

Kang Byong Dug

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 21 of 2022)**

Steven Chong, C.J.
15 October 2022

Criminal law – Outraging modesty – Sentence

Pg Shahyzul Khairuddien Bin Pg Abd Rahman and Mr Tiah Teck Chiun (M/S Pengiran Izad & Lee) for Appellant.

DPP Muhammad Qamarul Affyian Bin Abd Rahman and DPP Pg Hj Nor'azmeena Bin Pg Hj Mohiddin for Public Prosecutor.

Cases cited:

Angliss Singapore Pte Ltd v Public Prosecutor [2006] 4 SLR (R) 653
Balasubramanian Palaniappa Vaiyapuri v Public Prosecutor [2002] 1 SLR (R) 138
Shan Kai Weng v Public Prosecutor [2004] 1 SLR (R) 57
Rajeevan Edakalawan and Toh Lam Seng v Public Prosecutor [2003] 2 SLR (R) 346
Dennis Anak Ketok v Public Prosecutor [Criminal Appeal No. 14 of 2019]
Ng Chun Hian v Public Prosecutor [2014] 2 SLR 783
Regina v Millberry [2003] 1 WLR 546
Ng Kean Meng Terence v Public Prosecutor [2017] 2 SLR 444
R v Stabler [1984] 15 Cr App R (S) 129
Sim Gek Yong v Public Prosecutor [1995] 1 SLR 537
Public Prosecutor v Normajili Bin Napir [Criminal Appeal No. 16 of 2009]
Sgt. 3983 Haji Nora'afbillah Bin Ahmad@Ja'afar [Criminal Appeal No. 37 of 2020]
Harpal Singh v Public Prosecutor [Criminal Appeal No. 28 of 2015].
R v David Angus Johnson [1994] 15 Cr App R(S) 827
Noor Effa Nirza Binti Jamil v Public Prosecutor [Criminal Motion No. 6 of 2019]
Mohammad Eddy Faisal Bin Abdul Razak [Criminal Appeal No. 16 of 2019]
Public Prosecutor v Norwidyawati Binti Haji Mokti [Criminal Appeal No. 13 of 2019]
Ruhaya Binti Mohd Razali v Public Prosecutor [Criminal Appeal No. 9 of 2018]
Public Prosecutor v Seleman Bin Nawi [Criminal Appeal No. 18 of 1994].
Sabeli Bin Ismail v Public Prosecutor [Criminal Appeal No. 38 of 2016]
Reginalo Choong Cheng Jian v Public Prosecutor [Criminal Appeal No. 41 of 2020]

Leaw Siat Chong v Public Prosecutor [2001] 3 SLR (R) 646 at [13]
R v Basil Mortimer Bernard [1997] 1 Criminal Appeal R(S) 135]
Lim Teck Chye v Public Prosecutor [2004] 2 SLR (R) 525 at [82]
Amiruddin Bin Haji Junaidi [Criminal Motion No 2 of 2017]
Ahmad Ramadhan Bin Haji Muhtadin v Public Prosecutor [Criminal Appeal No. 1 of 2017]

Steven Chong, C.J.:

Introduction

On 22 June 2022 in the Magistrate’s Court the appellant pleaded guilty to the following charge:

“That you on the 24th day of July 2019 at about 1630 hours, at the Royal Brunei Golf & Country Club, Jerudong in Brunei Darussalam, did use criminal force on one Ms. X (Dahliena Binti Moktar, Female 45 years old, D.O.B. 13/12/1976) knowing it to be likely that you would thereby outrage the modesty of the said Ms. X, to wit, by touching her right buttock and you have thereby committed an offence under section 354 of the Penal Code.”

The Magistrate sentenced the appellant to 7 months’ imprisonment and an additional one month’s imprisonment in lieu of whipping of one stroke. In the result the aggregate sentence passed was 8 months’ imprisonment.

The appellant appeals against that sentence.

The facts

The Statement of Facts presented by the prosecution and admitted by the appellant reads as follows:

“The defendant is a 65 year old Korean male. The defendant has been in Brunei Darussalam since 2012 and at the material time, the defendant was the Vice Chairman of KMB Sdn Bhd and a member of the Royal Brunei Golf & Country Club.

Ms X (Dahliena Binti Moktar, Female, 45 years old, D.O.B. 13/12/1976) is a Bruneian woman and, at the material time, was working at the Royal Brunei Golf & Country Club.

On the 24th July 2019, at about 1630 hours, Ms X was working at the Bar Counter of Royal Brunei Golf & Country Club, as a cashier. Ms X, at the time, was sitting down on the bar stool behind the bar counter when the defendant approached the said counter. Seeing that, Ms X acknowledged the defendant and started getting up from the bar stool.

As Ms X stood up from the bar stool, she bent down slightly to look for her personal belongings under the counter. The defendant had at this point walked to the side of the counter, unbeknown to Ms X. The defendant then reached out and touched Ms X's right buttock, knowing it to be likely to outrage the modesty, which he did without Ms X's consent, thus causing Ms X to become outraged.

Ms X scolded the defendant and pointed at the CCTV camera to warn the defendant. Seeing that communication was ineffective, the defendant left the bar counter area and went back to the golf course.

Ms X informed the management of the Royal Brunei Golf & Country Club of the incident and subsequently lodged a police report on 27th July 2019. The defendant surrendered himself to the police on 1st August 2019 upon being informed that he was being investigated.

The defendant admitted in his statement recorded by the police that he had touched Ms X's right buttock and without Ms X's consent.

During investigation, the police obtained CCTV from the Royal Brunei Golf & Country Club and CCTV footage shows the defendant doing the above act.

On record, the defendant has no previous conviction."

The guilty plea

The appellant being a national of the Republic of Korea, the Notes of Proceedings of the court below show that the charge was read to him in the Korean language by an interpreter; he understood the charge and penalty of the offence; and he pleaded guilty to the charge.

Furthermore, the Notes of Proceedings indicate that the Statement of Facts tendered by the prosecution was also read to the appellant in the Korean language by the interpreter; he understood the contents; and he admitted to the contents.

Mitigation plea

In summary counsel for the appellant urged the Magistrate to take into account the following factors in his favour: (1) guilty plea, (2) good character; (3) remorse for his act; (4) police co-operation; (5) offer of compensation to the victim but this was rejected; (6) contribution to the country having engaged in construction works, farming, waste management and attracting foreign investments; (7) his "extreme stress" and "deteriorating health" from a number of ailments; and (8) his act was "out of character" and "not in anyway committed with the intention to outrage her modesty" and was "in fact attempting to remove a small piece of lint from the complainant's trousers".

The Deputy Public Prosecutor immediately after the appellant's mitigation plea informed the Magistrate that the prosecution disagreed with the appellant's version of the incident and that it was the prosecution's case that he had touched the victim's buttock as alleged in the charge and this act was captured on the CCTV footage.

Counsel for the appellant did not join issue with the Deputy Public Prosecutor and the Magistrate proceeded to pass sentence.

Magistrate's sentencing approach

The Magistrate observed that the penalty provided for the offence of outraging modesty is imprisonment for a term of up to 5 years and whipping.

Dismissing the submission of counsel for the appellant for a probation order the Magistrate said:

"The court is not able to ignore the aggravating features that is present in this case. The defence alleged that the defendant was attempting to remove a small piece of lint from the victim's trousers. However, CCTV footage taken from the Golf Club reception/bar counter had clearly shown that the defendant had walked up to the counter where the victim was sitting and touched her right buttock when she stood up from the bar stool and bending down to reach for her belongings.

Sexual act, of whatever kind or degree, cannot be condoned. It is the court's duty to protect women who are subject to such deplorable behavior.

Notwithstanding his guilty plea, clean track record, reputable professional standing and genuinely remorseful, I find that there is no justification to consider a probation order or even a fine.

Having regard to the serious nature of the offence, I am satisfied that a deterrent sentence is necessary in this case so as to reflect the gravity of the offence and also to deter potential offenders from committing the same offence.

In considering the penalty, aggravating factors and seriousness of the offence, the court takes a starting point of 12 months' imprisonment. In view of his guilty plea and mitigation, the sentence is reduced to 7 months' imprisonment and an additional 1 month's imprisonment in lieu of whipping of one stroke."

Grounds of appeal

Broadly, the grounds of appeal are that the Magistrate:

- (a) misdirected herself as to the role of the court in sentencing;
- (b) misdirected herself as to the aggravating features of the case;
- (c) failed to give reasons for applying a starting point sentence of 12 months' imprisonment;
- (d) failed to give adequate consideration to the distinguishing features of the instant case from the cases submitted by the prosecution; and
- (e) failed to give adequate weight to the mitigating factors and the delay in the prosecution.

My decision

Ground (a)

The complaint by the appellant is against this passage in the sentencing remarks of the Magistrate:

"Sexual act, of whatever kind of degree, cannot be condoned. It is the court's duty to protect women who are subject to such deplorable behavior."

It is submitted that the Magistrate misdirected herself when she said it was the court's duty to protect the "*victim*".

Reference was made to *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR (R) 653 as authority for the proposition that the relevant sentencing considerations are retribution, deterrence, rehabilitation and prevention.

The submission is misconceived as the appellant has misunderstood the Magistrate's remarks. Admittedly, the said remarks could have been better phrased but considered contextually the Magistrate was not saying it was the court's duty to protect the "*victim*" specifically. Rather, the Magistrate was stating the court's duty to protect "*women*" in general from indecent assaults and this accords with the sentencing principle of deterrence.

Ground (b)

The submission is that what the Magistrate described as "*aggravating features*" are in reality a recitation of the facts constituting the offence.

I agree. The Magistrate failed to identify the aggravating factors in the offence.

Grounds (c), (d) and (e)

These three grounds may conveniently be dealt with together and not necessarily in turn.

Validity of the guilty plea

In mitigation on behalf of the appellant counsel for the first time advanced the claim that his act was unintentional and he was merely “*attempting to remove a small piece of lint from the complainant’s trousers*” at the time.

Section 175 of the Criminal Procedure Code provides that before a plea of guilty is recorded the Court shall ascertain that the accused (1) understands the nature and consequences of his plea; and (2) intends to admit, without qualification, the offence alleged against him.

The requirement of understanding the nature of the plea means that the accused must know exactly what he is being charged with: *Balasubramanian Palaniappa Vaiyapuri v Public Prosecutor* [2002] 1 SLR (R) 138.

As to understanding the consequences of the plea the accused must be aware of the punishment prescribed for the offence: *Shan Kai Weng v Public Prosecutor* [2004] 1 SLR (R) 57.

The accused must admit to all the ingredients of the offence contained in the Statement of Facts without qualification: *Rajeevan Edakalawan and Toh Lam Seng v Public Prosecutor* [2003] 2 SLR (R) 346.

A plea of guilt is only qualified by statements in the mitigation plea where such statements indicate a lack of *mens rea* or *actus reus*: *Balasubramanian (supra)*.

The question whether the accused (1) understood the nature and consequences of his plea and (2) admitted to the offence without qualification, when he pleaded guilty to the charge and admitted to the facts presented by the prosecution is fact sensitive: *Dennis Anak Ketok v Public Prosecutor* [Criminal Appeal No. 14 of 2019].

The assertion by the appellant in his mitigation plea that his act of touching the victim’s buttock was unintentional, on the face of it and considered in isolation, could arguably be construed as a qualification of his guilty plea to the charge of using “*criminal force*” on the victim “*knowing it to be likely that you would thereby outrage the modesty*” of the victim.

On deeper analysis and considered in the context of the appellant being legally represented by counsel experienced in criminal law when he pleaded guilty to the charge and admitted to the facts supporting the charge, the Magistrate’s record stating he understood the charge and

penalty and the facts, and his counsel not challenging the prosecution's rebuttal of his assertion in mitigation that his act was "*unintentional*", or seeking to withdraw his guilty plea, I am satisfied his guilty plea to the charge and admission to the facts were unqualified and unequivocal.

There is no suggestion either the appellant or his counsel had misunderstood the elements of the offence in the charge or the facts presented. The safety of the appellant's conviction was not undermined by his assertion in mitigation that his act was "*unintentional*".

A Newton hearing is the exception rather than the norm. It should not necessarily be convened unless the sentencing judge was satisfied it was necessary to resolve a difficult question of fact that was material to the determination of the appropriate sentence. The sentencing judge might decline to hear evidence where the case advanced on the defendant's behalf was absurd or obviously untenable: *Ng Chun Hian v Public Prosecutor* [2014] 2 SLR 783.

In the circumstances outlined above the inescapable inference to be drawn from the appellant's assertion in his mitigation plea, that his act of touching the victim's buttock was "*unintentional*" and he was "*attempting to remove a small piece of lint*" from her trousers, is that he was misguidedly trying to downplay his criminal act. It was a preposterous claim which strained credulity and rightly rejected by the Magistrate.

Reduction in sentence for guilty plea

There are three reasons why a court might reduce a sentence on account of a plea of guilt: (a) the guilty plea can be a subjective expression of genuine remorse and contrition which can be considered a personal mitigating factor; (b) it spares the victim the ordeal of having to testify and re-live the incident; and (c) it saves the resources of the State which would otherwise have been expended if there was a trial: *Regina v Millberry* [2003] 1 WLR 546.

In assessing the proper mitigatory weight to be given to a plea of guilt the sentencing court should have regard to the three *Millberry* justifications and consider the matter together with all the other offender – specific factors in calibrating the sentence to fit the facts of the case: *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 444.

A plea of guilt, in itself, is not necessarily indicative of remorse. When an accused who pleads guilty attempts to downplay his criminal act, as in the instant case, his plea of guilt is not reflective of remorse. The sentencing court would be justified in such a case in not affording the accused the usual one third reduction of the starting point sentence. But the accused may be given some credit for his plea of guilt as the victim has been spared the ordeal of a trial and judicial resources have been saved.

Counsel putting forward mitigation pleas on behalf of accused persons should be mindful of their instructions and exercise their professional judgment in advising them that a divergence

of facts between the mitigation plea and the Statement of Facts may bring into question the weight of the mitigating factor relied upon or even the validity of the plea.

A plea of guilt does not automatically merit a discount. In *R v Stabler* [1984] IS Cr App R (S) 129, the English Court of Appeal held:

“In nearly all cases the court must look at all the circumstances, including the nature of the offence and any mitigating features . . . which include the question of giving credit for the plea [of guilt] and the other matters which are raised. In addition the court must look at the interests of society and strike a balance when considering what sentence is proper. In some cases the protection of society is an overwhelming consideration and in our judgment this is just such a case. We see no ground for giving any discount in the circumstances of this particular case.”

The approach in *R v Stabler* was followed in *Sim Gek Yong v Public Prosecutor* [1995] 1 SLR 537, a decision of the Singapore High Court, where Yong Pung How CJ said at [540]:

“In certain cases, the circumstances may be such that any mitigating effect afforded by a guilty plea is heavily or even completely outweighed by the need for a deterrent sentence.”

Precedent

The Magistrate referred to the following three cases concerning the offence of outraging modesty in her sentencing remarks: *Public Prosecutor v Normajili Bin Napir* [Criminal Appeal No. 16 of 2009]; *Sgt. 3983 Haji Nora’afbillah Bin Ahmad@Ja’afar* [Criminal Appeal No. 37 of 2020]; and *Harpal Singh v Public Prosecutor* [Criminal Appeal No. 28 of 2015].

Normajili pleaded guilty to touching the buttocks of a 14 year old girl in a bookshop and was sentenced to 6 months’ imprisonment and one stroke. This court upheld the sentence imposed and said:

“Generally, a custodial sentence of 6 months would be appropriate in cases of outraging modesty involving any intrusion on the private parts of the victim when the offender pleads guilty and has a clear record. This means a starting point of 9 months upon conviction after a trial.”

Nora’afbillah was convicted after a trial of pressing his penis on the buttocks of a woman who was shopping in a grocery store. His appeal against the sentence of one year’s imprisonment and one stroke was dismissed.

Harpal Singh, a shop assistant, pleaded guilty to “poking” his penis on the lower back of a fellow employee in the sports equipment store where they worked. His appeal against the sentence of one year’s imprisonment and 2 strokes was dismissed.

The submission of the appellant is that the Magistrate should have “*started with the benchmark set in Normajili and adjusted it according to the facts of the present case*” and she was wrong to depart from it without giving any reason.

Furthermore, it is contended that the Magistrate erred in placing reliance on the sentences passed in *Nora’afbillah* and *Harpal Singh* as the facts are distinguishable.

I think there is force in the submissions. On the facts the kind of indecent assault committed by the appellant is similar to what *Normajili* did in comparison to the acts of *Nora’afbillah* and *Harpal Singh*. The Magistrate should have been guided by *Normajili* in determining the starting point sentence. If the Magistrate was of the view that there were factors in the appellant’s case which warranted a departure from the guideline sentence in *Normajili*, she should have specified them.

A lower court should respect the guidance given by a higher court in similar cases. In *R v David Angus Johnson* [1994] IS Cr App R(S) 827, a decision of the English Court of Appeal, Roch LJ said at [830]:

“[A] judge when sentencing must pay attention to the guidance given by this court and sentences should be broadly in line with guideline cases, unless there are factors applicable to the particular case which require or enable the judge to depart from the normal level of sentence. In such special cases the judge should indicate clearly the factor or factors which in his judgment allow departure from the tariff set by this Court.”

Guideline sentences promote consistency and predictability in sentences.

Delay in the prosecution

The offence was committed by the appellant on 24 July 2019. He was charged with the offence in the Magistrate’s Court on 17 March 2022. The appellant submits there is a delay of nearly 3 years in the prosecution and this should be taken into account in his favour in sentence.

Counsel for the appellant finds support in a line of cases where the Court of Appeal recognized delay in the prosecution as a factor which justifies a “discount” in sentence: *Noor Effa Nirza Binti Jamil v Public Prosecutor* [Criminal Motion No. 6 of 2019]; *Mohammad Eddy Faisal Bin Abdul Razak* [Criminal Appeal No. 16 of 2019]; *Public Prosecutor v Norwidyawati Binti Haji Mokti* [Criminal Appeal No. 13 of 2019]; *Ruhaya Binti Mohd Razali v Public Prosecutor* [Criminal Appeal No. 9 of 2018]; and *Public Prosecutor v Seleman Bin Nawi* [Criminal Appeal No. 18 of 1994].

The Deputy Public Prosecutor attempted to explain away the delay in the prosecution by attributing it to representations being made to the prosecution by counsel for the appellant in

July 2021. This, however, is not a satisfactory explanation for the overall delay in bringing the charge to court.

A delay in the prosecution may justify the sentencing court to exercise its discretion to give a reduction in sentence. But delay in the prosecution not contributed to by the accused does not inevitably result in a reduction in sentence. As Yong Pung How CJ said in *Tan Kian Kwang v Public Prosecutor* [1995] 3 SLR (R) 746 (followed in *Sabeli Bin Ismail v Public Prosecutor* [Criminal Appeal No. 38 of 2016]; and *Reginalo Choong Cheng Jian v Public Prosecutor* [Criminal Appeal No. 41 of 2020] at [20]:

“Delay in prosecution simpliciter may not even be a mitigating factor. Nonetheless, in appropriate cases, the court may exercise its discretion to order a “discount” in sentence, if there has been significant delay in prosecution which has not been contributed to in any way by an accused person, if it would otherwise result in real injustice or prejudice to the accused. There are two main considerations in this regard. Firstly, the accused may have to suffer the stress and uncertainty of having the matter hanging over his head for an unduly long or indefinite period. The argument may carry more force if the delay sets in after an accused has been charged, since it is only then that the charge can be said to “hang over his head”. This was evidently considered important by Roberts CJ in Yau Kong Kui’s case ([9] supra). The argument may be wholly negated, however, if the offence in question is serious, or where the accused has numerous antecedents, or has taken steps to avoid detection. A fortiori, where the accused has actively misled the police in the course of investigations, he cannot complain of the delay in prosecution, much less seek to extract some mitigating force from it.”

“Deteriorating Health”

One of the mitigating factors which the appellant argues the Magistrate failed to give adequate consideration is his *“deteriorating health”*. In his written mitigation plea the appellant stated that he suffered from several ailments including *“eye problem”*; autoimmune disease; and diabetes.

The short answer to this argument is that ill-health is not a mitigating factor except in the most exceptional cases when judicial mercy may be exercised: *Leaw Siat Chong v Public Prosecutor* [2001] 3 SLR (R) 646 at [13]; and *R v Basil Mortimer Bernard* [1997] 1 Criminal Appeal R(S) 135].

Judicial mercy may be exercised when the offender suffers from a terminal illness: *Lim Teck Chye v Public Prosecutor* [2004] 2 SLR (R) 525 at [82]; and *Amiruddin Bin Haji Junaidi* [Criminal Motion No 2 of 2017].

There is no medical evidence that the appellant suffers from a terminal illness or a sentence of imprisonment will endanger his life.

Dominant consideration

At the heart of the appellant's submissions is the contention that the sentence is excessive and the mitigating factors and delay in the prosecution justify a probation order.

I am unable to accept the submissions.

The dominant consideration when it comes to sentence for offences of this nature must be the public interest in the protection of women.

Female employees are entitled to feel safe in their place of work. The appellant committed a serious violation of the victim's modesty at her workplace while she was working. A custodial sentence is necessary in order to deter potential offenders. A lenient sentence will not deter. A probation order would be wholly inappropriate.

In my judgment, having regard to the gravity of the offence and the culpability of the appellant, a starting point sentence of 9 months' imprisonment is appropriate notwithstanding the mitigating factors relied upon by him such as his clear record; police co-operation; and compensation offer.

Although the appellant's guilty plea was not an intimation of remorse as in the same breath he sought to downplay his responsibility for his crime (claiming he was trying to remove a small piece of lint from the victim's trousers), I think a reduction in sentence of one month is justified because the victim was spared the ordeal of a trial and judicial resources have been saved.

I also think the inordinate delay in the prosecution warrants a further reduction of one month in the sentence.

In the result the sentence is 7 months' imprisonment which I think is commensurate with the seriousness of the offence and the culpability of the appellant.

Thus, while the Magistrate erred in applying a starting point sentence which exceeded that in *Normajili*, the sentence she ultimately passed of 7 months' imprisonment was appropriate.

That said, the Magistrate was plainly wrong in imposing an additional sentence of one month's imprisonment in lieu of whipping of one stroke. This point was conceded by the Deputy Public Prosecutor.

The appellant being above 50 years of age he was not punishable with whipping under section 258 of the Criminal Procedure Code. Section 260 of the same provides the court with a discretion to impose an additional term of imprisonment where a sentence of whipping is prevented from being executed due to an offender's health. Section 260 does not apply where

age is the reason for not imposing whipping: *Ahmad Ramadhan Bin Haji Muhtadin v Public Prosecutor* [Criminal Appeal No. 1 of 2017].

Conclusion

For the foregoing reasons I allow the appeal to the extent that the sentence of one month's imprisonment in lieu of whipping is quashed.

The sentence of 7 months' imprisonment remains.

DATO SERI PADUKA STEVEN CHONG
Chief Justice