

PUBLIC PROSECUTOR

AND

HAMRAN BIN BAKAR

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 6 of 2016)**

Before: Mortimer P, Burrell and Seagroatt JJ A.
14th May 2016

Headnote: Public Prosecutor's appeal for an increase in sentence. Sentence of 14 years imprisonment after a guilty plea to 9 counts of rape on 3 of the defendant's young daughters (contrary to ss 376(1) and (2) CAP 22) considered to be inadequate – many aggravating features – 16 years imprisonment substituted.

DPP Hjh Rozaimah Haji Abd Rahman for Applicant
Respondent in person

Cases cited in the judgment

*Public Prosecutor v CPL6690 M bin T [2005] 1 JCBD 287
Zainuddin bin Sarbini v Public Prosecutor (CA 44/2013)*

Burrell, JA.:

This is an application by the Public Prosecutor to review and increase a sentence of 14 years imprisonment passed by Intermediate Court Judge Pg Masni Pg Hj Bahar on the Respondent (who I shall hereafter refer to as 'The Defendant') after he pleaded guilty to 9 counts of rape, (4 contrary to s.376(2) and 5 contrary to s.376(1) of the Penal Code CAP 22) on 30th March 2016.

Facts

This is a particularly serious and disturbing case. The Defendant is the father of the 3 victims in the 9 charges. He raped his 3 daughters (Miss X, Miss Y and Miss Z) both when they were of tender years (aged 13-16) and, in the case of Miss X, again when she was of mature years aged 26.

The rapes contain a number of aggravating features including incest, gross breach of trust, multiple offences, the use of force, violence and deception and causing fear to young victims. The earliest offence occurred in 2002 when Miss X was 13, the most recent in 2016 when she was 26. Miss X was a daughter of the Defendant's first wife whereas Miss Y and Miss Z were daughters of his second wife. They were 15 and 16

years old at the time of the offences committed against them. The particular charges to which the Defendant pleaded guilty were committed in 2002-2003 and 2014 – 2016.

The Defendant agreed a detailed statement of facts which outlined each of the nine offences. For the purpose of this application we shall attempt to summarize it. Some of the facts are extraordinary.

On four occasions in 2002/3 the Defendant raped Miss X. On two occasions whilst driving at night along a quiet road he stopped and left Miss X in the vehicle whilst he walked away saying he wished to relieve himself. Moments later he reappeared pretending to be a stranger and violently raped the young girl by the stationary car or in nearby woods. He then ran away only to re-appear again. Miss X then told him what had happened but he said little about it and they drove home. On another occasion the Defendant burst into the family home where Miss X and her younger brother were alone in the house. He pushed the young brother to one side then violently raped Miss X. Afterwards he said to her that he would kill her if she told anybody about the incident.

The 4th charge from 2002/3 concerned an incident when the Defendant and Miss X were again in his car during the evening and in a quiet vicinity. On this occasion he did not pretend to be someone else but he suddenly stopped the car and violently attacked his daughter in the course of which he bit her vagina and then raped her. Afterwards he explained to her that she had to submit to his sexual demands in order to ward off evil spirits which possessed him from time to time. She naively accepted this explanation from her father. None of these matters in 2002/3 were reported to the police.

By 2014 two daughters of his second wife, Miss Y and Miss Z had reached their early teenage years. The Defendant attempted to rape Miss Y when she was 15, in 2014, by forcing himself on her. However, Miss Y shouted and screamed and as a result intercourse did not take place.

In 2015, Miss Z who was 11 months younger than Miss Y was twice raped by the Defendant. On both occasions she was driven to a quiet location in Tutong where he forced her to undress and had sex with her. On the second occasion, her screams for help whilst being raped inside a remote hut went unheard.

The Defendant's appalling conduct finally came to light as a result of his continued sexual assaults on Miss X, who by February 2016 had reached the age of 26. Twice in that month the Defendant drove Miss X to a quiet location in Tutong and compelled her to have sexual intercourse with him. She did so only because she still believed that she had to submit to his sexual demands to ward off evil spirits which haunted both him and herself.

Miss X's boyfriend came to learn of this matter and made a report to the police. The ensuing police investigation revealed the whole history of the Defendant's conduct to which he confessed as soon as he was confronted with all the allegations.

Sentence

The offences from 2002/3 are all contrary to s.376(2) of the Penal Code which carries a minimum sentence of 8 years and a maximum of 30 years with at least 12 strokes.

The 2014-16 offences are all contrary to s.376(1) which is punishable with imprisonment up to a maximum of 30 years plus whipping, save that the maximum for the attempted rape in charge 5 is 15 years, pursuant to s.511 of CAP 22.

The learned Judge in her written reasons correctly identified the disturbing features of this case. She helpfully selected a starting point for each offence. For the 2002/3 s.376(2) offences she started with an 18 years sentence and enhanced it by a year for each of the 3 following attacks; thus, charge 2 19 years, charge 3 20 years and charge 4 21 years. This approach cannot be faulted.

Turning to the 2014-16 offences she selected 10 years for the attempted rape on Miss Y (charge 5), 18 years for each of the two rapes of Miss Z, aged 16 at the time and 21 years for the rape of Miss X, aged 26. Again, these individual sentences are well merited in all the circumstances.

The Judge then, correctly, discounted each sentence by one third to take account of the Defendant's early pleas of guilty. There was no other mitigation in this case but his pleas of guilty were important as it would have been a traumatic ordeal for the three victims to have had to recount all the lurid details in evidence against their father. The sentences actually passed were, in order of the charges, 12 years, 12 years 6 months, 13 years 3 months, 14 years, 7 years, 12 years, 12 years, 14 years and 14 years.

No strokes were imposed pursuant to s.258 of the Criminal Procedure Code CAP 7, as the Defendant was over 50 years of age.

Finally, and this is the crux of the Prosecution's appeal, she said:

"Having sentenced the Defendant, I now turn my attention to the overall criminality involved in this case, I order for all the sentence to run concurrently with each other, resulting in the total sentence of 14 years imprisonment and no whipping."

Discussion

It is the Public Prosecutor's submission that by making all the sentences concurrent the resulting 14 years imprisonment does not adequately reflect the overall criminality in this particularly grave and serious series of rapes on young daughters.

Before increasing the sentence we must be satisfied that it is inadequate and manifestly so. We are invited to consider six aspects of this case as follows:

- i. the gross abuse of trust and gross abuse of parental authority.
- ii. the tender age of the victims who were his daughters.
- iii. the fact that three daughters were involved.
- iv. the fact that the offences spanned 14 years.
- v. manipulation of Miss X's naïve state of mind.
- vi. enhancement of sentence for repeat offences.

Given that the maximum sentence for a single offence contrary to s.376(2) is 30 years we have come to the conclusion, that, in this case, a sentence of 21 years after trial for the entire course of conduct was insufficient.

The combined aggravating factors, of which there are many, have led us to the view that a starting point for the whole matter should have been nearer to the maximum sentence of 30 years prescribed for a single offence. We think the starting point should have been in the order of 25 years.

Offences of this nature are disturbingly frequent in this jurisdiction. The need for deterrent sentences is plain.

The Public Prosecutor has brought to our attention a number of previous decisions. We have considered them with a degree of caution as no two cases are the same. Rape cases in particular are highly fact sensitive. There is no doubt that they can be of value to a sentencing court, but primarily for comparative purposes only.

With this in mind we note the following. In *Public Prosecutor v CPL6690 M bin T [2005] 1 JCBD 287* the Defendant was sentenced to 16 years and 15 strokes having pleaded guilty to rapes on his daughters aged between 15 and 18, between 1999 and 2005. The sentencing Judge made the following apposite remarks:

“The position of superiority of the father vis-à-vis his daughter-victims was such that the daughters, being scared as obviously they had been, had no option but to succumb to his despicable desire which in the circumstances of this case seemed to have been insatiable.

Closely aligned to the position of superiority is the element of abuse of trust that such inexperienced girls of vulnerable age, repose in their elders, particularly the father, flagrant and callous abuse of such trust by the father aggravates this kind of offence.”

In *Zainuddin bin Sarbini v Public Prosecutor (CA 44/2013)* 13 years and 12 strokes was upheld as the proper sentence following guilty pleas to 2 counts of rape of an 11 year old daughter. The 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 six aggravating features, relied on by the Appellant and listed above are all undoubtedly present in this case. They cannot be overlooked and in our judgment should have led the sentencing Judge to a starting point of 25 years for the overall conduct of the Defendant.

Decision

Accordingly we shall allow the appeal. A reduction of one-third from 25 years for his pleas of guilty would normally result in a sentence of 16 years and 8 months. We are satisfied that, in this case, a sentence of 16 years is sufficient bearing in mind that this a Prosecutor's appeal for an increase in sentence.

The Appellant further invites this court to consider increasing the sentence of imprisonment pursuant to s.260(1) of the Criminal Procedure Code CAP 7 which provides for an additional sentence of up to 12 months imprisonment in lieu of whipping where, as in this case, the Defendant is over 50 years of age. We decline to do so.

Order

All the sentences imposed in the court below shall be served concurrently save that 2 years of the sentence on additional charge 9 shall be served consecutively, making a total of 16 years and no whipping.

Mortimer, P.

Burrell, J.A.

Seagroatt, J.A