

MOHAMMAD HAIREY BIN HAJI KAMIS

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Motion No. 38 of 2018)**

Before: Burrell P, Seagroatt and Lunn JJ A.

15th November 2018

Applicant in person

DPP Dk Didi-Nuraza binti Pg Hj Abdul Latiff for Respondent

Headnote: Sentence-the applicant pleaded guilty to three charge: 1st charge, outraging the modesty of his step-daughter, aged 13 to 14 years, contrary to section 354B of the Penal Code (3 years imprisonment); 2nd charge, observing and video recording his naked 16-year-old step daughter in her bedroom in the family home as she dressed following bathing, contrary to section 377H of the Penal Code (8 months imprisonment, consecutive to the 1st charge); and 3rd charge, consumption of Methylamphetamine, contrary to section 6 (b) of the Misuse of Drugs Act (\$1,500 fine- payment forthwith, 3 months' imprisonment in default.)

Appeal against sentence allowed: 2nd charge, the sentence of 8 months' imprisonment was quashed and a sentence of 4 months' imprisonment substituted, to be served consecutively to the sentence imposed on the 1st charge; the Court regretted the destruction by the prosecution of the recording and all copies prior to the hearing, albeit pursuant to an order of the judge sought by the prosecution; 3rd charge, the judge having made no enquiries as to the applicant's means, the Court quashed the order that in default of payment of the fine, the applicant serve a sentence of 3 months imprisonment, to be served consecutively to the other sentences.

Cases cited in the Judgment

Public Prosecutor v JBJ (Criminal Trial no. 5 of 2014)

Zainal Abidin bin Hj Md Hashim v Public Prosecutor (CA No. 8 of 2016)

Haji Mohammad Sulifatdi@Haji Mohammed Suhaili bin Awang Haji Sulaiman v

Public Prosecutor (CM No. 30 of 2017)

Public Prosecutor v Ang Zhu Ci Joshua [2016] SGM 2

Public Prosecutor v Tay Beng Guan Albert [2000] 2 SLR (R) 778

Public Prosecutor v Chong Hou En [2015] SGHC 69

Lunn JA, :

1. The applicant, who is unrepresented, seeks leave to appeal out-of-time the total sentence of 3 years and 8 months' imprisonment and a fine of \$1,500, in default of payment of which the applicant was ordered to serve 3 months' imprisonment, imposed on him on 29 November 2017 by Intermediate Court Judge Lailatul Zubaidah binti Hj Mohammed Hussein on his conviction, following his pleas of guilty, to three offences.

The charges

2. The 1st charge alleged that at the family home in Kampong Pintu Malim, Brunei Darussalam on a date in 2013, whilst being in a position of trust or authority towards Ms X, a person then under the age of 18 years, the applicant assaulted her, thereby outraging her modesty, by massaging her breasts over her shirt, contrary to section 354B of the Penal Code, Cap. 22. The 2nd charge alleged that at the same premises on a date in 2016, and for the purpose of sexual gratification, the applicant observed and made video recordings of Ms X, whilst she was naked but, knowing that she did not consent to that conduct, contrary to section 377H of the Penal Code. The 3rd charge alleged that on or about 5 April 2017 in Brunei Darussalam the applicant consumed Methylamphetamine, contrary to section 6 (b) of the Misuse of Drugs Act, Cap. 27.

Statement of Facts

3. In 2011, the applicant married his wife, who had two children from a previous marriage. Ms X, who was one of those children, was born on 22 September 1999. On the evening of 27 October 2017, the applicant's wife discovered a memory card hidden amongst the applicant's clothes in a closet in the family home. The memory card contained photographs of her daughter, the applicant's stepdaughter, naked and bare breasted. Following her report to the police that day, the applicant was arrested on 28 October 2017.
4. On 5 April 2017, the applicant had been arrested by police officers of the Narcotics Control Bureau in a raid they conducted on other premises in Kampong Pintu Malim. A urine sample taken from the applicant tested positive for Methylamphetamine.

The 1st charge

5. On a day in 2013, having entered the room in the family home in which Ms X was sleeping with her two siblings, the applicant massaged her breasts over her shirt whilst she was asleep. Ms X, who was 13 to 14 years of age, woke up, yelled and subsequently complained to her mother, who confronted the applicant. However, no report was made to the police.

The 2nd charge

6. In the afternoon on a day 2016, at the family home, the applicant peeped through a hole in the wall of a room which he occupied into the bedroom in which Ms X, who was

then 16 years of age, was naked having showered and having begun to dress. The applicant observed her naked and used his mobile telephone to record three videos and three photographs of her, two of which captured her bare breasts.

Reasons for sentence

7. In his reasons for sentence, having noted that the applicant was unrepresented, the judge said that in mitigation the applicant claimed that he committed the offences, which he regretted, whilst under the influence of dangerous drugs.
8. Of the fact that Ms X was his stepdaughter, the judge found that the applicant's conduct in committing the 1st and 2nd charges was a "*gross breach of trust*", not only of Ms X but also of her mother, his wife.

1st Charge

9. In determining the appropriate sentence to impose in respect of the 1st charge, the judge referred to the sentences of imprisonment imposed in the *Public Prosecutor v JBJ* (Criminal Trial no. 5 of 2014); *Zainal Abidin bin Hj Md Hashim v Public Prosecutor* (CA No. 8 of 2016); *Haji Mohammad Sulifatdi@Haji Mohammed Suhaili bin Awang Haji Sulaiman v Public Prosecutor* (CM No. 30 of 2017).

2nd Charge

10. In respect of the 2nd charge, the judge said that there were no sentencing precedents in Brunei. In those circumstances, the judge had recourse to judgments of courts in Singapore in *Public Prosecutor v Ang Zhu Ci Joshua* [2016] SGMC 2; *Public Prosecutor v Tay Beng Guan Albert* [2000] 2 SLR (R) 778 and *Public Prosecutor v Chong Hou En* [2015] SGHC 69.
11. Noting that the offence committed in the *Public Prosecutor v Chong Hou En* was contrary to section 509 of the Penal Code in Singapore, which carries a maximum penalty of imprisonment of one year, the judge said that in his view the factors identified as being relevant to sentence in that case: namely, the degree of planning and premeditation; the location and level of intrusion and the age of the victim were all factors relevant to sentencing in the offence the subject of the 2nd charge. In doing so, he said that "*the nature of the offences are the same.*"

Starting points for sentence

12. The judge did not identify a starting point for sentence in respect of the 1st charge, but took a starting point for sentence of 12 months' imprisonment in respect of the 2nd charge.

Discount of sentence

13. In respect of the 2nd charge the judge said that he afforded the applicant a discount of sentence for his plea of guilty and mitigation.

Sentence

14. In the result, the judge sentenced the applicant to 3 years' imprisonment and 2 strokes for the 1st charge and 8 months' imprisonment for the 2nd charge, which sentences he ordered to be served consecutively. Finally, the judge sentenced the applicant to a fine of \$1,500 for the 3rd charge "*to be paid today*", with a sentence of 3 months' imprisonment in default of payment of the fine.

Notice of appeal against sentence

15. A Notice of Appeal against sentence was filed with the Court on 29 September 2018 by the applicant's brother. However, the Notice did not address, let alone offer any explanation, for the fact that the application was made 9 months out-of-time.
16. In his letter to the Court, dated 15 October 2018, the applicant did not address or offer any explanation for the Notice of Appeal being filed 9 months out-of-time. At the oral hearing, the applicant explained the delay in filing the Notice of appeal by asserting that this was the first sentence of imprisonment imposed on him and he was not aware of the time requirements. When he was told of those requirements, he was told that an appeal would cost \$2,000. The applicant said that he regretted committing the offences and would not reoffend and asked for a reduction of sentence, so that he could look after his family.

The respondent's submissions

17. For the respondent, Ms Didi-Nuraza Latiff submitted that the applicant had failed to explain why he had filed his notice of appeal against sentence 9 months out of time. She submitted that the judge was entitled to determine that the 1st charge was a "*gross breach of trust*" and to impose the minimum sentence of 3 years' imprisonment, together with 2 strokes. In imposing a sentence of 8 months' imprisonment for the 2nd charge, the judge was correct to have regard to the degree of planning involved, the level and location of intrusion involved in observing and recording the victim's private acts and her age. Finally, she said that the sentence imposed in respect of the 3rd charge was within the usual range of sentence imposed for that offence. In the result, she submitted that the overall sentence imposed on the applicant was appropriate.

Discussion

The 1st charge: section 354 B

18. Although the judge did not state it to be the case, the sentence of 3 years' imprisonment imposed in respect of the 1st charge was the minimum sentence, pursuant to section 354 B of the Penal Code, that the judge was permitted to impose in respect of the applicant's conviction of that offence. We are satisfied that the sentence was appropriate for that single offence.

The 2nd charge: section 377H

19. The 2nd charge alleged that the applicant:

"...did for the purpose of obtaining sexual gratification, observe and record 3 videos of Ms X... while she was naked and about to put on her undergarments, knowing that she does not consent to being observed and recorded for your sexual gratification..."

20. It is to be noted that section 377H of the Penal Code provides:

"(1) Whoever-

(a) for the purpose of obtaining sexual gratification, observes another person doing a private act; and

(b) he knows the other person does not consent to being observed for sexual gratification, shall be punished with imprisonment not exceeding 3 years, a fine or both.

(2)...

(3) Whoever-

(c) for the purpose of obtaining sexual gratification, records another person (B) doing a private act, and with the intention that he or a third person will look at that image of B doing that act; and

(d) he knows the other person B does not consent to his recording the act with that intention, shall be punished with imprisonment not exceeding 3 years, a fine or both."

21. Clearly, the charge averred that the applicant had acted contrary to both sub-sections (1) and (3) of section 377H, namely by observing and recording Ms X for his own sexual gratification.

22. Section 377 H was an amendment by addition to the Penal Code in 2012 and reflects section 67 of the Sexual Offences Act, 2003 of the United Kingdom. Both pieces of legislation specifically proscribe voyeurism for the first time. Section 67 (5) provides for a maximum sentence of 2 years' imprisonment following a conviction on indictment for the offences provided by section 67 (1) to (4).

23. As noted earlier, having stated that there were no sentencing precedents in Brunei in respect of offences contrary to section 377H of the Penal Code, the judge referred to judgments in three cases in the High Court of Singapore. However, those cases were concerned with section 509 of the Penal Code of Singapore which, save for the provision of a sentence of imprisonment of one year only in Singapore, is in identical terms to section 509 of the Penal Code of Brunei. It is to be noted that in the Singapore there was and is no equivalent to section 377H of the Penal Code of Brunei. Section 509 of the former, provides:

"Whoever, intending to insult the modesty of any women-

(a) utters any words, makes any sound or gesture or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman; or

(b) intrudes upon the privacy of such woman shall be punished with imprisonment for a term not exceeding 3 years with fine."

24. Not surprisingly, having regard to the potential ambit of any intrusion "*upon the privacy of such woman*", in the context of an insult to her modesty, it was relevant for the courts in Singapore in those cases to have regard to the particular circumstances of the commission of the offence, in particular that they involved covert video recordings of woman in obvious circumstances of privacy, to determine the culpability of the appellants.
25. In *Public Prosecutor v Tay Beng Guan Albert* the respondent pleaded guilty to two charges, contrary to section 509 of the Penal Code of Singapore, in circumstances where he had made a recording with a concealed video camcorder of a female colleague without her knowledge as she bathed in his bathroom and depicted her "*undressing and stepping into the bath tub, and thereafter stepping out of the bath tub naked, drying herself and covering herself with a bath towel.*" Earlier, he made another similar video recording of another colleague as she relieved herself in the toilet. Yong Pung How CJ said that, in contrast to 'peeping' offences, where the observation was transient, the commission of the offence was aggravated by the fact that a recording was made, which the respondent could view again and again, together with the risk that the recording might fall into the hands of others. Yong CJ allowed the prosecution's appeal against the fines imposed on the respondent by the magistrate and substituted two sentences of one month's imprisonment on each charge to be served consecutively.
26. In *Public Prosecutor v Chong Hou En*, Onn J allowed the prosecution's appeal against the order that the respondent undergo 30 months of probation following his pleas of guilty to five counts, contrary to section 509 of the Penal Code of Singapore, and one count of possession of 10,574 obscene films, contrary to section 30(1) of the Films Act, Cap. 107. One of the section 509 charges concerned and "*up skirting*" video of a female in a shopping mall, made with a camera concealed in his shoe, whilst the other four charges were in respect of covert video recordings made of four female family members of his girlfriend whilst they showered in the bathroom of her parents' home. The video recordings depicted the females fully nude. Whilst two of the victims were about 30 years of age, the other two were 10 and 12 years of age respectively.
27. Onn J said that the fact that the respondent video recorded the events was an aggravating factor, because it enabled the events to be replayed and because of the danger of further dissemination of the material, which called for a deterrent sentence. In the result, having quashed the order of probation, he substituted sentences of 12 weeks' imprisonment for each of the five charges contrary to section 509 and 4 weeks imprisonment for possession of the obscene films, ordering that the latter sentence be served consecutively to one of the sentences of 12 weeks imprisonment. Accordingly, the total sentence imposed on respondent was 16 weeks' imprisonment.
28. Section 377H (1) and (3) define clearly the prohibited conduct: namely; for sexual gratification, observing and/or recording a person doing a private act, knowing that the person did not consent to that conduct and, in respect of the recording, with the intention to look at that recording of the person doing that private act. Clearly, the

offence provided by sub-section (3) proscribes making a video recording of the private act with the requisite intention. It follows, that the judge's references to statements made in the Singaporean judgments in respect of circumstances of aggravation of the commission of an offence contrary section 509 of the Singapore Penal Code, namely the making of a video recording of the circumstances of the intrusion into privacy, are not directly relevant to the offence created by section 377H. That conduct, together with the requisite intention to look at it, is the offence provided by subsection 3, not an aggravation in the commission of the offence.

29. Accordingly, contrary to the judge's determination, the fact that the recording made by the applicant was made on a mobile telephone, which allowed the applicant to "*replay these videos*", is not a factor in aggravation of the commission of the offence contrary to sub-section 3. No doubt, given the widespread access to such mobile telephones, the use of such devices, with such an intention, would be a commonplace means of committing the offence. Regrettably, all such recordings carry with them the risk of wider distribution of the material. However, it is to be noted that, in the applicant's case, the particulars of the charge averred that the recording was for the applicant's sexual gratification only.
30. On the other hand, clearly the level of intrusion involved in the observation and recording of the private act and the related planning, together with the age of the victim, are factors relevant to a determination of culpability. Here, the observation and recording were done through a hole in the wall, which was described as "*a small hole on the wall which anyone can look through.*" [Statement of Facts, paragraph 12.] It was not suggested that the hole was created for the purpose of committing the offence. The place in which the victim was observed was her bedroom, not a bathroom or toilet. It appears that the recording on the mobile telephone was achieved simply by applying the telephone to the hole in the wall.

The memory card

31. Clearly, given the challenging circumstances in which the applicant had made the recording of the victim, the quality of the recording, its length and the detail it depicted were all matters of some relevance to sentence. As noted earlier, the Statement of Facts, condescended to very little of that detail, although it was asserted that the "*contents of the memory card were copied into a CD by the police (attached as Annex A)*". However, no such CD was attached to the lower court file. Ms Nuraza said that at the sentencing hearing the judge gave no indication of having viewed the images depicted on the CD.
32. When asked to provide the Court with a copy of the memory card, Ms Nuraza was unable to do so, explaining that, at the conclusion of sentencing on 29 November 2017, the prosecution had sought and the judge had made an order, pursuant to section 357 of the Criminal Procedure Ordinance, that the original of the recording made by the applicant and all copies be destroyed immediately. Ms Nuraza said that the application and the order were made and delivered orally. There was no written order. There is no reference to the application or the making of the order in the Notes of Proceedings.

Clearly, it is imperative that orders made by the Court are recorded into writing and are available in the court files.

33. Ms Nuraza said that although the order provided for immediate destruction of the material, and although she had communicated the effect of the order to the police, in accordance with the usual practice the order was not carried out until after the expiration of the period for giving Notice of appeal. For her part, realistically she acknowledged readily that it was commonplace in Brunei for Notices of appeal to be given out-of time, sometimes considerably out -of-time. Nevertheless, she sought to justify the practice of seeking orders of destruction on the basis that the material was "*sensitive*" and that destruction eradicated the risk of improper dissemination of the material to others, notwithstanding that she acknowledged that all such material was kept in the custody of the police until destruction.
34. It is most regrettable that all copies of the video recording and photographs taken by the applicant have been destroyed. It has deprived this Court of the opportunity of examining the material that was the crux of the 2nd charge. Given that it is accepted to be commonplace that Notices of appeal are given out-of-time, it is clearly necessary that such material is preserved and not destroyed. In the result, this Court is left with the limited description only of the nature and quality of the recording set out in the Statement of Facts, namely "*the defendant saw Miss X naked and putting on her undergarments. The defendant used his mobile phone to take 3 videos of Ms X in the said action. He had also taken 3 photographs-2 capturing Ms X's bare breasts and one of Ms X's breasts covered with her bra.*" The Court has no information about the length of those videos. In all the circumstances, in the absence of that information, and the limited nature of the information otherwise available, the Court must approach the factual basis of the offence on the version most favourable to the applicant.
35. The offence contrary to section 377H is clearly of considerable ambit and encompasses a wide range of private acts, from bathing or using the toilet to sexual activity, alone or with another or others, including sexual intercourse in all its circumstances and permutations. Whilst all persons are entitled to an expectation of privacy in the ordinary course of undressing/dressing and bathing, the degree of embarrassment likely to result from a breach of that legitimate expectation of privacy pales into insignificance compared with breach of privacy of a person's sexual activities. The culpability to be attributed to the range of circumstances of the commission of the offence is to be accommodated within the maximum sentence of 3 years' imprisonment and a fine.
36. The nub of the applicant's culpability lay in the fact that his observation of and the recording he made was of his naked 16-year-old stepdaughter within what ought to have been the security and safety of the family home. The judge was correct to describe that as a "*gross breach of trust*". However, it is to be noted that the offence was committed on one occasion only.
37. In our judgment, having regard to all the matters articulated earlier and in the very particular circumstances of this case, the appropriate starting point for sentence to be taken for the applicant for the 2nd charge is 6 months' imprisonment. The applicant is

entitled to a discount of one-third from that starting point to reflect his plea of guilty. Accordingly, the appropriate sentence to be imposed on the applicant for the 2nd charge is 4 months imprisonment

The 3rd charge

38. As Ms Nuraza asserted in her written submissions, the sentence of a fine of \$1,500 and, in default of payment, a sentence of 3 months imprisonment falls within the usual range of sentence imposed for the consumption of Methylamphetamine, contrary to section 6 (b) of the Misuse of Drugs Act, approved of by the High Court. [See *Wong Kai wing v Public Prosecutor* (CA No. 21 of 2000); and *Rasdi Bin Daud v Public Prosecutor* (CM No. 6 of 2013)]
39. Ms Nuraza informed the Court that at the sentencing hearing, the judge made no enquiry as to the applicant's means. The relevance of information to the Court of an appellant's financial means is illustrated by the case of *Rasdi Bin Daud v Public Prosecutor*. On the appellant's appeal, Steven Chong J , as the Chief Justice was then, declined to reduce fines to a total of \$5,000 imposed on the appellant by the magistrate following his pleas of guilty to five charges, including two charges of consumption of Methylamphetamine. Further, the judge declined to order an extension of time in which to pay those fines. In respect of each of the latter two charges, the magistrate had imposed fines of \$1,500, and 3 months' imprisonment in default of payment, in respect of each charge. In default of payment of all the fines, the appellant faced a total of 9 months imprisonment. Having noted that the appellant worked as a motor-mechanic, the judge determined that the period of two months which the magistrate had given the appellant to make payment was a "*reasonable period to pay the fines*".
39. The only information available to the judge at all relevant to the issue of the applicant's ability to pay a fine was the reference in the Statement of Facts that the applicant worked "*as a packer Brunei press*". However, the judge had no information as to his income, let alone what, if any, assets he possessed. In any event, given that the applicant was sentenced to 3 years' imprisonment for the 1st charge, whatever income he earned as a packer would have ceased and was irrelevant to his ability to pay the fine. The applicant's ability to pay the fine was entirely contingent on what assets were available to him. Of that, the judge had no information whatsoever. In those circumstances, it was inappropriate to impose a sentence of imprisonment in default of payment of the fine "*today*".
40. Having regard to the fact that the offences the subject of the 1st and 2nd charges were separated by two to three years in time and were of a different nature, albeit that they were committed against the same victim and at the same place, we are satisfied that the judge was correct to order that the sentence imposed in respect of the 2nd charge be served consecutively to the sentence imposed in respect of the 1st charge.

Conclusion

41. For the reasons that we have given, we are satisfied that there is merit in the applicant's appeal against sentence and we allow the application for an extension of

time to file the Notice of appeal against sentence. We allow the appeal and quash the sentence of 8 months' imprisonment imposed in respect of the 2nd charge and in its place substitute a sentence of 4 months' imprisonment, which is to be served consecutively to the sentence of 3 years' imprisonment imposed in respect of the 1st charge. We quash the judge's order that, in default of immediate payment of the fine of \$1,500, the applicant serve a sentence of 3 months' imprisonment consecutively to the sentences of imprisonment imposed in respect of the 1st and 2nd charges. Accordingly, the total sentence imposed on the applicant is 3 years and 4 months' imprisonment, with 2 strokes, and a fine of \$1,500.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A