

**Z Bin AHM**

AND

**Public Prosecutor**

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**(Court of Appeal of Brunei Darussalam)  
(Criminal Motion No. 4 of 2023)**

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Steven Chong, C.J.; Seagroatt and Woolley, JJA

**Date of Hearing: 6<sup>th</sup> June, 2024.**

**Date of Judgment: 18<sup>th</sup> June, 2024.**

*Criminal law – Outraging modesty by a person in a position of trust - Sentence*

Applicant In Person.

DPP Siti Khalillah Hj Hussin for Public Prosecutor.

**Cases cited:**

*A.I v Public Prosecutor* [2004] 2 JCBD 185

*Md Adi Saputra v Public Prosecutor* [Criminal Motion No. 49 of 2020]

**Steven Chong, C.J.:**

Introduction

On 30 November 2022 in the Intermediate Court the applicant pleaded guilty to four charges of outraging modesty when he was in a position of trust towards the victim under 18 years old contrary to section 354B of the Penal Code.

Judge Pg Masni Binti Pg Hj Bahar sentenced the applicant to an aggregate sentence of 8 years' imprisonment and 4 strokes.

The applicant seeks leave to appeal out of time against that sentence.

## The facts

In brief the applicant aged 51 is the uncle of the victim who was 8 years old at the time of the first offence and 10 years old at the time of the fourth offence. She is the daughter of the applicant's sister-in-law.

The applicant is a military retiree. He has a wife and three children. The victim and her siblings were often left in his care in his house when their parents went to work and sometimes they would have sleepovers. The children endearingly called him "daddy".

### 1<sup>st</sup> Charge

On four separate occasions between April 2021 and November 2022 the applicant sexually abused the victim when she was in his house. The first incident took place on 11 April 2021 in the living room. The applicant told the victim to lie down next to him. He then fondled her chest and continued to do so even when she tried to resist him.

### 2<sup>nd</sup> Charge

The victim celebrated her 9<sup>th</sup> birthday in the applicant's house on 22 June 2021. This second sexual assault also occurred in the living room. The applicant told the victim to sit next to him on a sofa and he fondled her chest; inserted his hand into her panties and touched her vagina; and told her not to tell anyone about the incident.

### 3<sup>rd</sup> Charge

Sometime in September 2022 the applicant asked the victim to go into his daughter's bedroom. Inside, he told her to lie down and he hugged her from behind; fondled her chest; and pressed his erect penis on her buttocks. They were both fully clothed at the time. This was the third incident.

### 4<sup>th</sup> Charge

Finally, in November 2022 when the victim was sitting on a sofa in the living room the applicant hugged her from behind and fondled her chest.

On all four occasions the victim kept quiet because she was afraid of the applicant.

Shortly after the November 2022 incident the victim confided in her grandmother that she did not want to go to the applicant's house because he had "disturbed" her. The victim's parents made a police report when they found out what had happened.

After arrest the applicant admitted the offences in police interviews.

### The sentence

The Judge gave full credit to the applicant for his guilty plea and imposed the mandatory minimum sentence of 3 years' imprisonment and 2 strokes on the 1<sup>st</sup> Charge; 5 years 3 months' imprisonment reduced to 3 years 6 months' imprisonment and 2 strokes on the 2<sup>nd</sup> Charge; 6 years' imprisonment reduced to 4 years' imprisonment and 2 strokes on the 3<sup>rd</sup> Charge; and 6 years 9 months' imprisonment reduced to 4 years 6 months' imprisonment and 2 strokes on the 4<sup>th</sup> Charge.

She ordered the sentences of imprisonment on the 1<sup>st</sup> and 2<sup>nd</sup> charges to be concurrent and the strokes to be non-cumulative. Likewise, the sentences of imprisonment and strokes on the 3<sup>rd</sup> and 4<sup>th</sup> Charges. The two sets of sentences of imprisonment were then ordered to be consecutive and the strokes to be cumulative resulting in a total sentence of 8 years' imprisonment and 4 strokes.

### The appeal

The applicant contends that the sentence is excessive having regard to his guilty plea; clear record; co-operation given to the police; and remorse for his actions.

### Decision

We are satisfied the sentences of imprisonment individually and in totality properly reflected the aggravating and mitigating features of the case and are not manifestly excessive.

Notwithstanding the applicant's guilty plea, clear record and police admissions, a severe sentence was warranted considering the following aggravating factors: (1) gross violation of trust by him being the victim's uncle; (2) young age and vulnerability of the victim; (3) serious nature of the sexual abuse which included intrusion on the genitalia of the victim; (4) duration of the offending; and (5) offences were committed in his house where the victim's parents thought she would be safe.

The gradation in sentences on the four charges in relation to the order of repetition of the offence accords with the observations of this court in *A.I v Public Prosecutor* [2004] 2 JCB 185.

As to the sentence in totality of 8 years' imprisonment this reflects the overall criminality of the offences, and is in alignment with the sentence of 9 years 4 months' imprisonment and 4 strokes imposed on the applicant on pleading guilty to four charges of outraging the modesty of a young girl who was 10 years old at the time of the fourth offence, upheld by this court in *Md Adi Saputra v Public Prosecutor* [Criminal Motion No. 49 of 2020].

We take note that in the instant case the Judge had imposed sentences of whipping on the charges but she then stated that as the applicant was 51 years old *“by virtue of section 258 of the CPC he is exempted from undergoing the whipping”*.

Section 258 of the Criminal Procedure Code provides that no males more than 50 years old *“shall be punishable”* with whipping. We consider the Judge’s sentence of whipping was superfluous and should not have been imposed in the first place.

We think the enactment of a penalty provision like section 376(5) of the Penal Code (applicable to rape offences) mandating the court to sentence an offender over the age of 50 to a term of imprisonment in lieu of whipping for offences of outraging modesty would achieve fairness and consistency in sentencing. This is a matter for the Attorney General to consider.

For the reasons we have given the application is dismissed.

**STEVEN CHONG, C.J.**

**SEAGROATT, J.A.**

**WOOLLEY, J.A.**