MUHAMMAD HAMDI BIN ABDULLAH

AND

PUBLIC PROSECUTOR

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(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 3 of 2018)

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PUBLIC PROSECUTOR

AND

MUHAMMAD HAMDI BIN ABDULLAH

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(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 4 of 2018)

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Before: Mortimer P, Burrell and Seagroatt JJA.
2nd May 2018

Headnote: Sentence – s376(1) and (2) CAP22 rape by father on daughter aged 19-22 – sentence of 15 years after plea reduced to 13 years – totality considered - s376(5) CAP 22 applied – mandatory provision – 2 months imprisonment added in lieu of whipping, appellant aged over 50

Criminal Appeal No 3 of 2018
Appellant in person
DPP Sharon Yeo for Public Prosecutor/Respondent

Criminal Appeal No 4 of 2018
DPP Sharon Yeo for Appellant
Respondent in person

Case cited in the Judgment:

M.S bin H.I vs Public Prosecutor (Criminal Appeal 7 of 2005)
Prosecutor vs CPL 6690 M bin T
Public Prosecutor vs Harman bin Bakar (Criminal Appeal 6 of 2016)
Public Prosecutor vs Haji Ramli Bin Haji Nasib (Criminal Trial 15 of 2017)
A.I. v Public Prosecutor (2004) 2 JCBD 185

Burrell, JA.:

On 8th February 2018 the appellant pleaded guilty to two counts of rape before Steven Chong, J. The victim in both counts was the appellant's second eldest of four daughters. At the time of the first rape, in 2014, she was 19 years old and at the time of the second rape, in 2017 she was 22. The first charge was contrary to s 376(1) of CAP 22 which carries a maximum sentence of 30 years with whipping. The second charge was contrary to s 376(2) which contains the added ingredient that the defendant was in a position of trust or authority towards the victim and carries a maximum sentence of not less than 10 years and not more than 30 years and not less than 12 strokes.

Sentence

The judge gave due regard to the very serious features of this case. He also gave a proper discount for the appellant's pleas of guilty. For the first offence he passed a sentence of 10 years imprisonment and for the second 12 years imprisonment. He noted that had there been a trial the sentences would have been 15 and 18 years respectively.

He finally considered the question of totality and ordered that 3 years from the first sentence be served consecutively to the 12 years on the second charge thus making a total of 15 years imprisonment. He noted that this would have been 22 ½ years had there been a plea of not guilty.

No strokes were ordered as the appellant was over the age of 50 but he made no order for imprisonment in lieu of whipping pursuant to s.376(5) of CAP 22 to which we refer later in this judgment.

The Appeal

The appellant seeks a reduction in his sentence. He has expressed remorse and awareness of the suffering he has caused his family. He also seeks credit for pleading guilty at the earliest opportunity and for co-operating with the police since his arrest. The issue before this court is whether or not the sentence passed was manifestly excessive in all the circumstances or was wrong in principle.

[In passing we feel it necessary to note that the inclusion in the Respondent's list of authorities of a 55 page decision from the Supreme Court of Australia on the meaning of "manifestly" in the context of a dangerous driving case was unnecessary].

The courts have stated on many previous occasions that offences of this type are serious, disturbing and warrant deterrent sentences.

In *M.S bin H.I vs Public Prosecutor (Criminal Appeal 7 of 2005)*, a case concerning two counts of rape on a 12 year old daughter a sentence of 16 years and 12 strokes on a plea of guilty was reduced to 13 years and 12 strokes on appeal. The individual sentences for the 2 rapes were 10 and 12 years.

Also in 2005 Chief Justice Saied in *Public Prosecutor vs CPL 6690 M bin T* passed a sentence of 16 years and 15 strokes on a father who had raped all 3 of his daughters aged 15, 18 and 19. His starting point for a single offence of rape in such circumstances was 20 years after trial.

More recently in *Public Prosecutor vs Hamran bin Bakar (Criminal Appeal 6 of 2016)* for 9 counts of rape, again involving 3 daughters, aged between 13 and 26, this court decided that a starting point of 25 years was appropriate to reflect the overall criminality in that particular case. It should be noted that the number of aggravating features in that case was greater than in the present appeal; there were 3 daughters involved, they were younger and the offences spanned 14 years of abuse. The sentence after pleas of guilty was 16 years.

A 16 years sentence was also passed in the case of *Public Prosecutor vs Haji Ramli Bin Haji Nasib (Criminal Trial 15 of 2017)* which involved the rape of an intellectually impaired 16 year old daughter on 4 occasions.

We note these previous cases for comparative purposes. All have slightly different aggravating features. We also have regard to the guideline case of *A.I. v Public Prosecutor (2004) 2 JCBD 185* which stated that the proper sentence for an offence of repeated rape by a father on a daughter of tender years is 12 years imprisonment on a plea of guilty. Since 2004 the need for deterrent sentences has been noted many times. There continues to be a disturbing frequency with which these very serious offences come before the courts in Brunei.

The present case involved a daughter, albeit not of tender years, who was raped in her own home. The agreed statement of facts included the following matters. The appellant's abuse of this particular daughter commenced in 2014 and continued until his arrest in 2017. The girl was subjected to further indignity of giving oral sex. She was of below average intelligence and was thus more vulnerable and dependant than girls of a similar age. The appellant's conduct has affected the girl psychologically; she suffers from mild depression and anxiety. We agree with the judge's individual sentences of 15 years after trial for the first offence and 18 years for the second offence. A proper discount was made for the pleas of guilty which is particularly important in a case of this nature as it means the girl is spared the ordeal of giving evidence.

To achieve uniformity with earlier decisions its not an easy task. However in this case, we have concluded that for the overall criminality a sentence of about 20 years would have been proper after trial. After the usual discount a final sentence of 13 years would be appropriate. This will be achieved by ordering that one year of the 10 year sentence shall be served consecutively to the 12 years on the 2nd count, subject to the Respondent's appeal to which we now turn.

Respondent's Appeal

The judge ordered that there should be no whipping in this case as the defendant was over 50 years of age.

In July 2017 s.376 of the Penal Code was amended. The amendment included sub section (5) which provides that:

> *5) in any case which section 258 of the Criminal Procedure Code (Chapter 7) applies, the courts shall sentence the offender, instead of whipping, to imprisonment for a term which may extend to 12 months, in addition to the punishment to which he had been sentenced under this section.*

This is a case to which s.258 applies. We therefore add a sentence of 2 months in lieu of whipping to the 12 years sentence on the second charge contrary to s.376(2)

The final sentence will therefore be 13 years and 2 months.

Order

Appellant's appeal allowed in part in accordance with the above so that the sentences on counts 1 and 2 are reduced from 15 years to 13 years.

Respondent's appeal allowed to the extent that 2 months is added to the sentence of 12 years on the second charge, pursuant to s.376 (5) of the Penal Code CAP 22.

The final sentence shall be 13 years and two months imprisonment.

Mortimer, P.

Burrell, J.A. **Seagroatt, J.A**