant had instructed her to lie down, pulled down her underwear and inserted his penis into her vagina, causing her pain. For his part, the Applicant admitted having had sexual intercourse with Ms. X without her consent on 14 July 2021.

6. Further investigations revealed that, prior to 14 July 2021, there had been telephone communications between the Applicant and Ms. X, in which he had provided her with his mobile phone number.

7. A medical examination conducted on Ms. X on 14 July 2021 identified the presence of spermatozoa on a vaginal swab taken from her, evidencing the fact that she had been subjected to sexual intercourse that day. A clinical psychology report, dated 21 July 2021, stated that she had been diagnosed as having mild mental retardation and a mild learning disorder.

Sentence

(i) Prosecution submissions

8. In written submissions provided to the Judge and read out in court Hjh Rozaimah Hj Abd Rahman, Deputy Public Prosecutor, submitted that several aggravating factors warranted a substantial custodial sentence, namely: the victim's young age; her mental impairment; the fact that the rape was committed in broad daylight in front of her house; and the fact that the Applicant had cultivated a relationship with the victim.

9. The relevant facts and the sentences imposed in five previous rape cases were drawn to the attention of the Judge, to assist the court in determining the appropriate sentence: *Abdul Sani Bin Kefli v Public Prosecutor* [Criminal Motion No. 20 of 2019]; *Y Bin HG v Public Prosecutor* [Criminal Appeal No. 16 of 2018]; *Public Prosecutor v Khairul Bin Haji Dagang* [Criminal Trial No. 8 of 2017]; *Hj R Bin Hj N v Public Prosecutor* [Criminal Motion No. 26 of 2018]; and *Public Prosecutor v Mohammad Nazrol Bin Hj Siawang@Hj Ibrahim* [Criminal Trial No. 8 of 2018].

10. In the result, Hjh Rozaimah submitted that the appropriate starting point to be taken by the Judge was one of 18 years' imprisonment, reduced to 12 years' imprisonment in view of the Applicant's guilty plea.

(ii) Reasons for sentence

11. In his reasons for imposing sentence on the Applicant, the Judge rejected the prosecution's submissions that he take a starting point of 18 years' imprisonment and, reflecting his plea of guilty, discount the sentence to one of 12 years' imprisonment. Having said that he had regard to the evidence that, having befriended the victim, the Applicant had taken advantage of her mental condition to abuse her on an earlier occasion by touching her breasts and then subsequently raping her, the Judge stipulated a starting point for sentence of 30 years' imprisonment, which he acknowledged to be the maximum sentence of imprisonment for the offence.

Discount of sentence

12. Having said that the evidence in the case was strong and that the Applicant ran away, the Judge rejected the prosecution's submission that he afford the Applicant a discount of one-third from the starting point taken for sentence. Rather, he determined to deduct only five years' imprisonment from the starting point of 30 years' imprisonment. In the result, he imposed on the Applicant a sentence of 25 years' imprisonment with 20 strokes of whipping.

The appeal

Applicant's submissions

13. Of the fact that the Notice of Appeal against the sentence imposed by the Judge was not filed within the prescribed time limit but only filed on 21 October 2024, the Applicant explained that following sentence he had been shunned by his family and friends and was unable to make payment of the requisite fee to file the Notice until visited by his nephew in 2024.

Grounds of appeal

14. The Applicant contends that the sentence imposed is excessive and urges this Court to consider several mitigating factors. First, he is the sole breadwinner for his family, which includes his elderly mother, his wife, who is paralysed, and their three children. Secondly, he cooperated with the police following his arrest. Thirdly, he pleaded guilty at an early stage. Fourthly, he contends that in similar cases, the offenders received comparatively lighter sentences.

Respondent's submissions

15. In her written submissions for the prosecution, Hjh Rozaimah resiled from the submissions that she had made to the Judge that the appropriate starting point for sentence was 18 years' imprisonment, from which the Applicant was entitled to a discount of 6 years' imprisonment. Now, she submitted to this Court that the starting point identified by the Judge in sentencing, of the maximum sentence of 30 years' imprisonment, was warranted and that the sentence of 25 years' imprisonment imposed on the Applicant was justifiable, given the aggravating factors that were present and the sentencing authorities relevant to the rape of child victims. She provided this Court with a Psychological Report, dated 10 April 2025.

16. Hjh Rozaimah referred the Court to two judgments of this court, and to the reasons for sentence in a case in the High Court, concerning victims of a tender age to assist the Court: *A.I. v Public Prosecutor* [2004] 11 JCBD 185¹; *Zainuddin bin Sarbini v Public Prosecutor* [2024] JCBD 216²; *Public Prosecutor v Mohammad Nazrol bin Hj Siawang @ Ibrahim* (Criminal Trial No. 8 of 2014)³; and *AHF bin Au v Public Prosecutor* (Criminal Appeal No. 10 of 2023).⁴

17. She reminded the Court that in 2017, s. 276(2)(b) of the Penal Code, Cap 22 had been revised and now provided that the mandatory minimum penalty for an offence contrary to the subsection was the imposition of a sentence of not less than 10 years' imprisonment with not less than 12 strokes.

18. Hjh Rozaimah acknowledged that in *AHF bin Au v Public Prosecutor* this Court had upheld a total sentence of 30 years' imprisonment imposed by the Judge on the appellant on his pleas of guilty to two charges of rape of an 11-year-old girl. The appellant had pleaded guilty only after the completion of the victim's evidence-in-chief. The appellant, then 29 years of age, was a close friend of the victim's brother and permitted to live at the family home in which the victim resided. The first rape was committed sometime in 2021 in the appellant's mother's home, to which he had taken the victim. The second rape occurred in December 2021 in the home in which they both lived. The Judge had taken a starting point of 18 years' imprisonment for the first charge and 20 years' imprisonment for the second charge. Having afforded the appellant a discount of sentence from the starting point, the Judge imposed sentences of 14 years' imprisonment and 16 years' imprisonment respectively, which sentences he ordered to be served consecutively.

¹ Court of Appeal, 4 December 2004.

² Court of Appeal, 7 May 2014.

³ High Court, 2 September 2015.

⁴ Court of Appeal, 20 June 2024,

19. Hjh Rozaimah sought to distinguish *AFH bin Au* on the basis that in the instant appeal the evidence was overwhelming: the victim's grandfather was an eyewitness; and the presence of spermatozoa was found on a vaginal swab of the victim. Also, the psychological report described the victim as having mild mental retardation and mild learning disorder.

20. Of the factors of aggravation in the commission of the offence, the prosecution repeated the submissions made to the Judge, namely: (i) the victim was of tender years, 12 years of age; (ii) the psychological reports diagnosed her as having mild mental retardation and mild learning disorder; the updated psychological report, dated 10 April 2025, diagnosed her as having Autism Spectrum Disorder, albeit that the opinion was expressed that no further psychological intervention was warranted; (iii) the fact that the Applicant had befriended the victim, with whom he had telephone contact prior to the offence; (iv) the time and place of the rape, namely in the morning in the open air within the compound of her home, such that it was a brazen commission of the offence witnessed by her grandfather.

Discount of sentence from the starting point

21. In her oral submissions Hjh Rozaimah submitted that the fact that the evidence against the Applicant was overwhelming was a factor that entitled the Judge to determine not to afford him a discount of one-third from the starting point taken for sentence following his plea of guilty. However, she acknowledged candidly that she was unable to cite any authority in support of that proposition.

Discussion

22. We readily accept that the circumstances of the commission of the offence were very serious indeed. Nevertheless, we are satisfied, with respect, that the Judge fell into error in determining to take the maximum sentence of 30 years' imprisonment as the starting point for sentence for a single charge of rape. We have regard to the approach of this Court in its judgment in *AFH bin Au*, of which two of the members of this Court were members. There, the primary aggravating factors in the commission of rape were that the victim was only 11 years of age and that the appellant was in serious breach of trust, as someone trusted as a close friend of her brother to live in the family home. This Court approved a starting point of 18 years' imprisonment for the first charge of rape.

23. In the Applicant's case, having regard to all the circumstances of the commission of the offence, but in particular the aggravating factors that the Applicant had befriended the victim, who had mild mental retardation and clearly gained an element of her trust, together with the fact of the commission of the offence in the open in grounds of the compound of the victim's home, we are satisfied that the appropriate starting point to be taken for sentence is one of 20 years' imprisonment.

Discount for plea of guilty

24. We reject Hjh Rozaimah's submission that the Judge was entitled to take into account the 'overwhelming' nature of the evidence against the Applicant on the charge of rape as a basis for reducing the discount afforded to the Applicant from the starting point taken for sentence. The Court of Appeal of England and Wales in *R v Caley* [2013] 2 CR. App. R. (S) 305 determined that is not a proper basis to reject the usual discount of sentence. In the judgment of the court,

Hughes LJ, as Lord Hughes was then, said, “*The various public benefits which underlie the practice of reducing sentences for plea of guilty apply just as much to overwhelming cases as to less strong ones*”.⁵

25. The utilitarian benefits of a plea of guilty are obvious: the prosecution does not have to investigate the matter exhaustively and expensively and, perhaps, obtain expert evidence; the public’s limited resources can then be concentrated on those cases where a trial will really be necessary and such cases will not be delayed, in particular where the accused is remanded in custody.⁶ The benefits for the victim, in particular in a sexual case, are that she does not have the anxiety of having to wait months or years before giving evidence nor the trauma of actually giving evidence, confronted by her rapist. Further, there is the considerable benefit of the knowledge that the defendant has accepted his guilt.⁷

26. The Sentencing Guideline, ‘*Reduction in sentence for a guilty plea-first hearing*’, issued by the Sentencing Council in England in 2017, is entirely consistent with the description of Hughes LJ in *R v Caley* as to the benefits of a plea of guilty and the proper approach to the issue of the strength of the prosecution case. It states succinctly:

“B. Key principles

*The benefits apply regardless of the strength of the evidence against an offender. The strength of the evidence should **not** be taken into account when determining the level of reduction.”*

27. We are satisfied that those principles are equally appropriate to the circumstances in Brunei Darussalam. Having entered a plea of guilty at an early opportunity, the Applicant was entitled to be afforded a discount of one-third from the starting point.

Conclusion

28. Accordingly, we grant the application for an extension of time in which to file the Notice of Appeal and quash the sentence of 25 years’ imprisonment imposed on the Appellant. In its place, we impose a sentence of 13 years and 4 months’ imprisonment on the Appellant. We make no other order.

STEVEN CHONG, C.J.

⁵ *R v Caley* [2013] 2 CR. App. R. (S) 305 at page 316, paragraph 24.

⁶ *Ibid.* page 311, paragraph 6.

⁷ *Ibid.* page 311, paragraph 5.

A handwritten signature in black ink, appearing to read 'J. Woolley', written in a cursive style.

LUNN, J.A.

WOOLLEY, J.