NORIN BIN PUNGUT/YUSSOF

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 16 of 2016)

Before: Mortimer P, Leonard and Burrell JJ A.
22nd November 2016

Headnote. *Sentence - appeal - Intermediate Court - individual sentences of under 20 years imprisonment resulted in effective prison term of 23 years 6 months – whether excessive.*

Held: effective term excessive. Excessive individual sentences reduced to produce effective term of 12 years imprisonment. – Jurisdiction – section 13 (3) (a) Intermediate Courts Act Cap. 162 - quaere whether Intermediate Court has power to impose sentences which produce effective term of over 20 years imprisonment.

Mr. Pg Muhammad Khairul Nizam bin Pg Hj Mohd Yassin (Messrs. Yusof Halim & Partners) for Appellant
DPP Sharon Yeo Mian Yie for Respondent

Cases referred to in the judgment.

Public Prosecutor v Cpl 6690 M bin T (Criminal Trial No. 10 of 2005),
A.I. v Public Prosecutor. Criminal Appeal No. 8 of 2004
Haji Hasnan bin Haji Shahbudin v Public Prosecutor: Criminal Motion N0. 26 of 2014
Fakhrul Azman bin Awang Magani v Public Prosecutor: Criminal Motion No. 44 of 2014

Leonard, JA.:

This is an appeal against sentence. On 4 July, 2016 the appellant pleaded guilty in the Intermediate Court to fifteen charges. Charges 1 and 2 alleged rape of Miss X, a girl aged 13, punishable under Section 376(1) of the Penal Code, Cap 22. Charges 3, 4 and 5 alleged possession of obscene photographs of Miss X, punishable under section 293A (1) of the Penal Code. Charges 6 and 7 alleged having unlawful carnal knowledge of Miss Y, aged 15, punishable under section 2 of the Unlawful Carnal Knowledge Act. Chapter 29. Charge 8 alleged the offence of sexual grooming of Miss Y contrary to section 377G of the Penal Code. Charges 9 to 15 inclusive alleged possession of photographs of Miss Y. Five of those photographs, were allegedly obscene and one (the subject of charge 10), was allegedly

indecent. In all six charges the offence was punishable under section 293A (1) of the Penal Code.

For the above offences the appellant, who had a clear record, received sentences which produced a total effective period of imprisonment of 23 years 6 months plus 16 Strokes.

The first ground of appeal is that the judge exceeded her court's jurisdiction in imposing a sentence of 23 years and 6 months because section 13(3) (a) of the Intermediate Courts Act Cap. 162 provides that

> "*Intermediate Courts shall not have jurisdiction to impose a period of imprisonment longer than 20 years in respect of any offence*".

The DPP in her written submissions conceded that point. In fact, however, the judge did not impose a sentence longer than 20 years in respect of any offence. She imposed a series of sentences, all within her jurisdiction, which resulted in an effective period of imprisonment of over 20 years. If we were to accept the proposition that an Intermediate Court cannot do that we would need, in view of the unambiguous wording of section 139(3) (a), to hear full argument. This court is not bound by a concession as to the law made by the DPP. It is unnecessary in the present case to make a finding on the issue raised as the appeal will be allowed for other reasons but we observe that it was open to the legislature to limit the power of the Intermediate Court, where it was imposing more than one sentence, to make orders resulting in a period of imprisonment of over 20 years. It has created by section 13 of the Criminal Procedure Code a limit in relation to cumulative sentences imposed by magistrates but we are not aware of any similar statutory provision in relation to the Intermediate Court.

The appellant when sentenced was a 31 year old Bruneian with a clear record who was working in the Royal Brunei Armed Forces. From January 2015 he was living with his girlfriend and her father in Kg Mentiri. In December that year the mother of two sisters, Miss X and Miss Y, passed away and the girls moved in with their paternal grandfather, their aunt (the appellant's girlfriend) and the appellant. Both girls referred to the appellant as 'ayah' and 'yayah', meaning father. Miss X's date of birth was the 15th of May, 2002. The date of birth of Miss Y was the 25th of October 2000. At all material times the appellant knew the ages of the two girls. He took turns with the grandfather and his girlfriend in taking the girls to school on every school day.

At some time in February, 2016 the appellant on questioning the girls about their sexual history was told by them that they were sexually active with their respective boyfriends. After that, the defendant started sending messages on Whatsapp to Miss Y, asking her to send him photographs of herself naked. She sent him a photograph showing her naked upper body clad only in a bra and two photographs showing her naked breasts. When later he asked for more she sent one showing her breasts and two showing her breasts and pubic area. At some time in the middle of March the appellant asked Miss Y to send a photograph of her whole naked body. She sent him one photograph showing her breasts and two which showed her breasts and her pubic area. After that, the appellant said that he wanted to have sex with her and he subsequently sent her a message asking her to come to the bedroom that he shared with his girlfriend who at the time was not at home.

That was at some time in the early morning on a day in March. She complied. At his request she took off her clothes and lay on the bed. The appellant sucked her breasts, licked her private parts and had sexual intercourse with her, ejaculating outside her body. He took a photograph of himself touching her upper body. This act of sexual intercourse in March is the basis of the charge of unlawful carnal knowledge, charge 6. Following that incident the appellant contacted Miss Y on more than 2 occasions when his girlfriend was at work, asking Miss Y to go to the bedroom. They had sexual intercourse, apparently in April, and he ejaculated outside her body. He took a photograph of his hand touching her naked body. That act of intercourse was the basis of charge 7, again for unlawful carnal knowledge.

Because the appellant had asked Miss Y to go to his room and she had complied, the prosecution saw fit to prefer against him charge 8, alleging sexual grooming, contrary to section 377G of the Penal Code. It seems to us that it is extremely unlikely that the legislature ever contemplated a resort to that section where the two people concerned live and constantly meet in the same dwelling. It is more suitable to deal with circumstances where strangers communicate on social media and one of them is a sexual predator who arranges a meeting with the underage victim with the intention of having sexual intercourse.

Prosecutors would be well advised to be careful not to overload a charge sheet with unnecessary charges. It was obvious from the general tenor of the evidence that the appellant was grooming the girls from the time that he enquired about their sexual activity and that was a matter relevant to the sentence for charges of rape and of unlawful carnal knowledge.

Charges 9, 10, 11, 12, 13, 14 and 15 each related to a different one of seven photographs of Miss Y which were found in the appellant's possession and which by pleading guilty he admitted to be indecent in one case and obscene in the others.

We now turn to the case relating to Miss X. Charges 1 and 2 alleged rape of Miss X by the appellant. At the material times, Miss X was aged 13. When having sex with her he took two photographs, one showing his penis and the girl's pubic area and one showing his penis penetrating her vagina. The general pattern of the appellant's conduct in relation to her was similar to that of his conduct towards Miss Y and he was found to be in possession of the three photographs of her the subjects of charges 3, 4 and 5 respectively

In approaching the question of sentence the judge, taking into account the pleas of guilty gave a one third discount on each sentence of imprisonment save that on charge 6 where she gave a discount of one half but there was no discount on the whipping. The selection of a one third discount was correct but it should have extended to the whipping as well as the imprisonment.

On charge 1 for rape of Miss X, the judge took a starting point of 21 years and 10 strokes and reduced it to 14 years and 10 strokes. On charge 2 for rape of Miss X she selected a starting point of 28 years plus 13 strokes and reduced it to 18 years 6 months plus 13 strokes.

For the two sentences of unlawful carnal knowledge the judge selected a starting point of four years imprisonment and one stroke on charge 6 and 6 years and 2 strokes on charge 7. She discounted the first sentence by half to 2 years plus one stroke and the second by one third to

4 years plus 3 strokes respectively (the starting point on the latter charge having been 2 strokes).

On the charge of grooming Miss Y she took a starting point of 21 months reduced to 14 months.

All convictions relating to photographs of the girls attracted sentences of 9 months reduced to 6 months.

Going on to consider the question of totality the judge ordered that the sentences on charges 1 and 2 be concurrent, resulting effectively in 18 years 6 months and 13 strokes.

The sentences on charges 3, 4 and 5 were also made concurrent (effectively 6 months) but consecutive to those on 1 and 2, thus adding 6 months to the effective total.

The sentences on charges 6, 7 and 8 were concurrent but consecutive to the former, adding 4 years and 3 strokes

The sentences on charges 9 to 15 were also concurrent but consecutive to the former, adding 6 months.

Thus the total effective sentence was 23 years 6 months and 16 strokes. The effective term of imprisonment and the whipping imposed implies a starting point after trial of 35 years 3 months plus 24 strokes and is manifestly excessive.

The appellant submits and the DPP concedes that the sentences of 14 years and ten strokes on charge 1 and 18 years 6 months and 13 strokes on charge 2 were excessive and against the weight of authority for a first offender. That submission is justified. Though the judge gave careful consideration to the relevant facts she referred for guidance, in her reasons for sentence, only to the case of *Public Prosecutor v Cpl 6690 M bin T (Criminal Trial No. 10 of 2005)*, which was a case at first instance where the facts were not comparable with those of the present one. That case and other guideline cases were cited before us. The current guidance was set out *in A.I. v Public Prosecutor. Criminal Appeal No. 8 of 2004* in which it was said in the judgment:

> *"We are satisfied that the present level of sentencing in Brunei Darussalam indicates that a proper sentence after plea for rape of a daughter of tender years is 10 years and 12 strokes."*

The court added that if the offence is repeated it should properly attract an increased sentence and that some account should be taken when sentencing of the fact that force was used. There was an element of violence employed by the father in that case. To effect the first rape he forcefully undressed his daughter. To achieve the second rape he forced his way into the bathroom where his daughter had been taking a shower, carried her to the bathtub, placed her on top of it and, despite her struggles, raped her. In the event the Court of Appeal imposed for the first rape a sentence of 10 years and 12 strokes and for the second rape an effective sentence of 12 years and 12 strokes. In the case which is now before us there was no such element of violence.

In relation to sentence on a person who, albeit not a parent of the victim, was in a position of trust towards her, the above guidelines were considered by this court in the case *of Haji Hasnan bin Haji Shahbudin v Public Prosecutor: Criminal Motion N0. 26 of 2014* and we held that they were highly relevant and authoritative.

Though the appellant before us is not the biological father of the two victims, he was in a position of trust in his relationship with them. He violated that trust. His offences, however, lacked the element of incest, which is particularly frowned upon by society and this is relevant when one comes to consider the question of overall criminality in deciding how to apply the totality principle.

On the particular facts of this case we take the view that the appropriate starting point on charge 1 should have been 15 years and 15 strokes. After taking into account the appellant's clear record and plea of guilty, that should have been reduced to ten years and ten strokes. For charge 2 the starting point for the repeated offence of rape should have been 18 years and 15 strokes reduced to 12 years and 10 strokes.

The Appellant was unrepresented below and could not be expected to cite relevant authority. Unfortunately we can see nothing in the papers before us to show that the judge received such assistance in that regard as she was entitled to expect from the DPP.

In *Fakhrul Azman bin Awang Magani v Public Prosecutor: Criminal Motion No. 44 of 2004* we refused leave to appeal against sentence in a case where the sentence was below the normal level but for the avoidance of doubt we will state that our decision was made in the context of an application for leave and is not to be regarded as a general guideline for sentence. Moreover, as we have often said, guidelines are only guidelines and it is open to a court to depart from them but only if good reason can be shown.

The photographs the subjects of the charges under section 293A (1) of the Penal Code were all contained in one pendrive. Instead of cluttering the charge sheet with individual charges, the prosecution could have laid one charge covering all the photographs. Though the images depicted varied considerably in what they portrayed, the judge imposed the same sentence in each case, namely nine months imprisonment reduced to six, and ordered that they be served concurrently. We have been invited to give guidelines on sentencing for offences of possession of indecent or obscene photographs under section 293A (1) of the Penal Code but in this case we do not consider it appropriate to do so.

In the present case, where there were repeated offences of rape and of unlawful carnal knowledge, there were 2 vulnerable victims, there was grooming, there were photographs and the appellant was in a position of trust, the two girls were sexually experienced, the prosecution did not seek to prove violence and there was no element of incest there should, applying the totality principle, be an overall starting point after trial of 18 years imprisonment and 15 strokes, reduced to 12 years and 10 strokes in recognition of clear record and the pleas of guilty. In order to achieve that result we will allow the appeal to the following extent.

The sentence on charge 1 will be reduced to 10 years imprisonment and 10 strokes.
The sentence on charge 2 will be reduced to 12 years imprisonment and 10 strokes.

All the sentences of imprisonment and the strokes will be concurrent with each other, making an effective total of 12 years imprisonment and 10 strokes.

Mortimer, P.

Leonard, J.A. **Burrell, J.A**