

**Public Prosecutor**

AND

**Bahrin Bin Rejab**

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**(Court of Appeal of Brunei Darussalam)**  
**(Criminal Appeal No. 9 of 2007)**

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Power, P; Mortimer and Davies, JJ.A.  
**5<sup>th</sup> November, 2007.**

A total sentence of 6 year and 7 months and 5 strokes for 3 offences of carnal knowledge of a boy aged 5 years and 7 months contrary of S. 377 of the Penal Code and 1 offence of outraging his modesty contrary to S. 354 held to be manifestly lenient. Appeal allowed and a sentence of 9 years imprisonment and 5 strokes substituted.

Aldila Bte Hj Mohd Salleh (Deputy Public Prosecutor) for the Public Prosecutor.  
Defendant in person.

**Cases cited in the Judgment:**

*Kanagasuntheram v Public Prosecutor* [1992] 1 SLR 81.  
*Lim Hoc Hin Kevin v Public Prosecutor* [1998] 1 SLR 801.  
*Public Prosecutor v Haji Idris Bin Haji Johari* Crim Trial 8 of 1998.  
*R v Goad* [2005] EWCA Cr App 16.  
*R v Willis* 1974 60 Cr App R 146.

**Mortimer, J.A.:**

1. On 4 January 2007 the Respondent (Bahrin) was convicted after a trial before Mr Commissioner Hairol of three offences of sodomising a child aged 5 years and 7 months contrary to Section 377 of the Penal Code and one offence of using criminal force intending to outrage modesty contrary to Section 354 of the Code. These offences took place between September and November 2004. Bahrin was sentenced to 2 years' imprisonment on each of the sodomy charges and 7 months with 5 strokes on the outraging modesty charge. All these sentences were to be served consecutively making 6 years and 7 months in all.
2. The Public Prosecutor appeals against the sentences on the grounds that the total imposed is manifestly inadequate.
3. Bahrin originally appealed against his sentence but later withdrew it. Today he applied for leave to pursue his appeal nevertheless. We allowed him to do so.

## **The Facts**

4. Bahrin was 26 years of age at the time of the offences. He was a trusted near neighbour of the victim's family and a frequent visitor to their house.
5. The first offence of sodomy between September and October 2004 took place in a bedroom at Bahrin's house. The child was taken there by Bahrin and in the bedroom was told to remove his trousers and underpants. Bahrin did the same. He told the child to lie face down and then sodomised him.
6. The second offence between October and November 2004 took place in the bathroom of the child's house when his mother was out. He was told to remove his clothes and to kneel down. He committed a similar offence. Before Bahrin and the child had left the bathroom the child's mother returned. Bahrin replaced his trousers and opened the door. When the mother questioned Bahrin as to what he was doing with the child in the bathroom he made the excuse that he was helping the child to urinate.
7. The third offence between October and November 2004 took place when the child was taken into the jungle in the vicinity of his house by Bahrin where he sodomised him once again.
8. The fourth offence took place between October and November 2004 again at Bahrin's house. Bahrin asked the child to go to his house. In the living room he asked the child to suck his penis. He did so.
9. The child did not tell his parents, his relatives or his school teachers about the offences. Bahrin had threatened to kill him if he did so. He did however tell a school friend about the offence in the jungle. Bahrin had told him to teach his friends about sodomy.
10. The offences came to light in May 2005. The child was found in a girls' lavatory at school with two girls. He and one girl were partially undressed. This inappropriate behaviour was reported to the family and the offences came to light. The family confronted Bahrin who denied any criminal behaviour. His reaction was that he would rather do this to an adult.
11. The police were informed and initially these matters came to trial with admirable speed. Pleas were taken on 15 August 2005 and the trial proper began on 8 October 2005. Thereafter the momentum was lost. After a number of adjournments the hearings were not completed until about September 2006 leading to verdict and sentence on 4 January 2007.

## **The Public Prosecutor's Case**

12. DPP Madam Aldila contends that the total sentence of 6 years and 7 months with 5 strokes is manifestly inadequate. She takes 4 points. First, that the level of sentence imposed is shown to be manifestly inadequate by the much higher sentences passed for similar offences in other jurisdictions. Second, that the social danger posed by the offender in this case was not sufficiently reflected in the sentence. Third, that the evidence demonstrating the serious

effects on the victim was not fully taken into account. Finally, that the Respondent has demonstrated no remorse and has no strong mitigating factors in his favour.

### **The Level of Sentence in Other Jurisdictions**

13. In support of his contention that the level of sentences passed in other jurisdictions is far higher than in Brunei the DPP cites 3 cases. The first 2 are Singaporean. In *Lim Hoc Hin Kevin v Public Prosecutor* [1998] 1 SLR 801 the defendant pleaded guilty to 4 charges under Section 377 of the Singaporean Penal Code for having carnal intercourse against the order of nature, 1 offence of attempting the same offence and 5 offences under Section 377A for committing acts of gross indecency with another male person. He was sentenced to 10 years' imprisonment on each of the 4 charges under Section 377 and to lesser periods for each of the other offences. The 4 sentences of 10 years were ordered to run consecutively but concurrently with the others. The sentence of 40 years' imprisonment was upheld by the Court of Appeal with sentencing guidelines in a judgment delivered by the Chief Justice. It was a very serious case. Five victims were involved; all young boys between 8 and 12 years. The defendant was described as a "irrepressible paedophile" who had "systematically manipulated and abused the trust placed in him by the 5 naïve young boys".
14. Bearing in mind that in the Singaporean Penal Code Section 377 provides for a maximum of life imprisonment, the Chief Justice concluded:
 

*"The Learned Judge's imposition of a sentence of 10 years' imprisonment on each of the 4 charges under Section 377 could not be regarded in any way as manifestly excessive. The public protection justifies a long term incarceration. In future, chronic paedophiles (such as the Appellant) who are shown to be unable or unwilling to control themselves and who target children as victims should be sentenced to life imprisonment..."*
15. In his judgment the Chief Justice refers in some detail to some known factors to be taken into account in sentencing in this type of case.
16. The second Singaporean case is *Kanagasuntheram v Public Prosecutor* [1992] 1 SLR 81. In that case the defendant pleaded guilty to 1 count of rape and 2 counts under Section 377 upon a 17 year old girl. The victim was raped more than once and subjected to fellatio and anal intercourse. Further the Defendant had a previous conviction for rape when 2 other charges of anal intercourse were taken into consideration. The offences against the 17 year old girl were committed soon after his release. The sentences of 14 years and 24 strokes for the rape, 6 years for the fellatio and 8 years for the anal intercourse were ordered to run consecutively resulting in a total of 22 years and 24 strokes. These sentences were upheld on appeal in a judgment also delivered by the Chief Justice.
17. Finally on this point the DPP refers to *R v Goad* [2005] EWCA Cr App 16 in the English Court of Appeal. The defendant pleaded guilty to 14 offences of

buggery against boys under the age of 16 over the period from 1966 to 1994. The Defendant was 60 years of age and it was as grave a case as any court is likely to hear. In the circumstances he was sentenced to life imprisonment on each count with the Judge warning him that life imprisonment in the circumstances could mean “just that”.

18. This case demonstrates, where the court has the appropriate powers (as in the United Kingdom), a willingness to remove dangerous persistent paedophiles out of circulation when the necessity arises. The hearing in the Court of Appeal was on the Attorney General’s application against the Judge’s Order that he was not to be considered for parole for the period of 6 years and 2 months. There was no appeal against the sentences of life imprisonment.
19. We note that as the maximum sentences for these offences in both Singapore and the United Kingdom is life imprisonment the level of sentences passed in those jurisdictions is of limited assistance here in Brunei.

### **Brunei Cases**

20. The only local case of real relevance to our consideration is *Public Prosecutor v Haji Idris Bin Haji Johari* Crim Trial 8 of 1998. The Defendant was found guilty of 3 offences of sodomising a 5 year old child contrary to Section 377 of the Penal Code and to 4 charges of causing hurt to the child under Section 323. He was sentenced to 5 years’ imprisonment on each of the offences against Section 377 and to various sentences totalling 2 years for the other offences which were themselves very serious. All the sentences were ordered to run consecutively making 17 years in all. These sentences were not considered on appeal by this court.

### **Bahrin’s Case**

21. Bahrin asks that in all the circumstances the sentence should not be increased but on the contrary should be reduced. Although there was no demonstration of remorse at trial he now says he is sorry for what he has done and is determined not to re-offend in future. It may also be said on his behalf that only 1 victim was involved

### **Section 377 of the Penal Code**

22. Any consideration of this Appeal begins with the powers of the Court under Section 377 of the Code which provides for a maximum of 10 years imprisonment. Compared with other jurisdictions and with the powers for the rape of a girl of tender age they are very limited. Undoubtedly this is an anomaly which may require addressing by the legislature. It is not an anomaly which we can overlook in considering the appropriate level of sentence. However, anal intercourse remains the most serious form of sexual abuse of children.
23. The principal matters to be taken into account in sentencing for offences under Section 377 where children are involved are usefully summarised by Yong Pung How CJ in Lim’s case. They are mostly uncontroversial. Whereas it

goes without saying that the facts of each case have to be fully taken into account when deciding the appropriate sentence there are often common features to such offences. They are always grave. We refer to some of those common features.

### **Harm to the Victim**

24. Harm to the victim in these offences is to be assumed. The risk of long term harm must always be present, although as was noted in *R v Willis* 1974 60 Cr App R 146 it should not be assumed that one consequence will be the development of homosexuality in the victim. If there is evidence of actual harm as in the present case such evidence is relevant but in the absence of some unexpected or unusual feature its weight is limited. In the same way evidence that a victim is unaffected by the offence should not be given great weight. The offence always involves the risk of serious harm of which there may be no evidence by the time of trial and this must be taken into account.

### **Social Danger**

25. The Chief Justice refers to the danger to society posed by an offender in contrast to the danger to the particular victim when there is a real risk of re-offending. As he said in Lim's case at 809F:

*"The presumption is that the safety of the child must be paramount and chronic paedophiles who have a propensity to re-offend, because they are either totally unable or unwilling to control themselves, have to be put away for long periods."*

26. Bearing in mind that in this jurisdiction the court's powers are limited to 10 years imprisonment and that there is no power to pass an indeterminate life sentence this is not a factor which can be taken into account in the way contemplated by the Chief Justice.

### **Circumstances which may indicate increased gravity of the offences**

27. At 810F para 25 in Lim's case the Chief Justice summarised some common aggravating features:

- "(1) Abuse of Trust and Authority. Where an offender is placed in a position of trust by the parents or by the victims, the breach of trust justifies a substantial sentence on the grounds of general deterrents. All those who have charge of children cannot abuse their positions for the sake of gratifying their sexual urges.*
- (2) Moral Corruption. Where the offender has enticed or cajoled the victims to indulge in unnatural carnal intercourse by the promise of gifts (for example money) this has a very corrupting effect on the young victims, especially adolescents: R v Willis. This should be reflected by a more severe sentence."*

28. Before leaving Lim's case however we mention two matters considered in the judgment. The first is the weight to be given to a plea of guilty in such cases.

Here we part company from the reasoning of the Chief Justice. In this jurisdiction however strong the evidence against an accused person a plea of guilty is always to be regarded as a substantial mitigation which entitles him to a discount. This is especially so in sex cases where such a plea avoids the necessity of the victim to go through the trauma of giving evidence.

29. The second matter is the guidance given in paragraph 24 of the judgment:

*“Bearing in mind the gravity of the offence, we started from the position that a paedophile who commits unnatural carnal intercourse (in the form of anal intercourse) against young children below the age of 14 years, without any aggravating or mitigating factors, should be sentenced to 10 years’ imprisonment.”*

Such a guideline cannot apply in this jurisdiction because the maximum is limited to 10 years’ imprisonment under the Section.

### **The Present Appeal**

30. Any examination of the sentences in this case starts with a consideration of the Court’s powers. As we have said these are limited to 10 years’ imprisonment even for offences against children of tender age.
31. Whereas Bahrin was undoubtedly in a position of trust towards the child it must be said that there is no evidence that he targeted the child. He was a trusted neighbour who nevertheless abused his position. There was no enticing of this child but such was not necessary because of his tender age. There were however threats of violence to prevent the child telling parents or others. These are a serious feature.
32. There is evidence of particular and harmful effects on the child which are assumed to be a consequence of the offences. In our view however these effects were no more serious than would have been assumed in every case of this kind with a victim of this age.
33. The DPP is right when he submits that Bahrin has shown no remorse for these offences. Indeed denying them had the consequence that the victim had to give evidence and relive the offences. Nevertheless, he has not previously offended and 1 child is involved not a number of children.
34. In these circumstances paying particular regard to our powers we consider an appropriate sentence for each offence of anal intercourse contrary to Section 377 to be 6 years. The Judge’s sentence of 2 years on each of these offences does not reflect their gravity. As for the last offence again a sentence of 7 months with 5 strokes does not reflect the gravity of this particular offence of outraging modesty by inserting his penis into the child’s mouth. We would vary this sentence by increasing it to 3 years and 5 strokes.
35. Turning to the totality. In spite of Bahrin’s remorse and promises not to re-offend we consider a total of 9 years to be appropriate and we order the sentences of 6 years on charges 1, 2 and 3 to run concurrently but

consecutively with the sentence of 3 years on charge 4, making 9 years and 5 strokes in all.

### **Conclusion**

36. For these reasons we dismiss Bahrin's appeal and we allow the Public Prosecutor's Appeal. We increase each sentence on charges 1, 2 and 3 from 2 years to 6 years. We increase the sentence on the 4<sup>th</sup> charge from 7 months to 3 years. The sentences on charges 1, 2 and 3 shall run concurrently but that the sentence on the 4<sup>th</sup> charge shall be consecutive. The total sentence imposed therefore is one of 9 years' imprisonment and 5 strokes.

**Power, P**

**Mortimer, J.A.**

**Davies, J.A.**