

BENJAMIN BIN HAJI ARIP

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 5 of 2021)**

Before: Burrell P, Seagroatt and Lunn JJ A.

7th June 2021

Headnote: Sentence – Outraging modesty, s.354 Penal Code CAP 22 – Serious breach of trust between victim (aged 11) and appellant (aged 60) – Maximum sentence only appropriate for the worst cases – Appellant entitled to one-third plea of guilty for early plea – Sentence of 4 years imprisonment reduced to 3 years.

Mr. Hj Mohamad Daud of Messrs. Daud Ismail and Company for Appellant.
DPP HjH Rozaimah binti Hj Abdul Rahman of Public Prosecutor for Respondent

Burrell, P.:

On 6th January 2021 the appellant appeared before Judge Abdullah Soefri in the High Court and pleaded guilty to a charge of using criminal force likely to outrage the modesty of an 11 year old girl contrary to S.354 of the Penal Code Chapter 22.

On 11th January 2021 the appellant was sentenced to 4 years imprisonment with effect from the date of sentence. He now appeals against the sentence. Both at the Court below and before this Court the appellant has been represented by Mr. Hj Mohamad Daud of Messrs Daud Ismail and Company.

Facts

An outline of the facts to which the appellant agrees is as follows.

The appellant is a 62 year old married man. In 2017 the appellant and his wife adopted the victim of this case, referred to as Miss X, who was then 10 years old.

On an unspecified day in 2018 the appellant and Miss X were at their home in Penaga, Seria. The appellant's wife was not at home at the material time when Miss X was having a shower

the appellant asked her to hand some soap to him. When she opened the bathroom door she was naked and the appellant pushed her onto the floor where he kissed her cheeks and touched her breasts. Afterwards the appellant told Miss X not to tell anyone about the assault because if she did she would be returned to her biological father.

In spite of this threat she later told a school friend and subsequently the school friend's father reported the matter to the police. The appellant was arrested on 20 August 2020 whereupon he admitted his guilt to this offence.

Mitigation

The following factors were brought to the sentencing judge's attention which he duly took into consideration when passing sentence.

The appellant admitted his guilt at the earliest opportunity and thus saved time for the police and the Courts. He had reached the age of 62 without ever committing a criminal offence, and gave his full co-operation during the investigation of this case.

Sentence

The judge observed that the maximum sentence for this offence was 5 years imprisonment. He noted that, depending on the circumstances, sentences in previous cases had ranged between 6 months and 5 years. He regarded this case as one of the most serious of its type and selected a starting point of 5 years imprisonment. He then discounted the sentence, because of the early plea of guilty, by one fifth instead of the usual one third. He commented that the offence was a gross breach of trust which indeed it was, bearing in mind that the appellant had recently become the adopted father of this vulnerable 11 year old girl.

Appeal

The judge understandably was clearly of the view that this defendant did not deserve leniency. He gave less than the usual discount for the plea of guilty and directed that the 4 years commence from the date of sentence.

Mr. Daud, on the appellant's behalf, makes 3 points.

First, he submits that the starting point of 5 years is too high. He has referred us to a number of previous cases when much lower sentences were passed on the same charge to which this appellant pleaded guilty. The cases he cites are all less serious than the present case. The question remains, however, is the statutory maximum of 5 years too high considering the facts of this particular case?

Secondly, he submits that the appellant was entitled to the usual one third discount. It is accepted that this appellant's admission of guilt was made at the earliest opportunity. Where a

judge or magistrate exercises his or her discretion to discount the sentence by less than one-third, the reasons for doing so should be given.

Thirdly, this appellant spent 25 days in custody before his sentence was imposed. Mr. Daud asks that this be taken into account whereas the sentence actually passed was stated to be with effect from the date of sentence.

For the respondent DPP Hjh Rozaimah binti Hj Abdul Rahman submits that given the aggravating features of this case, a starting point of the statutory maximum was proper. The aggravating factors were:

- (i) the breach of trust between a young girl and her recently adoptive father.
- (ii) the age difference of 11 years and 60 years.
- (iii) the threat uttered that she would be returned to her biological father if she told anyone about the incident.
- (iv) the element of premeditation in the commission of the offence.

It is further submitted that the reduction in sentence for his early plea of guilty from the usual one third down to one fifth is a matter within the judge's discretion and is not inappropriate in this case.

Finally, it is submitted that the judge was entitled to have no regard to the 25 days in custody prior to sentencing and accordingly direct that the 4 years be with effect from 11 January 2021.

Decision

1. The starting point

Given the statutory maximum of 5 years imprisonment it is trite to observe that such a sentence is only appropriate for the worst examples of the offence. Although a serious case, for the reasons outlined above, we do not consider this to be an example of the very worst of its type.

DPP Rozaimah referred this court to a number of previous cases including:

PP v APO L/Cpl 5613 Gawing anak Yakob [ICCT 27/2017]

Subki bin Ibrahim vs PP (Criminal Appeal 13/1992)

Mohd Arif vs PP (Criminal Appeal 31/2010)

In these cases sentences of 2½ years imprisonment for individual offences were passed in cases involving breach of trust and young victims, after pleas of guilty.

In the present case, whilst undoubtedly serious, we think the starting point should be less than the statutory maximum by a small amount. The starting point should be 4 years and 6 months.

2. The discount

When reducing the sentence from 5 years to 4 years the judge described the 5 years maximum as a “*severe limitation*”. He had earlier said that he would have selected a higher starting point had he been allowed to do so. He also observed that there is no statutory provision to increase a sentence “in lieu of whipping” when strokes cannot be imposed by virtue of a defendant’s age.

We think it important to note that the perceived inadequacy of a statutory maximum sentence and the lack of any provision to increase a sentence in lieu of whipping are not grounds for exercising a judicial discretion to allow less than the usual third discount after an early plea of guilty.

The plea of guilty in this case was at the earliest opportunity and was particularly important in a case of this type where the consequence is that a young vulnerable victim is spared the ordeal of giving evidence.

Accordingly, the 4 year 6 months starting point will be reduced to 3 years.

3. Time spent in custody prior to sentencing

Again, absent any specific reason for ignoring time spent in custody before sentencing, it should be taken into account. This appellant spent 25 days in custody. We will take it into account.

Order

Appeal allowed to the extent that the 4 year sentence shall be reduced to 3 years with effect from 17 December 2020 such date being 25 days before the date on which sentence was passed.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A