

PUBLIC PROSECUTOR

AND

MOHAMMAD SYAFWANDI BIN MUSTAFA

(High Court of Brunei Darussalam)
(Criminal Trial No. 5 of 2024)

Muhammed Faisal bin PDJLD Kol (B) DSP Hj Kefli, JC
11th May, 2024.

Headnote: *Criminal Law – defendant charge for attempted rape u/s 376(1) Penal Code read with section 511 of the same and an alternative charge of outraging modesty u/s 354 Penal Code – plead guilty to alternative charge and DAA to rape charges – sentencing – example of worst case committed u/s 354 Penal Code – maximum sentence – no discount for guilty plea – public interest*

PO Nor’Adliatul Hidayah Hj Mohd Zaidi and PO Hanan for the Public Prosecutor.
Defendant in person and unrepresented.

Cases cited:

Public Prosecutor AND Muhammad Zini Bin Sulaiman [2012] 1 JCBD 31
R v. Ambler [1976] Crim LR 266
R v. Tait and Bartley [1979] 24 ALR 473
Bensegger v. R [1979] WAR 65
In Sim Gek Yong v. Public Prosecutor [1995] 1 SLR 537
Public Prosecutor v Muhammad Firdhaus Bin Hamid and Masnani Binti Haji Masri [2014] 1 JCBD 12
Public Prosecutor AND Muhammad Zulkifli Bin Abdul Jalil (Criminal Trial No. 4 of 2016)
KASIM BIN OMAR AND PUBLIC PROSECUTOR (Criminal Appeal No. 10 of 2021)

SENTENCING

Muhammed Faisal, JC:

I. INTRODUCTION

The defendant faced a charge for attempted rape under section 376(1) Penal Code Chapter 22 read together with section 511 of the same and to an alternative charge under section 354 Penal Code for outraging modesty. He has pleaded guilty to the alternative charge, and the Prosecution has subsequently withdrawn the attempted rape charge.

Today, is the return date for his sentencing for the alternative charge.

II. CHARGES

For completion, both charges are reproduced, below:

Charge

That you, on the day 26th day of January 2024 at about 2230hrs, inside a bedroom at address No.4, Simpang 1959, Kampong Junjongan in Brunei Darussalam attempted to commit rape on Miss X (F.33, Indonesian national) and in order to the commission of the attempted rape, and you have thereby committed an offence punishable under section 376(1) of the Penal Code, Chapter 22 read with section 511 of the same.

Alternative Charge:

That you, on the day 26th day of January 2024 at about 2230hrs, inside a bedroom at address No.4, Simpang 1959, Kampong Junjongan in Brunei Darussalam, did use criminal force onto Miss X (Nur F.33, Indonesian national), to wit, by strangling her neck and pushing her onto the bed, and whilst pressing your body on top of hers, you uttered the words 'I am tired, I am exhausted, I want to have sexual intercourse with you' and thereafter proceeded to kiss her on the lips whilst still strangling her, intending thereby to outrage the modesty of the said Miss X and you have thereby committed an offence punishable under section 354 of the Penal Code, Chapter 22.

III. SUMMARY OF FACTS

On the evening of January 26, 2024, the Defendant, a 25-year-old Brunei Darussalam national and security guard with SETIA Protective Security Services (SPSS), visited Kampong Belading, situated on the border between Brunei and Limbang, in order to obtain and consume alcoholic beverages. Thereafter, now in a state of insobriety, he drove to Kg Manggis to meet his wife but stopped near to Amily Enterprise, a tailor shop in Kg Junjongan, to rest momentarily.

He remembered that at Miss X, worked as a tailor at Amily Enterprise. He entered the shop forcibly. Startled, Miss X looked out her bedroom window but saw nothing. Curious, she stepped out and encountered the Defendant, who then strangled her and pushed her onto

the bed. Despite her attempts to scream, she couldn't due to being strangled. The Defendant expressed his intent to have sex with her, kissing her while strangling her until she briefly lost consciousness. When she woke, he was undressing her. She resisted, biting his hand, and requested to use the bathroom. He escorted her but let go of her hand to turn off the light, giving her the chance to escape through the back door and seek help from nearby residents.

She woke up her neighbors, three Indian gentlemen. Not initially comprehending her, they grasped that Miss X was distressed due to someone attempting to strangle her and sought their assistance. They observed her in a state of panic and fear. Despite their efforts to search for the Defendant inside and outside the tailor shop, they couldn't locate him. Eventually, the Defendant approached them, and Miss X informed them of the attempted rape. The Defendant denied the accusation but admitted to being drunk and wanting to sleep when asked. One of the Indians instructed him to leave, and the defendant returned to his vehicle which was parked nearby. He remained in his vehicle.

Miss X reported the incident to the police, and was subsequently medical examined at the hospital. She suffered neck injuries due the assault upon her. This assault followed a prior incident in 2023 where the Defendant had propositioned Miss X for sex, an offer she had refused.

IV. MITIGATION

The defendant is married and has a 1-year old child. His wife is heavily pregnant and is expecting their 2nd child. He is remorseful of his actions and pleads for a non-custodial sentence, in lieu of which, he pleas for a lenient sentence.

He has no previous convictions and had pleaded guilty at the first opportunity when the alternative charge was presented to him.

V. SENTENCING CONSIDERATIONS

This is a most violent example of a crime of hideous nature. The Defendant had attempted, by his own admission, to force sex upon Miss X. In his efforts to do so, he has caused injuries to her, by strangling her, which caused Miss X to further fall momentarily into unconsciousness. Upon regaining her consciousness, the Defendant was in the process of undressing her.

His actions are a prime example of criminal, sexual violence. They cannot be explained away by reasons of intoxication or that of a crime of opportunity; he has propositioned Miss X for sex previously. Apart from the physical injuries, it would be safe to assume that Miss X would

also suffer from some form of mental trauma, following her ordeal. Had it not been for her strong efforts to resist him, the Defendant would have succeeded in performing his foul endeavors upon her. Had it also not been for timely assistance of the 3 gentlemen, the defendant may neither be deterred nor apprehended.

There is no room for such repulsive behavior in our society. It is gratifying to know that, although such offences do occur, they are far and few in between. To maintain this, a heavy and custodial sentence is needed, both as a punishment to the Defendant and as a future deterrence to him and to other would be perpetrators.

VI. MAXIMUM SENTENCE

In the High Court matter of ***Public Prosecutor AND Muhammad Zini Bin Sulaiman [2012] 1 JCB 31***, the defendant was imposed the maximum sentences under section 28(1)(a) of the Children and Young Person Order 2006, sections 304(2) & 325 of the Penal Code. Steven Chong Ag CJ opined that that case “...falls into the category of the worst cases under the offence charged...” and warranted the maximum sentence. I find it useful to quote his reasoning for deciding so: -

“On the facts of this case is the maximum sentence warranted?”

In R v. Ambler [1976] Crim LR 266, the Court of Appeal in England held that:

“...it is to be borne in mind that when judges are asking themselves whether they should pass the maximum sentence, they should not use their imagination to conjure up unlikely worst possible kinds of cases. What they should consider is the worst type of offence which comes before the court and ask themselves whether the particular case they are dealing with comes within the broad band of that type”

That approach was adopted by the Federal Court of Australia in *R v. Tait and Bartley* [1979] 24 ALR 473, where the court referred to the decision of Burt, C.J., in *Bensegger v. R* [1979] WAR 65, in which he said:

“A maximum sentence prescribed by statute is not reserved for the worst offence of the kind dealt with that can be imagined. If such were the case it would never be imposed as the addition of non-existing but aggravating circumstances would never be beyond the reach of imagination. The true rule as I understand it is that the maximum sentence should be reserved for the worst type of cases falling within the prohibition or... ‘for the worst cases of the sort’. That expression should be understood to be marking out a range and an offence may be within it notwithstanding the fact that it could have been worse than it was”.

In Sim Gek Yong v. Public Prosecutor [1995] 1 SLR 537, a decision of the Singapore High Court, Yong Pung How C.J., cited with approval the decisions in *R v. Tait and Bartley* and *Bensegger v. R*, and said at page 542:

"To restrict the maximum sentence to the worst case imaginable would only invite an endless permutation of hypotheses. ... The possibilities are limitless and the uncertainty intolerable, All that a court can realistically do - and all that it should do - when deciding whether or not to impose a maximum sentence is to identify a range of conduct which characterizes the most serious of the instances of the offence in question. This would, as the court in R v. Tait and Bartley pointed out, involve consideration both of the nature of the crime and of the circumstances of the criminal"

These principles were applied again in the cases of ***Public Prosecutor v Muhammad Firdhaus Bin Hamid and Masnani Binti Haji Masri*** [2014] 1 JCB 12 and ***Public Prosecutor AND Muhammad Zulkifli Bin Abdul Jalil*** (Criminal Trial No. 4 of 2016). In both cases the defendants face charges of culpable homicide not amounting to murder.

In ***KASIM BIN OMAR AND PUBLIC PROSECUTOR*** (Criminal Appeal No. 10 of 2021), the Court of Appeal upheld the High Court's decision to impose the maximum sentence, for culpable homicide not amounting to murder and for voluntarily causing grievous hurt, under section 304(2) and 325 Penal code, respectively, where the Court of appeal stated *"...we have no hesitation in determining that the Chief Justice was correct to find that the circumstances were such that they fell within the broadband of the worst type of offence, for which it was appropriate to impose the maximum sentences of imprisonment of 15 years and 10 years."*

VI. SENTENCING

This is an example of the worst case of an offence committed under section 354 Penal Code. As such, my starting point for his sentence can only be that of the maximum sentence, of 5 years' imprisonment and 5 strokes.

Despite his plea of guilty and remorsefulness, given the nature of the offence and the manner it was committed, I do not believe, that the defendant is deserving of merit for his guilty plea. I do not take this decision lightly, but given the nature and circumstances of this case, it is in the public interest to show that justice is done and to dispel any perception that defendant is not "let off" lightly for his indiscretions.

The defendant is thus sentenced to 5 years' imprisonment and 5 strokes, sentence to be backdated from the date of institution of court proceedings (*in the court below*).

MUHAMMED FAISAL BIN PDJLD Kol (B) DSP HJ KEFLI
Judicial Commissioner