

Dayemo@Abdul Aziz Bin Haji Moktal

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 27 of 2019)**

Steven Chong, CJ

30 July 2020

Criminal law – Sentence – Outraging modesty – Adolescent victims – Causing a person under 16 years of age to watch pornographic material – ss.354 and 377C of the Penal Code.

Appellant unrepresented.

DPP Emily Goh for the Public Prosecutor/Respondent.

Cases cited:

Subki Bin Ibrahim v Public Prosecutor [1992] JCBD 345

Hj Abd Aziz Bin Hj Md Salleh v Public Prosecutor [2012] 2 JCBD 56

Ishak Bin Hj Musa v Public Prosecutor [Criminal Appeal No. 12 of 2019]

Pg Sahri Bin Pg Hj Omar v Public Prosecutor [2013] 2 JCBD 177

R v Willis (1974) 60 Cr App R 146

Lim Hock Hin Kevin v Public Prosecutor [1998] 1 SLR 801

R v Ingham (3 October 1974)(Court of Appeal (Crim Div), UK), per Lord Widgery CJ

Steven Chong, CJ:

This is an appeal against sentence.

Charges

On 5 December 2019 in the Magistrate's Court the appellant was convicted after a trial of six counts under the Penal Code: two counts of outraging modesty contrary to section 354 (1st and 7th Charges); and four counts of causing a person under 16 year of age to watch a pornographic video contrary to 377C (3rd, 4th, 5th and 6th Charges). The appellant was acquitted of one count of sexual grooming contrary to section 377G (2nd Charge).

Facts

In brief the salient facts found by the Magistrate were that sometime in 2016 the appellant who was 45 years old, met Z, aged 13, for the first time in a shop in Mentiri and struck up a conversation with him. On the very next day after that encounter the appellant picked Z up from home and drove him to his residence in Perpindahan Mentiri.

The appellant invited Z to his bedroom where they watched a pornographic video. This was followed by the appellant performing fellatio on Z. After that the appellant “rewarded” Z by giving him cigarettes, phone cards and money.

Over the next several months there were at least five similar incidents involving the appellant and Z.

On one occasion Z brought along his friends X and Y, both aged 12, to the appellant’s house. The appellant invited the three boys to his bedroom. After watching a pornographic video with the three boys the appellant touched Y’s chest and penis. Later, the appellant fellated X.

Sentence

The Magistrate sentenced the appellant as follows:

1st Charge (performing fellatio on X): 2 ½ years’ imprisonment and 3 strokes.

3rd Charge (causing Z to watch a pornographic video): 18 months’ imprisonment.

4th Charge (causing Z to watch a pornographic video): 18 months’ imprisonment.

5th Charge (causing X to watch a pornographic video): 2 years’ imprisonment.

6th Charge (causing Y to watch a pornographic video): 2 years’ imprisonment.

7th Charge (touching Y on his chest and penis): 2 years’ imprisonment and 2 strokes.

Save for the sentences on the 3rd and 4th Charges, as well as the sentences on the 5th and 6th Charges, which were ordered to run concurrently, the sentences were ordered to run consecutively resulting in an aggregate sentence of 8 years’ imprisonment and 5 strokes.

Grounds of appeal

The appellant appeals against that sentence on the following grounds: (1) the sentence is excessive; (2) the lengthy term of incarceration will cause hardship to his family; and (3) the

sentence of 8 years' imprisonment is in excess of the Magistrate's sentencing power of a maximum of 7 years' imprisonment.

Precedents

The offence of outraging modesty under section 354 of the Penal Code is punishable with imprisonment up to 5 years with whipping. The range of sentences for offences contrary to section 354 has been between 2 years 3 months and 5 years' imprisonment: see *Subki Bin Ibrahim v Public Prosecutor* [1992] JCBD 345; *Hj Abd Aziz Bin Hj Md Salleh v Public Prosecutor* [2012] 2 JCBD 56; and *Ishak Bin Hj Musa v Public Prosecutor* [Criminal Appeal No. 12 of 2019].

As to the offence under section 377C of the Penal Code this is also punishable with imprisonment not exceeding 5 years. No whipping is prescribed. A sentence of imprisonment of one year was imposed for a section 377C offence in *Pg Sahri Bin Pg Hj Omar v Public Prosecutor* [2013] 2 JCBD 177.

Vulnerable victim

The Magistrate, in passing a lesser sentence of 18 months' imprisonment on the 3rd and 4th Charges involving Z, compared to the sentence of 2 years' imprisonment on the 5th and 6th Charges involving X and Y, expressed the view, which the Deputy Public Prosecutor "*concurs*" with, that Z was a "*willing participant*" in the offending activity and was not "*particularly vulnerable*" because the appellant rewarded him with cigarettes, phone cards and money.

I disagree.

In my judgment Z was just as vulnerable as X and Y notwithstanding he was one year older than them. All three of them were adolescents and impressionable. Clearly, on the evidence, Z was enticed into engaging in the sexual activities by the appellant's gifts. This kind of moral corruption on young victims is considered an aggravating feature and increases the gravity of the offence: see *R v Willis* (1974) 60 Cr App R 146 and *Lim Hock Hin Kevin v Public Prosecutor* [1998] 1 SLR 801. The Magistrate therefore erred in principle in imposing a lower sentence on the 3rd and 4th Charges.

Individually, having regard to the sentencing range for such offences, none of the sentences can be criticized for being excessive. Ultimately, the question is whether the sentence in totality of 8 years and 5 strokes is excessive.

Family hardship

The appellant's two young children and elderly mother are dependent on him. The appellant's incarceration will undoubtedly cause hardship to them as they will be deprived of his support. It is often the case that the imprisonment of an offender will cause hardship to his family but it

cannot be one of the factors which can affect what would otherwise be the right sentence: see *R v Ingham* (3 October 1974)(Court of Appeal (Crim Div), UK), per Lord Widgery CJ.

Sentencing power

The appellant is right that the Magistrate can only pass a sentence of imprisonment of a maximum of 7 years pursuant to section 11 of the Criminal Procedure Code.

However, the appellant has overlooked section 13 of the Criminal Procedure Code which provides that when a person is convicted at one trial of two or more distinct offences, the Magistrate may pass consecutive sentences of imprisonment in aggregate of up to 15 years.

The sentence in totality of 8 years' imprisonment is within the sentencing power conferred on the Magistrate.

Conclusion

Paedophiles who prey on young victims to gratify their sexual perversion must be punished severely to deter them. Considering the offences involved three victims, the young age of the victims, the seriousness of the sexual acts with the risk of transmission of disease, and the element of moral corruption, the overall sentence of 8 years and 5 strokes is fully deserved.

The appeal is dismissed accordingly.

DATO SERI PADUKA STEVEN CHONG
Chief Justice