

Y BIN HG
AND
PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 16 of 2018)

Before: Burrell P, Seagroatt and Lunn JJ A.
21 November 2018

Sentence-appeal against a total sentence of 16 years' imprisonment with 12 strokes following pleas of guilty to two counts of rape of two of his daughters, aged 11 and 14 years respectively, dismissed.

Appellant in person
DPP Hjh Rozaimah binti Haji Abdul Rahman for the Respondent

Cases cited in the Judgment

A. I. v Public Prosecutor [2004] 2 JCBD 185;
A.S.K. v Public Prosecutor [2005] 1 JCBD 234;
Public Prosecutor v Cpl. 6690 M bin T [2005] 1 JCBD
J. bin Hj J. [2008] 1 JCBD 164;
Zainuddin bin Sarbini v Public Prosecutor [2014] 1 TCBD 216;
Public Prosecutor v Zainuddin bin Serbini [2013] 1 JCBD 110);
Public Prosecutor v Hamran bin Bakar (Criminal Appeal No. 6 of 2016);
Muhammad Hamadi bin Abdullah v Public Prosecutor (Criminal Appeal No. 3 of 2018);
Public Prosecutor v Muhammad Hamadi bin Abdullah (Criminal Appeal No. 4 of 2018)

Lunn, JA. :

1. The appellant appeals against the total sentence of 16 years' imprisonment and 12 strokes imposed on him by Steven Chong, CJ on 27 October 2018 following his pleas of guilty on 15 September 2018 to a charge of rape of his daughter Ms X on 5 August 2018, contrary to section 376 (2) (c) of the Penal Code, Cap. 22[1st charge] and two charges of abusing two young persons in his care, namely his daughters, Ms X and Ms Y, on 6 August 2018 by slapping their respective faces [4th and 5th charges], together with his pleas of guilty on:

- (i) 8 October 2018, to an amended third charge of abusing a young person in his care, namely his son Mr Z then aged 13 years, by slapping his head repeatedly on 6 August 2018 [3rd charge]; and
 - (ii) on 16 October 2018, to a charge of rape of a child under 14 years of age, namely his daughter Ms Y then 11 years of age, on a day in 2017, contrary to section 376 (2) (c) of the Penal Code [2nd charge]
2. The 1st and 2nd charges alleged the rape of the appellant's daughters, referred to as X and Y respectively, being children in respect of whom he occupied a position of trust and authority, on different dates inside a bedroom of the family home in Kampong Bolkihah B in Brunei Darussalam. By the 1st charge, it was alleged that the appellant raped Ms X, then aged 14 years, on 5 August 2018. By the 2nd charge it was alleged that the appellant raped Ms Y, then aged 11 years, on a day in 2017.
 3. By the 3rd, 4th and 5th charges it was alleged that in the morning of 6 August 2018 the appellant had abused his three children by slapping them as described above.

The Statement of Facts

4. By the Statement of Facts, which the appellant accepted as the basis of the judge accepting his pleas of guilty, the appellant acknowledged that the victims of the two charges of rape, Ms X and Ms Y, and the three victims of the charges of abuse, Mr Z, Ms X and Ms Y were the children of his third marriage. That marriage having ended in divorce, the appellant had custody of those three children and lived together with him in a house at Kampong Bolkihah B. The appellant, who had retired from the Royal Brunei Armed Forces, earned his living as a fisherman.

The 1st charge

5. During the evening of 5 August 2018 Ms X, then aged 14 years, was awoken from her sleep in the bedroom in the family home that she shared with the appellant by his contact with her body. Having removed her clothing, without her consent he inserted his penis into her vagina, but withdrew and ejaculated outside her vagina.

The 2nd charge

6. During the evening of a day in 2017, Ms Y, then aged 11 years, was awoken from her sleep in a bedroom in the family home to find that the appellant was inserting his penis in her to have sexual intercourse without her consent. In response to her protests, the appellant withdrew from her vagina and left the bedroom immediately.

Medical examinations

7. Medical examinations of Ms X and Ms Y on 14 August 2018 revealed that there were "old tears" to their respective hymens.

The 3rd, 4th and 5th charges

8. On the morning of 6 August 2018, having discovered that the credit on his mobile telephone had been exhausted, the appellant became infuriated. Having been told by Ms X that it was his son, Mr Z, who used up that credit, the appellant slapped Ms X's face and, having slapped Mr Z, threw the latter out of the house, telling him never to return. Finally, the appellant slapped Ms Y on her face.
9. On 13 August 2018, in the course of their search for their brother Mr Z, Ms X and Ms Y came to the Masjid Kampong Bolkiah A, where they encountered a male friend of the appellant, who contacted the latter to inform him of their presence. The appellant having arrived and angrily demanded that Ms X and Ms Y return to the family home with him, the latter refused to do so, Ms X complaining to the appellant's male friend that the appellant had sexually disturbed them. As result, the male friend, together with colleagues, escorted the appellant and Ms X and Ms Y to the Kampong Ayer Police Station. There, the appellant admitted the conduct the subject of the charges.
11. Finally, the Statement of Facts acknowledged that the appellant had no previous criminal convictions.

Reasons for sentence

12. In sentencing the appellant, the Chief Justice noted that he had pleaded guilty and that he was a 49 year old retired servicemen in the Royal Brunei Armed Forces.
13. Having referred to the judgment of this Court in *A.I. v Public Prosecutor*, the Chief Justice said that the judgment provided guidelines for sentence for offences of the kind committed by the appellant and noted that:

"For an isolated rape of a daughter of tender years the starting point should be 15 years and 15 strokes reduced to 10 years and 12 strokes after a plea. An increase in sentence is justified where there is a repetition of the offence."

14. The Chief Justice went on to note that since that judgment section 376 (2) of the Penal Code had been repealed and substituted by a new provision on 24 July 2017 in respect of the mandatory minimum sentence of imprisonment. Prior to that date, the mandatory minimum sentence was 8 years' imprisonment, whereas on and after that date it became 10 years' imprisonment.
15. The Chief Justice said that in determining the appropriate starting point for sentence, and in affording the appellant a discount for his pleas of guilty, he had regard:

"...to the observations of the Court of Appeal in A.I v PP on the appropriate sentences to be imposed for incestuous rape (of particular relevance of the 2nd Charge) and the increased mandatory minimum sentence under the new section 376 (2) (c) (germane to the 1st Charge)".

Starting point and sentence

16. In the result, the Chief Justice stipulated a starting point for sentence for the 1st and 2nd charges of 18 years' imprisonment and 15 strokes and 15 years' imprisonments and 15 strokes respectively. Affording the appellant a discount of sentence for his pleas of guilty, he imposed sentences of 12 years' imprisonment and 12 strokes and 10 years' imprisonment and 12 strokes respectively.
17. For the 3rd, 4th and 5th charges, the Chief Justice stipulated a starting point for sentence of 6 weeks imprisonment, which he reduced to 4 weeks imprisonment to afford the appellant a discount for his pleas of guilty.

Totality

18. Finally, the Chief Justice said that, having regard to "*the overall culpability*" of the defendant he ordered that 4 years of the sentence of 10 years' imprisonment imposed on the 2nd charge be served consecutively to the sentence of 12 years' imprisonment imposed for the 1st charge. However, he ordered that the other sentences of imprisonment be served concurrently and that the strokes be "*non-cumulative*". Accordingly, the total sentence imposed on the appellant was 16 years' imprisonment and 12 strokes.

Notice of appeal against sentence

19. In the Notice of appeal against sentence, filed with the Court on 30 October 2018, the appellant's 29-year-old son, on behalf of his siblings, asked for the compassion and sympathy of the Court to reduce the sentences imposed on the appellant. He said that he and his siblings looked to the appellant for guidance.

The respondent's submissions

20. Ms Rozaimah referred the Court to many of its own judgments, and to the reasons for sentence provided by judges in sentencing in cases of incestuous rape: *A. I. v Public Prosecutor* [2004] 2 JCBD 185; *A.S.K. v Public Prosecutor* [2005] 1 JCBD 234; *Public Prosecutor v Cpl. 6690 M bin T* [2005] 1 JCBD; J. bin Hj J. [2008] 1 JCBD 164; *Zainuddin bin Serbini v Public Prosecutor* [2014] 1 TCBD 216; *Public Prosecutor v RBHAI* (Criminal Trial No. 17 of 2015) *Public Prosecutor v Hamran bin Bakar* (Criminal Appeal No. 6 of 2016); and *Muhammad Hamadi bin Abdullah v Public Prosecutor* (Criminal Appeal No. 3 of 2018) and *Public Prosecutor v Muhammad Hamadi bin Abdullah* (Criminal Appeal; No. 4 of 2018)
21. She submitted that the circumstances of the commission of the 1st and 2nd charges evidenced a gross abuse of trust by the appellant of his parental authority and position of superiority towards his two daughters, which called for a sentence of general deterrence. She submitted that the judgment of this Court in *Muhammad Hamadi bin Abdullah v Public Prosecutor* (Criminal Appeal No. 3 of 2018), in which the appellant's appeal against a sentence of 15 years imprisonment imposed following his pleas of guilty to two counts of rape, one in 2017, contrary to section 376 (1) and the other in February 2018, contrary to section 376 (2) of the Penal Code, was allowed, was to be distinguished on the basis that the victim in that case was 19 and 22 years' of age at the time of the offences, whereas the appellant's victims were 11 and 14

years of age at the time of the offences. The sentence of 16 years imprisonment and 12 strokes imposed on the appellant in the instant case was not manifestly excessive.

Discussion

22. It is clear that, having regard to the guidelines for sentencing in cases of incestuous rape articulated in the judgment of this Court in *A.I. v Public Prosecutor*, the Chief Justice was correct in stipulating starting points for sentence of 15 years' imprisonment with 15 strokes for the 2nd charge and 18 years' imprisonment with 15 strokes for the 1st charge and in imposing sentences of 12 years and 10 years' imprisonment with 12 strokes for the 2nd and 1st charges respectively. Similarly, no issue arises in respect of the sentences of 4 weeks' imprisonment that he imposed in respect of the 3rd, 4th and 5th charges and his order that they be served concurrently to the other sentences of imprisonment imposed on the appellant.

The issue

23. The issue that does arise is the appropriateness of the Chief Justice's order that, having regard to the totality of sentence, 4 years of the sentence of 10 years' imprisonment imposed on the 2nd charge be served consecutively to the sentence of 12 years' imprisonment imposed in respect of the 1st charge, so that the total sentence imposed on the appellant was 16 years' imprisonment with 12 strokes.
24. In *A.S.K. v Public Prosecutor* this Court allowed an appeal against the total sentence of 18 years' imprisonment with 18 strokes imposed on the appellant following his pleas of guilty to a count of rape of his 14-year-old daughter and a count of outraging the modesty of his 13-year-old daughter, which offences were committed in April and March 2004 respectively. The judge sentenced the appellant to 15 years' imprisonment with 15 strokes on the rape charge and 3 years' imprisonment and 3 strokes on the charge of outraging the modesty of a female, ordering that the sentences of imprisonment be served consecutively and the strokes cumulatively. In allowing the appeal, this Court said:

"...if we leave aside the force that was used, the guidelines in Ahmad (A. I. v Public Prosecutor) indicate that the appropriate sentence will be one of 10 years and 12 strokes. However, given the considerable force was used, we are satisfied that the sentence should be increased to one of 11 years and 12 strokes.

We see no reason to interfere with that sentence imposed on the outraging modesty charge."

25. In the result, having quashed the sentence imposed by the judge on the count of rape, that is the sentence that the Court imposed. This Court made no other orders. So, the total sentence imposed on the appellant was 14 years' imprisonment and 15 strokes.
26. Of the violence and threats inflicted by the appellant on his two daughters, this Court noted that, in outraging the modesty of his 13-year-old daughter, when she refused to leave the front passenger seat of his motorcar and that he had parked in a deserted

area, “...he forced his daughter from the vehicle by dragging her out. By this time, she was crying hysterically. On seeing this, the appellant gave her a hard slap on her face and kicked her on her hips.” Then, having stripped her of her underpants, he pinned her to the ground and rubbed his penis on the opening of her vagina. Finally, on their return to the vehicle he warned not to tell anyone, “threatening to harm if she did”. Of the circumstances of the rape of his 14-year-old daughter in the family home, this Court noted that the appellant had “dragged her forcibly into the bedroom, stripped of her pants, pinned her down and forced her to have intercourse. He threatened her with harm if you told anyone of what had happened.”

28. In the result, this Court said that one of the factors of aggravation of the commission of the offences was “the calculated use of force and by the threats made to her after the incident.”
29. In *J. bin Hj J.*, this Court dismissed an appeal against a total sentence of 18 years’ imprisonment with 12 strokes, imposed on the appellant following his conviction after trial of three charges of rape of two of his daughters, Ms X and Ms Y. In 2000, he raped Ms Y in the family home when she was 10 years of age, after which he threatened he would beat her mother if she revealed to her what had happened [charge 1]. In 2002 and 2006, he raped Ms Y when she was 7 and 11 years old respectively [charges 3 and 4]. On the first occasion he raped her in her grandfather’s home, after which he threatened to kill her if she told anyone of what had happened. On the second occasion, he raped her in a bedroom, in which her mother and siblings were sleeping, in the family home. The judge sentenced the appellant to 15 years, 17 years and 18 years, with 12 strokes, on each of the 1st, 3rd and 4th charges, which sentences he ordered to be served concurrently.
30. In dismissing the appeal, this Court said “*This is a very bad case of multiple rapes by a father of his two young daughters. Having regard to the totality principle we think the overall sentence of 18 years and 12 strokes is appropriate to reflect the criminality of the offences.*”
31. In *Zainuddin Bin Sarbini v Public Prosecutor*, this Court dismissed an application for leave to appeal out-of-time against the total sentence of 13 years’ imprisonment with 12 strokes imposed on the applicant following his pleas of guilty to two counts of raping his 11-year-old daughter in successive months, contrary to section 376 (2) of the Penal Code. In that case, the offence came to light when the victim gave birth to a child when she was 12 years of age. Having imposed sentences of 10 years’ imprisonment and 12 strokes for the first offence, the judge imposed a sentence of 12 years’ imprisonment with 12 strokes for the 2nd offence, ordering that one year of the sentence imposed for the 1st offence be served consecutively to the sentence of imprisonment imposed in respect of the 2nd offence.
32. In dismissing the appeal, this Court said “*long sentences of imprisonment must be passed for offences such as these to mark the gravity and seriousness of the applicant’s*

conduct and the traumatic consequences to the young and vulnerable victim." The Court went on to say:

*"...by ordering that just one year of the first sentence be served consecutively to the second sentence, making a total of 13 years and 12 strokes, **it could be said that a measure of leniency was being exercised.**" [Bold added.]*

33. The fact that this appellant was sentenced for raping two of his daughters is an additional factor in aggravation of the commission of the offences for which he was sentenced. As Dato Seri Paduka Mohammed Saied CJ noted in distinguishing the judgment of this Court in *A. I. v Public Prosecutor* in sentencing the defendant in *Public Prosecutor v Cpl. 6690 M bin T* [2005] 1 JCBD 289 for the rapes of his three daughters, one in 1999 and two in April 2005, when they were respectively 15, 19 and 18 years of age, and the attempted rape of the third daughter in May 2005

"the defendant in the present case flagrantly and callously abused the trust that three young sisters reposed in the man, whom they knew as their father."

34. Of the feelings of abhorrence in society for the offence and the consequences to the victims, Saied CJ went on to say:

"For a people of a society that does not comprise (a) large population, such incidents are not easily and quickly forgotten or forsaken, and the unfortunate victims are lumbered with the weight of the ignominious incidents that befell them at such young age as in this case."

35. For the three counts of rape, Saied CJ took a starting point of 20 years' imprisonment, which he said would equate to *"a little over 13 years"* after a discount for a plea of guilty. Having said that there ought to be *"some enhancement"* in respect of subsequent offences, he sentenced the defendant to 13 years' imprisonment with 13 strokes for the 1st charge; 14 years' imprisonment with 13 strokes for the 2nd charge; and 15 years' imprisonment with 15 strokes for 3rd charge and 7 years' imprisonment for the count of attempted rape, all of which sentences of imprisonment he ordered to be served concurrently.
36. In *Public Prosecutor v Hamran bin Bakar* (Criminal Appeal No. 6 of 2016), this Court allowed an application for review of sentence by the Public Prosecutor of the total sentence of 14 years' imprisonment imposed on the defendant by Intermediate Court Judge Pg Masni binti Pg Hj Bahar on the defendant's conviction, on his pleas of guilty, to eight charges of rape and one of attempted rape of his three daughters, Ms X, Ms Y and Ms Z in the overall period 2002 to 2016. The appellant raped Ms X four times in 2002/2003, when she was 13 and 14 years of age, and twice in 2016, when she was 26 years of age. He attempted to rape Ms Y in 2014, when she was 15 years of age. Then, he raped Ms Z twice in 2015, when she was 16 years of age.
37. This Court increased the total sentence imposed on the defendant to 16 years' imprisonment. In doing so, the Court said that the appropriate starting point to be taken to reflect the overall conduct of the defendant was 25 years' imprisonment,

which would normally have resulted in a sentence of 16 years and 8 months' imprisonment. However, having regard to the nature of the application by the Public Prosecutor, the Court said it was satisfied that an enhancement of sentence to 16 years' imprisonment was appropriate.

38. Ms Rozaimah was correct to remind the Court that in allowing the appellant's appeal in *Muhammad Hamadi bin Abdullah v Public Prosecutor (Criminal Appeal No. 3 of 2018)* this Court was dealing with sentencing of the appellant for two rapes of the same victim who was 19 and 22 years of age at the time of the offences, whereas the two victims in this appeal were aged 11 and 14 years respectively. One offence was committed in 2014 and the other offence in February 2017. The latter offence was contrary to section 376 (2) of the Penal Code, which came into effect on 24 July 2017 and required the imposition of a minimum sentence of 10 years' imprisonment.
39. In sentencing that appellant, the judge had ordered that three year's imprisonment imposed in respect of the 1st charge be served consecutively to the sentence of 12 years' imprisonment imposed in respect of the 2nd charge. The judge noted that the resulting total sentence of 15 years' imprisonment implied a sentence of 22 ½ years' imprisonment after trial. In allowing the appeal and quashing the order that 3 years of that sentence be served consecutively to the other sentence of imprisonment, the Court said that *"for the overall criminality a sentence of about 20 years would have been appropriate after trial"*. In consequence, the Court ordered that only one year of the sentence of imprisonment imposed in respect of the 1st charge to be served consecutively to the sentence imposed in respect of the 2nd charge.

Totality

40. It is to be noted that in *A.I v Public Prosecutor*, having allowed the appellant's appeal against two sentences of 15 years' imprisonment ordered to be served concurrently, following his pleas of guilty to two counts of rape one week apart of his 15-year-old daughter, this Court substituted sentences of 10 years and 12 years' imprisonment, which were ordered to be served concurrently. In doing so, the Court said *"We are satisfied that if the offence is repeated it should properly attract an increased sentence."* No doubt, the increased sentence for the 2nd offence, an increase of 20% over the sentence imposed for the 1st offence, reflected the increased culpability of the appellant for committing the second offence. That is a factor that is relevant to a consideration of the appropriate totality of sentence.

Section 376 (2) of the Penal Code

41. In sentencing the appellant, the Chief Justice said that he had regard to "the increased mandatory minimum sentence under the new section 376 (2) (c) (germane to the 1st charge)". He did not elaborate further on its relevance. The increase in the minimum sentence was from 8 years' imprisonment to 10 years' imprisonment. No doubt, the effect of the increase in the minimum sentence is to be viewed as an indication of the seriousness with which the offence is to be regarded. However, as noted earlier, it is the long established guideline of this Court that a conviction for the first offence, after a plea of guilty, of incestuous rape of a daughter of tender years should be visited with

a sentence of 10 years' imprisonment. The sentence imposed on the appellant for the 1st charge was 12 years imprisonment.

42. In *Zainuddin bin Sarbini v Public Prosecutor*, as noted earlier, this Court observed of the total sentence of 13 years' imprisonment imposed by the judge on the appellant for two counts of raping his 11-year-old daughter, that "*it could be said that a measure of leniency was being exercised.*" It could also be said that had a higher total sentence been imposed of, say, 15 years' imprisonment, it would not have been manifestly excessive. It is to be remembered that this Court was not being asked to consider an increase in sentence, albeit that by virtue of section 423 of the Criminal Procedure Code, this Court does have power to increase sentence on any appeal against sentence.

Conclusion

43. In the present appeal we have come to the conclusion that, whilst the total sentence of 16 years' imprisonment is to be regarded as being at the high end of an acceptable range, it is not manifestly excessive. In reaching that conclusion, we have in mind that:
- (i) his two daughters, who were victims of the offences, were of tender years;
 - (ii) the younger girl was only 11 years of age at the time that she was raped;
 - (iii) both the rapes were committed in the family home;
 - (iv) the offences constituted a gross breach of trust by the appellant as their father;
 - (v) the appellant had been entrusted with their custody following his divorce from their mother;
 - (vi) a severe sentence is called for to reflect society's abhorrence of the offence and the life-long societal, psychological and emotional consequences to the victims; and
 - (vii) the regrettable prevalence of the offence in this jurisdiction, the Chief Justice having observed at the outset of his remarks in sentencing "*Sadly, this is another case of incestuous rape.*" That statement resonates with the observation of this Court in *Public Prosecutor v Hamran bin Bakar*, namely: "*Offences of this nature are disturbingly frequent in this jurisdiction. The need for deterrent sentences is plain.*"
44. Accordingly, we dismiss the appellant's appeal against sentence.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A.