**JS Bin HL**

AND

**Public Prosecutor**

**_____**

**(Court of Appeal of Brunei Darussalam)**
**(Criminal Motion No. 8 of 2021)**

**_____**

Steven Chong, C.J.; Seagroatt and Woolley, JJA
**Date of Hearing: 8th June, 2024.**
**Date of Judgment: 19th June, 2024**

*Criminal law – Incestuous rape - Sentence*

Appellant In Person.
DPP Pg Azmeena bte Pg Hj Mohiddin for Public Prosecutor.

**Cases cited:**
*A.I v Public Prosecutor* [2004] 2 JCBD 185
*MZM Bin AT v Public Prosecutor* [Criminal Appeal No.15 of 2021]
*Caley and Ors v R* [2012] EWCA 2821)

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

Introduction

On 13 April 2019 in the High court the appellant was charged with two counts of rape of his daughter contrary to section 376(2)(c) of the Penal Code.

Initially the appellant contested the charges but at the commencement of the trial he changed his plea to guilty to the first charge and maintained his not guilty plea to the second charge.

The prosecution then withdrew the second charge and the Judge ordered an acquittal.

Reverting to the first charge the Judge sentenced the appellant to 14 years 6 months' imprisonment.

The facts

In summary the facts were as follows. The appellant was aged 58 and the victim was aged 28 at the time of the offence. The appellant lived in a house in Kampong Lumapas with his wife and seven children including the victim who was a single mother with three children of her own.

On the morning of 9 March 2020 when the appellant was at home with the victim and her 3 year old son who was asleep, he entered the bedroom wearing a towel around his waist and asked to have sexual intercourse with her. The victim indicated her refusal but the appellant proceeded to strip her. He then raped her on the bed ejaculating on her vagina.

In police interviews the appellant admitted to raping the victim on numerous occasions.

The sentence

In sentencing the Judge was guided by a number of precedent incestuous rape authorities including *A.I v Public Prosecutor* [2004] 2 JCBD 185.

The Judge considered as aggravating factors the offence was committed by the appellant in the family home in the presence of the victim's son; the gross breach of trust by him as her father; and the long term psychological harm caused to her evidenced by the clinical psychological report.

A starting point sentence of 21 years' imprisonment was imposed and this was reduced to 14 years' imprisonment to reflect the guilty plea.

Since the appellant was more than 50 years of age and no sentence of whipping could be imposed the Judge sentenced him to an additional term of 6 months' imprisonment.

In the result the aggregate sentence was 14 years 6 months' imprisonment.

The appeal

The appellant appeals for the sentence to be reduced on the ground that he is remorseful and his wife and mother have forgiven him.

Decision

The withdrawal of the second charge by the prosecution and the order of acquittal by the Judge on this charge following the appellant's guilty plea on the first charge were made under section 172 of the Criminal Procedure Code which provides:

> *"(1) When more charges than one are made against the same person and when a conviction has been had on one or more of them, the officer or other person conducting the prosecution may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into or trial of such charge or charges.*
>
> *(2) Such withdrawal or stay shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn or not proceeded with*."

The court required the DPP to submit a statement explaining why the prosecution adopted this course and sought the Judge's consent, which was given under section 172, recording an acquittal. We have been told the prosecution exercised its discretion having taken certain factors into account. Her written response did not provide what the court asked for and failed to deal with the consequence of an acquittal being recorded.

We make some observations about the application and effect of section 172. In our view the Judge, with the agreement of the prosecution, erred in ordering an acquittal on the second charge. The withdrawal of this charge by the prosecution had the effect of an acquittal but it does not follow that the Judge should order an acquittal. The Judge should instead have stayed proceedings on the charge and allowed it to remain on the file.

It is a fundamental principle of law that a person acquitted of an offence cannot be charged with the same offence. This is the principle of autrefois acquit.

The order of an acquittal by the Judge effectively put an end to the prosecution of the appellant on the second charge even if the conviction on the first charge upon his guilty plea is subsequently set aside. Such an outcome would be contrary to the very purpose of section 172 which is to preserve the discretion of the prosecution and the court to proceed with the trial on the second charge in the event the first charge is set aside.

Turning to the sentence, the Judge did not have the benefit of the judgment of this court in *MZM Bin AT v Public Prosecutor* [Criminal Appeal No.15 of 2021], where it was decided that an upward adjustment of the guideline sentences laid down in *A.I v Public Prosecutor* was necessary to take into consideration the increased mandatory minimum sentences for the offence of rape.

Considering the aggravating features outlined by the Judge and the fact that the appellant pleaded guilty at the door of the trial court and not at the first opportunity (reduction of not more than one tenth from the starting point sentence appropriate: *Caley and Ors v R* [2012] EWCA 2821), the sentence imposed is well within the range of the guideline sentences set out in *MZM Bin AT v Public Prosecutor*.

The appeal is dismissed.

**STEVEN CHONG, C.J.**

**SEAGROATT, J.A.** **WOOLLEY, J.A.**