

MOHAMMAD AL'NUZULL BIN SAMSUDDIN

AND

PUBLIC PROSECUTOR

**Court of Appeal of Brunei Darussalam
(Criminal Appeal No. 10 of 2022)**

Before: Steven Chong CJ, Seagroatt and Woolley JJ A.

Date of Hearing: Wednesday, 5th June 2024

Date of Judgment: Wednesday, 12th June 2024

Headnote: Outraging the modesty of a 14 year old deaf and mute pupil by his teacher (s.354B); judge's assessment of means of communication by victim, unable to give sworn evidence; gross abuse and breach of trust. Pornographic video taken of another pupil; gross perversion and abuse; total sentences 9 years and 3 strokes.

Mr. Pg Muhammad Khairul Nizam bin Pg Hj Mohd Yassin and Ms. Nabilah Binti Zainal Abidin of Messrs. Yusof Halim & Partners for Appellant
PO Hajah Atiyyah Azzahra binti Pehin Orang Kaya Lela Sura Dato Seri Laila Jasa Awang Haji Abas and DPP Hajah Rozaimah binti Haji Abd Rahman for Respondent

Seagroatt, JA.:

The Appellant pleaded not guilty on the 26th December 2019 when he appeared before Judge Masni in the Intermediate Court. He was represented by Haji Rozaiman. The first charge was an offence of outraging the modesty of a 14 year old boy by performing oral sex on him, contrary to section 354B of the Penal Code, Cap 22.

The second charge related to the appellant taking an obscene video of a 14 year old masturbating himself in the school dormitory, contrary to section 293(B)(I)(a). Both alleged offences were committed in 2019.

The trial commenced on the 17th August 2020 and concluded on the 28th December 2021 Judgment was due to be given on 26th March 2022. It was not in fact given until 3rd September 2022. That was an unacceptably long delay. The judge found both charges proved and remanded the appellant in custody. The sentences were pronounced on the 28th September 2022.

In respect of the first offence the judge imposed a sentence of 6 years imprisonment and 3 strokes. The law requires the sentence to be at least 3 years imprisonment with a maximum of 10 years. The second offence had wider ramifications. The video of the boy masturbating recorded on a phone was available for dissemination on a wide basis as well as for perverse self-gratification. The judge rejected the appellant's suggestion that the latter had discovered the boy's act of masturbation recorded on the boy's own phone, and then asked the boy to re-enact what he had done, which the appellant recorded on his own phone so that he could use it to instruct the boy in moral values. The judge decided to impose a sentence of 3 years. She then made the two custodial sentences consecutive to each other, thus totaling 9 years and 3 strokes.

The appellant appeals against the convictions and, in the event of his failing to upset these, against his sentences.

The Notice of Appeal is dated 19th October 2022 and so is in time. The grounds are in short form – the convictions are unsafe and unsatisfactory and against the weight of evidence, and sentences are manifestly excessive and unreasonable under the circumstances.

The grounds are expanded in the appellant's written submissions. However this submission formally and wisely abandons the appeal against conviction on the second charge, but maintains the appeal against the sentence.

The basis of the appeal submission as distilled from the appellant's counsel is that the judge should not have come to the conclusions in her judgment concerning the credibility and consistency of the victim's evidence, and that her findings ignored flaws in the boy's story.

Belatedly, some 18 months or more since the judgment in this case, the appellant's counsel (who did not represent him at the trial) sought to add a ground to his appeal which concerned the date of the offence as alleged in the charge. The wording was "in September 2019." It was not entirely clear what was now being contended but it seemed to relate to the victim's uncertainty as to the date alleged. At the trial defence counsel took no issue on this and did not cross examine the victim on the point. This is far too late in any event and even if it had been taken at trial it would not have been relevant. The boy could not remember the date exactly and his evidence had been accepted wholly by the judge.

The argument advanced on the appeal against the first conviction is based essentially on the fact that the victim is deaf and mute. The problems of communication with the witness were obvious though not insuperable. The learned judge dealt with these in a practical and painstaking manner. We considered her approach to be faultless.

She had decided very properly that he could not give sworn evidence. In view of the nature of the handicaps suffered by the victim it is hardly surprising that there were conflicts in some of his evidence. Obtaining testimony from such a witness is fraught with problems and the most simplistic of approaches is to be adopted. It is unsurprising too to find that a young teenager admits to a capacity to tell lies. It is consequently naïve to argue that such a capacity should be regarded as to nullify the value of his evidence.

The trial judge had fully armed herself with the legal strictures concerning the age and capacity of children as witnesses, especially in cases involving alleged sexual offences. She was correct to determine that the victim could not give sworn evidence.

The judge went on to itemize the form and nature of the evidence given by the boy. It was a very careful and telling resumé of what he said and showed. (Paragraph 37) The use of the dolls by the boy was significant evidence of comprehension and clearly consistent with the prosecution case. At some stage, in the defence cross-examination of the boy by the defending counsel, the latter ventured into an irrelevant and potentially confusing area (see paragraphs 50-53).

None of that was a proper basis for cross-examination and may well have opened up a picture of the appellant's behaviour towards the boy in the former's home, well outside the ambit of the particular charge, and probably prejudicial to the appellant's case.

The judge realistically and logically assessed the boy's evidence and found it consistent and true. "Unusually convincing" – "I am overwhelmed by his ability to express his feelings," are phrases or expressions underlining her conclusion that, for all his innate difficulties, he had convincingly related what had occurred to him.

She had observed the boy closely over a significant period of time and was able to reconcile any divergencies, none of which was relevant. Counsel for the appellant appearing before us had not been present at the trial and thus was unable to comprehend fully why or how the judge came to her clear decisions on the veracity of the victim.

Accordingly, we dismiss the appeal against conviction on the first count.

The appeal against the sentences.

The appellant is a mature man, over 30 years of age and a relief teacher of handicapped children. Not only his action in relation to this 14 year old boy, who suffers from severe problems of communication, but the extreme abuse, and gross breach of trust showed he took advantage of the boy's singularly limiting capabilities. There is no mitigation.

In respect of the first offence the minimum sentence is 3 years. There is a character reference which speaks of the appellant's "vast invaluable and experience handling special needs student" and "his selfless approachable nature was well-liked." This of course is double-edged as it undoubtedly facilitated his abuse of his vulnerable pupil. In view of his sexual predilections he ought never be allowed to be in a position in relation to young people. The public needs such protection. He has shown no remorse.

Undoubtedly the judge had these factors in mind when sentencing him. She fixed upon a sentence of 6 years and 3 strokes.

Turning to the sentence for the creation of the obscene video which again involved, though less directly, abuse of the young boy concerned. But it has a sinister aspect. Here was a paedophile not only committing a breach of trust but storing paedophile material for possible dissemination. There is no minimum sentence. The maximum is 10 years. The judge decided on a 3 year term of imprisonment, and that that should be consecutive to the 6 year term. The total is therefore 9 years with 3 strokes. He is not entitled to any discount. There were no mitigating factors. The judge was correct.

This appeal is dismissed.

Steven Chong, CJ.

Seagroatt, J.A.

Woolley, J.A