Public Prosecutor *v* ABJ
[2010] SGCA 1

Case Number	: Criminal Appeal No 15 of 2009
Decision Date	: 21 January 2010
Tribunal/Court	: Court of Appeal
Coram	: Andrew Phang Boon Leong JA; V K Rajah JA; Tay Yong Kwang J
Counsel Name(s)	: Bala Reddy, Gordon Oh and Peggy Pao (Attorney-General's Chambers) for the appellant; the respondent in person.
Parties	: Public Prosecutor — ABJ

Criminal Procedure and Sentencing

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2009] SGHC 185.]

21 January 2010

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 In the present case, the accused had pleaded guilty to having sexually assaulted and abused a friend's daughter repeatedly over a continuous period of some seven years. This systematic pattern of sexual assault and abuse began when the victim was just eight years old and continued regularly until she was 15 years old. The assault and abuse came to light only when the victim belatedly confided in her aunt, who then told her parents, who (in turn) reported the offences to the police.

2 The accused was subsequently charged with 44 counts of multiple sexual assaults perpetrated against the victim. He pleaded guilty to nine of the charges and the remaining 35 charges were taken into account for the purposes of sentencing.

3 The trial judge ("the Judge") sentenced the accused to (see *PP v ABJ* [2009] SGHC 185 at [5]):

(a) 16 years' imprisonment for each of the five charges under s 376(2) of the Penal Code (Cap 224, 1985 Rev Ed) ("the Penal Code") (*viz*, the first, second, eighth, 13th and 19th charges (see also below at [12])), which sentences were to run concurrently;

(b) one year's imprisonment for the charge under s 7 of the Children and Young Persons Act (Cap 38, 2001 Rev Ed) ("the CYPA") (*viz*, the 28th charge (see also below at [12]));

(c) eight years' imprisonment for the charge under s 377 of the Penal Code (*viz*, the 29th charge (see also below at [12])); and

(d) eight years' imprisonment for each of the two charges under s 376A(1)(*b*) and s 376A(1)(*a*), respectively, of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code (2008 Rev Ed)") (*viz*, the 42nd and 43rd charges, respectively (see also below at [12])), which sentences were to run concurrently.

4 In so far as the overall sentence was concerned, the Judge ordered (in respect of the sentences imposed and set out in the preceding paragraph) that the sentences in (a), (b) and (c) above were to run concurrently, and that these sentences were to run consecutively with the sentences imposed in (d) above, with the result that the accused was sentenced to a total of 24 years' imprisonment with effect from 21 July 2008. The accused could not be caned due to his age.

5 The Prosecution was dissatisfied with the sentence meted out to the accused and brought the present appeal. After hearing submissions from the parties, we allowed the appeal and sentenced the accused to 32 years' imprisonment. We now give the detailed grounds for our decision.

The background

6 The accused is a 60-year-old Chinese man. At the time of his arrest, he was working as a coffee shop assistant. He is married with two sons and two daughters. His wife and children are residing in China.

7 The victim is a 17-year-old Chinese girl. She is the eldest of four daughters in her family. At the time of the trial last year, she was repeating her Secondary Three studies in school. Her parents are divorced.

8 The accused and the victim's father were acquainted sometime in the year 2000, when they were fellow mediums in a Chinese temple. They also worked for the same employer as odd-job labourers. The victim's family regarded the accused as a "spiritual advisor" [note: 1] as well as a close and trusted family friend. The accused would stay over at the victim's home regularly, and the victim and her siblings would address him as "uncle". [note: 2]

9 Before the victim's parents' divorce, the family stayed at a four-room Housing and Development Board ("HDB") flat at Bangkit Road. After the parents' divorce in 2004, the victim stayed with her mother in a rented flat at Gangsa Road. The victim and her mother stayed at this last-mentioned flat until around August 2006, when they moved into their current HDB flat at Woodlands. The sexual assaults took place at all three of these homes and also at a fourth venue, *viz*, the accused's own flat at Lower Delta Road.

10 The sexual assaults continued for some seven years, beginning when the victim was only eight years old and continuing until she was 15 years old. The victim had reported to the doctors who interviewed her that the frequency of the abuse ranged from being committed "daily to 3–4 times a month" [note: 3] until the year 2008, when it became less frequent as she had avoided the accused by giving excuses to the effect that she was not free. [note: 4]

11 In his medical report dated 5 February 2009, [note: 5] Dr Cai Yiming ("Dr Cai"), a senior consultant psychiatrist, noted that severe psychological harm had been inflicted on the victim as a result of the accused's sexual assaults as well as abuse. In particular, the victim was driven to promiscuous behaviour, which she used as a "tool" [note: 6] to help her forget what the accused had done to her. She also indulged in acts of self-mutilation. Dr Cai also noted that the victim "had a low self-esteem and disliked herself". [note: 7] He further noted that she was "at risk of developing into [*sic*] a borderline personality disorder, drug and alcohol abuse and having interpersonal difficulties in the future". [note: 8] Most significantly, perhaps, Dr Cai was of the view that: [note: 9]

> It would be difficult for [the victim], even with intensive counseling, to show recovery as the

> effects of the sexual abuse on her [were] quite severe and over a prolonged duration involving the use of force and physical objects in genital penetration.

Indeed, all these findings are consistent with the contents of the Victim Impact Statement. [note: 10]

12 As already mentioned, the accused was charged with 44 counts of multiple sexual assaults perpetrated against the victim. These assaults included rape, anal sex, oral sex as well as indecent acts of penetration of the victim's vagina involving a banana as well as a stick. The accused pleaded guilty to nine of the charges, *viz*, the first, second, eighth, 13th, 19th, 28th, 29th, 42nd and 43rd charges. The first, second, eighth, 13th and 19th charges related to the rape of the victim when she was between eight and 11 years old (pursuant to s 376(2) of the Penal Code). The 28th charge related to the offence involving penetration of the victim's vagina with a banana when she was 13 years old (pursuant to s 7 of the CYPA). The 29th charge related to the offence involving anal intercourse when the victim was 13 years old (pursuant to s 377 of the Penal Code). The 42nd charge related to the offence involving the penetration of the victim's vagina with a stick when she was 15 years old (pursuant to s 376A(1)(*b*) of the Penal Code (2008 Rev Ed)). The 43rd charge related to the offence of sexual penetration of the victim when she was 15 years old (pursuant to s 376A(1)(*a*) of the Penal Code (2008 Rev Ed)). The accused was, as we have already noted, sentenced to a total of 24 years' imprisonment by the Judge (see above at [3]–[4]).

The arguments before this court

13 The Prosecution argued, on appeal, that the aggregate sentence imposed by the Judge was manifestly inadequate and disproportionate to the gravity of the offences in terms of the nature of the sexual assaults, the prolonged period of abuse and the extent of damage caused to the victim. In its written submissions, the Prosecution stated that "this [was] one of the worst cases of its kind", [note: 11] which observation was reiterated during oral submissions before the court. It also argued that the accused's age was not a limiting factor which prevented the court from imposing a heavier sentence on the accused.

14 The accused acknowledged (in a letter to the court) that he had committed very serious offences and stated that he was very sorry to the victim and to society. He promised to reform himself. He also referred to his medical problems and hoped that he could see his family in China one day. We pause to note, parenthetically, however, that the accused did not own up to his misdeeds of his own volition and that his offences came to light only when they were reported by the victim's parents to the police (see also the decision of this court in *PP v UI* [2008] 4 SLR(R) 500 at [73]).

Our decision

15 There is a general – and constant – need to balance societal needs and concerns on the one hand and the needs and concerns of the individual on the other. This is especially the case in the context of the sentencing process. As I observed in *ADF v PP* [2009] SGCA 57 at [218] and [222]:

> 218 The sentencing process is not – and ought not to be – a mechanistic one. Still less is a decision on sentencing in a given case arrived at merely by a resort to a prior precedent or precedents unless the facts as well as context in that case are wholly coincident with those in the prior case or cases. This last mentioned situation is, in the nature of things, likely to be rare. The sentencing process is a complex one where the precise factual matrix is all-important and where the court is tasked with the delicate process of balancing a number of important factors centring on both individual (in particular, in relation to the accused) and societal concerns. Indeed, the general aims of sentencing (viz, prevention, retribution, deterrence, rehabilitation and

the public interest) embody these various concerns (see generally Kow Keng Siong, Sentencing Principles in Singapore (Academy Publishing, 2009) at ch 6). Having regard to the fact that the sentencing process is not a mechanistic one, it ought (as I have just mentioned) to be a holistic and integrated one that takes into account all the general aims of sentencing as applied to the precise factual matrix before the court itself, and in so far as they are relevant to that particular factual matrix.

…

222 However, one cannot ignore the second principal (and, in some ways, contrasting) theme in sentencing, viz, the concerns surrounding the individual accused. One basic tenet is as logical as it is fair and commonsensical: that an accused should not be punished excessively, even if the wider or broader societal concerns might suggest otherwise. As I have mentioned above, the court has to balance the factors from both the individual as well as the societal perspectives. This concern – that the accused should not receive excessive punishment – is often reflected in that time-honoured adage that "the punishment should fit the crime". Nevertheless, this particular adage cannot be viewed solely from the individual accused's point of view but must also take into account the relevant societal or public context. On occasion, in fact, the societal concerns are so important that they must be given predominant (even conclusive) effect. This brings us back to the principle of balance, always bearing in mind that the entire process must be applied by the court in as holistic and integrated a fashion as possible.

[emphasis in original]

16 Hence, *all* relevant factors – both societal as well as individual in nature – must be taken into account in the context of the relevant factual matrix as a whole, bearing in mind that, on occasion, the societal concerns may (as stated in the preceding paragraph) be given predominant (or even conclusive) effect. This is, in our view, one such occasion. Before proceeding to elaborate further, we pause to observe, parenthetically, that, whilst bearing in mind the individual accused's point of view (in particular, in the context of the present appeal, the accused's age), one must also bear in mind the fact that the victim, too, is an individual who has (in this case) been severely and repeatedly violated by the accused.

17 This was, in no uncertain terms, an abhorrent case comprising a deliberate, systematic and remorseless pattern of sexual assaults on, as well as sexual abuse of, a young and innocent victim stretching over a continuous period of some seven years. These wanton and despicable assaults also involved, on occasion, sadistic acts of perversion committed in the context of a flagrant breach of trust as well as in a climate of fear. The psychological scars inflicted on the victim could not have been more severe and now appear to be indelible (see above at [11]).

18 In the circumstances, the age of the accused (which can, depending on the facts, be a mitigating factor (see the decision of this court in *PP v UI* at [78])) pales into insignificance in the light of what was perpetrated by the accused on the victim. It is important, at this juncture, to emphasise the important point referred to above (at [15]) to the effect that the sentencing process is not – and ought not to be – a mechanistic one. Indeed, as also mentioned above (also at [15]), much will turn on the precise facts before the court in the case at hand. For example, unlike *PP v UI*, the causal link in the present case between the accused's conduct and the harm suffered by the victim was clearly and unequivocally established. Further, although the forgiveness extended by the victim to the accused in *PP v UI* was accorded little (if any) weight, there was no element of forgiveness whatsoever in this case. Although the lack of violence in the commission of the offences ought not to be taken into account as a mitigating factor (see *PP v UI* at [74]), "the presence of

violence would undoubtedly be an *aggravating* factor" [emphasis added] (see *PP v UI* at [74]). Indeed, as we have seen, the accused had in fact remorselessly inflicted violence upon the victim in this case. Further, although there had also been a pattern of offences committed in breach of trust in *PP v UI*, the pattern of sexual assault and abuse of the victim in the present case was, in our view, even more deliberate, systematic as well as remorseless.

19 We were, in fact, of the view that this was an eminently suitable case to impose three consecutive sentences in accordance with the principles which V K Rajah JA laid down in *ADF v PP* (at [138]–[146]). In particular, in that case, Rajah JA observed as follows (at [146]):

> … The discretion given by s 18 of the [Criminal Procedure Code (Cap 68, 1985 Rev Ed)], despite the lack of manifest statutory constraints, is one that must be exercised sparingly and carefully assessed in relation to the one-transaction rule as well as the totality principle within the broad context of the material facts. A decision to impose more than two consecutive sentences ought not to be lightly made and, indeed, should usually only be imposed in compelling circumstances. Concurrent sentences are ordinarily called for when there is a single episode of criminality which results in a number of offences having been committed. For the avoidance of doubt, I stress that there is, however, no rule or principle of sentencing that distinct offences committed on the same day or in the same criminal episode must be made to run concurrently. On the other hand, the totality principle cannot be unthinkingly invoked to minimise punishment for those who maliciously pursue a deliberate course of criminal behaviour. Multiple wrongdoing by a multiple wrongdoer as a general rule must be viewed more severely than single offending involving similar offences. The community (and the victim(s)) have suffered more because of the greater harm done. Often the exercise of this discretion will involve intuitive (and not mathematical) considerations and calibration that takes into account the totality of the criminal behaviour. There is no rigid linear relationship between the severity of the offending and the length of the cumulative sentence. In my view, an order for more than two sentences to run consecutively ought to be given serious consideration in dealing with distinct offences when one or more of the following circumstances are present, viz:
>
> (a) dealing with persistent or habitual offenders …;
>
> (b) there is a pressing public interest concern in discouraging the type of criminal conduct being punished …;
>
> (c) there are multiple victims; and
>
> (d) other peculiar cumulative aggravating features are present … .
>
> In particular, where the overall criminality of the offender's conduct cannot be encompassed in two consecutive sentences, further consecutive sentences ought to be considered. I reiterate that the above circumstances are non-exhaustive and should not be taken as rigid guidelines to constrain or shackle a sentencing court's powers. Beyond this, I do not think that it will be helpful to spell out how this discretion must be exercised. Myriad permutations of offending can take place and too dogmatic or structured an approach would constrain effective sentencing. In the ultimate analysis, the court has to assess the totality of the aggregate sentence with the totality of the criminal behaviour.
>
> [emphasis in original]

20 Turning to the facts of the present case, the circumstances are certainly "compelling" (see *ADF*

v PP at [146]) and merit the imposition of more than two consecutive sentences. This was certainly a situation where there had been "[m]ultiple wrongdoing by a multiple wrongdoer" (see *ADF v PP* at [146]). Indeed, the accused in this case certainly did "maliciously pursue a deliberate course of criminal behaviour" (see *ADF v PP* at [146]), which, in our view, "there is a pressing public interest concern in discouraging" (see *ADF v PP* at [146]). More specifically, in addition to the severe harm that has been caused to the victim in this case, it is also in the public interest that the accused's overall sentence be enhanced, his age notwithstanding, given the deplorable and systematic nature of his offences. With due respect to the Judge, the sentence originally imposed fails to adequately encapsulate the heinousness of the accused's depraved and wanton conduct, which (as noted above at [13]) the Prosecution has described as one of the worst cases of its kind to come before the courts. In our view, the conduct of the accused, his age notwithstanding, has in the prevailing circumstances to be denounced in the strongest possible terms.

21 We therefore allowed the appeal by the Prosecution and ordered that the terms of imprisonment imposed by the Judge for the first, 29th and 42nd charges run consecutively. All the remaining sentences imposed by the Judge were to run concurrently. The accused was consequently sentenced to a total of 32 years' imprisonment with effect from 21 July 2008.

[note: 1] See para 6 of the Statement of Facts dated 15 July 2009 (in Record of Proceedings ("ROP") vol 2, p 12).

[note: 2] See para 7 of the Statement of Facts dated 15 July 2009 (in ROP vol 2, p 12).

[note: 3] See the Medical Report dated 9 September 2008 by Dr Tan Eng Loy, Registrar, Department of Obstetrics & Gynaecology, Singapore General Hospital (in ROP vol 2, p 20).

[note: 4] See the Medical Report dated 30 July 2008 by Dr Cai Yiming, Senior Consultant Psychiatrist, Institute of Mental Health (in ROP vol 2, p 23).

[note: 5] See ROP vol 2, pp 24–25.

[note: 6] *Id* at p 25.

[note: 7] *Ibid*.

[note: 8] *Ibid*.

[note: 9] *Ibid*.

[note: 10] See ROP vol 2, pp 27–30.

[note: 11] See para 3 of the Prosecution's Skeletal Submissions dated 6 January 2010.