Public Prosecutor *v* Qiu Shuihua
[2015] SGHC 102

Case Number : Magistrate's Appeal No 228 of 2014

Decision Date : 15 April 2015

Tribunal/Court : High Court

Coram : Chao Hick Tin JA

Counsel Name(s) : Hay Hung Chun and Ramesh Ethan Anand (Attorney-General's Chambers) for the appellant; Mervyn Cheong (M/s Eugene Thuraisingam LLP) for respondent.

Parties : Public Prosecutor — Qiu Shuihua

Criminal Procedure and Sentencing – Sentencing

15 April 2015

Chao Hick Tin JA:

1 Magistrate's Appeal No 228 of 2014 was an appeal brought by the Public Prosecutor against a four-month imprisonment sentence imposed by the district judge on the Respondent (see *Public Prosecutor v Qui Shuihua* [2014] SGDC 448 ("the GD")) in relation to two charges of sexual penetration of a minor, an offence under s 376A(1) of the Penal Code (Cap 224, 2008 Rev Ed) punishable under s 376A(2) of the same Code. To give a better understanding of the breadth of this section, I set out the relevant parts which read as follows:

> **Sexual penetration of minor under 16**
>
> **376A**.—(1) Any person (A) who —
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> (*a*) penetrates, with A's penis, the vagina, anus or mouth, as the case may be, of a person under 16 years of age (B);
>
> (*b*) sexually penetrates, with a part of A's body (other than A's penis) or anything else, the vagina or anus, as the case may be, of a person under 16 years of age (B);
>
> …
>
> with or without B's consent, shall be guilty of an offence.
>
> (2) Subject to subsection (3), a person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 10 years, or with fine, or with both.

2 Of the two charges, one charge related to digital-vaginal penetration and another penile-vaginal penetration. The Respondent admitted to the charges, and accordingly, pleaded guilty. The district judge sentenced the Respondent to two months' imprisonment for the charge involving digital-vaginal penetration, and four months' imprisonment for the charge involving penile-vaginal penetration. The two sentences were ordered to run concurrently. The Respondent also consented to having two additional charges under ss 376A(1)(*a*) and (*b*) taken into consideration for the purposes of sentencing.

3 After hearing the submissions of parties, I allowed the appeal. I enhanced the sentence imposed for the penile-vaginal penetration charge to ten months' imprisonment. I did not disturb the sentence of two months' imprisonment imposed by the district judge for the digital-vaginal penetration charge. Like the district judge, I also ordered both sentences to run concurrently with the sentence backdated to the date on which the Respondent began his incarceration. I now give the reasons for my decision to allow the appeal of the Prosecution.

Background facts

4 The Respondent is a national of the People's Republic of China. He was 21 years old at the time of the commission of the offences. The victim, a girl, was then aged 14. They became acquainted with each other through an instant messaging application known as QQ chat on 11 November 2012. At that time, they were aware of each other's age as both of them had truthfully stated their respective ages under their QQ chat user profiles. After interacting with each other through the application, the Respondent and the victim exchanged contact details and finally met each other on 12 November 2012. They continued to meet on the following day.

5 On the third day, 14 November 2012, the victim visited the Respondent at his work place. On this occasion, the victim gave the Respondent a pendant which bore the Chinese character meaning "love". He then took her to a container office where they engaged in petting which eventually led to the Respondent penetrating the victim's vagina with his finger. It was this act that gave rise to the charge for digital-vaginal penetration.

6 Two days later, on 16 November 2012, the victim, wanting to see the Respondent, visited the latter at his home as the latter had informed her that he was under the weather and did not want to leave his flat. They engaged in intimate acts but the victim initially refused to copulate with the Respondent as requested by the latter. The Respondent then told the victim that he felt "disappointed" and that he was "tired of her". [note: 1] He also threatened to break up with the victim if she refused to have sex with him. The victim thereafter succumbed to the Respondent's emotional blackmail and consented to sexual intercourse. The Respondent proceeded to engage in unprotected sex with the victim but ejaculated on the victim's body. The charge for penile-vaginal penetration relates specifically to this instance of fornication.

The decision below

7 The district judge was of the opinion that the primary sentencing consideration in relation to the two charges (for which the Respondent was convicted of) was that of deterrence. He also identified the benchmark sentence for the penile-virginal penetration offence to be 12 months' imprisonment. However, he sentenced the Respondent to only four months' imprisonment for the penile-vaginal penetration charge and two months' imprisonment for the digital-vaginal penetration charge, after taking into account the following mitigating factors:

(a) The Respondent had acted impulsively and the offences were committed in the spur of the moment.

(b) The Respondent was only 21 years old at the time of the offence. This meant that the age difference between the Respondent and the victim was relatively small.

(c) Despite the fact that the relationship had progressed for only a few days, *ie*, from 12 November 2012, the Respondent and the victim were in a "genuine" relationship when they engaged in sexual intercourse on 16 November 2012. He was not a sexual predator (see GD at

[22]).

The parties' submissions

The prosecution's case

8 The prosecution's arguments before me centred on the sentence imposed in relation to the penile-vaginal penetration charge which it contended was manifestly inadequate. Its arguments were twofold. First, the prosecution submitted that, given the briefness of the encounter between the Respondent and the victim, the district judge should not have concluded that a "genuine" relationship existed between them. The prosecution argued that the Respondent had not committed the acts out of impulse and emotion but had instead systematically preyed on the victim's naivety.

9 Secondly, the prosecution took the view that the district judge failed to accord adequate weight to the fact that the Respondent had emotionally blackmailed the victim into having sex with him. The prosecution also contended that the district judge had failed to give adequate consideration to the two additional charges which were taken into consideration for the purposes of sentencing.

10 The prosecution, therefore, submitted that a benchmark sentence of ten to twelve months' imprisonment should be imposed for the penile-vaginal penetration offence.

The respondent's case

11 Counsel for the Respondent, in answer, argued that the district judge was correct in finding the existence of a "genuine" relationship. In particular, he argued that the benchmark sentence of ten to twelve months' imprisonment should only be imposed in the absence of a relationship. Furthermore, he contended that the victim voluntarily consented to engaging in the sexual act, and was not coerced into doing so. Lastly, counsel for the Respondent submitted that little weight should be given to the two charges taken into consideration for the purposes of sentencing since they arose from the same transaction as the offence relating to the penile-vaginal penetration of the victim.

My decision

The applicable principles

12 Prior to the enactment of s 376A of the Penal Code in 2007, offences relating to sexual intercourse with a girl below the age of 16 were only punishable under s 140(1)(*i*) of the Women's Charter (Cap 353, 1997 Rev Ed) which provides:

> **140.**—(1) Any person who —
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> …
>
> (*i*) has carnal connection with any girl below the age of 16 years except by way of marriage; …
>
> …
>
> shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding 5 years and shall also be liable to a fine not exceeding $10,000.

13 The introduction of s 376A of the Penal Code, therefore, accorded the prosecution with greater

prosecutorial discretion in deciding on the appropriate charge to be brought against an accused person in light of the circumstances. This was indeed parliament's intention (see *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at col 2175 (Assoc Prof Ho Peng Kee, Senior Minister of State for Home Affairs). It follows that the considerations applicable to s 140(1)(*i*) of the Women's Charter should similarly be applicable to offences under s 376A of the Penal Code. In this regard, I would refer to the decision of Yong Pung How CJ in *Tay Kim Kuan v Public Prosecutor* [2001] 2 SLR(R) 876 ("*Tay Kim Kuan*"), a case dealing with an offence under s 140(1)(*i*) of the Women's Charter, where the then Chief Justice comprehensively expounded the policy behind that statutory provision (at [13]):

> … issues of consent are entirely irrelevant to offences under s 140(1)(*i*) of the Women's Charter, the policy of which is to afford blanket protection to young girls who are regarded by the statute as being mentally and emotionally unprepared to handle relationships of a sexual nature. Girls under the age of 16 are thus deemed by the law to be incapable of giving valid consent to a sexual act, and, in my view, rightly so, as many at that age are ill-equipped to handle the serious social consequences which often arise out of just one single night of reckless passion. These girls often lack not just the resources but the emotional strength of mind to cope with the heavy responsibilities of an unplanned pregnancy and worse, the physical and psychological trauma of having to undergo an abortion. The spectre of unwanted children, its links to juvenile delinquency and the concomitant effects on the progress of modern society all collectively favour the legislative policy of strict liability where sexual intercourse with underaged girls is concerned. Much as these girls may have procured or actively initiated the encounter, the purpose of s 140(1)(*i*) is to place the onus on the male adult to exercise restraint and discipline in curbing his carnality. In this respect, the law may be said to be paternalistic, and perhaps even overprotective in seeking to guard young girls from a precocious desire for sexual experience. Nevertheless the social and humane reasons for such a welfare state of the law are too compelling to be ignored. In my view, the court has to send out a clear signal to the public that men who engage in sexual intercourse with girls under 16 do so at their own peril. In particular, where the age difference between the parties is significant, the man can be expected to be punished more severely as his offence can then no longer be regarded as merely the result of the false steps of youth but rather the conscious and calculated decision of a mature adult.

As seen from Yong CJ's exposition, the policy behind the statutory provisions criminalising sexual intercourse with minors is clearly protective and paternalistic in nature. I agree entirely with his views. Consistent with that perception, I also agree with the district judge's view that the main consideration in sentencing *vis-à-vis* such offences is deterrence.

14 At this juncture, there are two points in Yong CJ's observations which I would like to deal with a little more, namely, that:

(a) consent is irrelevant to such offences as minors are deemed incapable of giving valid consent; and

(b) the age of the offender is a factor to be taken into account.

Consent

15 On the first point, I agree that the presence of consent on the part of the minor is irrelevant insofar as the consent cannot be a defence to the offence; neither can it be regarded as a mitigating factor for the purposes of sentencing. However, I would hasten to add that the absence of consent is certainly an aggravating factor. Indeed, without consent the offence committed could well be rape,

a much more serious offence. Moreover, even if there was consent, the court would also look at how the consent was given. An offender who procures the victim's consent through, for example, lies, incentives, threats, emotional pressure or force would undoubtedly be more reproachable than one who, on the behest of the victim, copulates with that victim.

16 This leads me to the relevance of a relationship for the purposes of sentencing for an offence relating to sexual intercourse with a minor. Counsel for the Respondent appeared to take the position that the existence of a relationship between the parties *per se* was a mitigating factor and would call for a lower sentence. To adopt such a position would be to say that a party that pressures a victim, with whom he is in a relationship with, to have sexual intercourse with him is always less culpable than a party who is not in a relationship with the victim. I find such a proposition too sweeping. Rather, it is the overall circumstances of each case that would be determinative, such as, the age of the parties, how the parties came to be acquainted with each other, how long have they known each other, who was the initiator of the act, and whether there was an element of the accused taking advantage of the victim. It is pertinent to note that in the context of rape, the Court of Appeal in *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 ("*Mohammed Liton*") had held (at [121]) that the existence of a prior intimate relationship would not always justify a lower sentence. In fact, the existence of such a relationship may sometimes be an aggravating factor (see *Mohammed Liton* at [116]). Although there are differences between the offence dealt with here and the offence of rape, the Court of Appeal's observations in *Mohammed Liton* (at [121]) must be emphasised:

> … As we have stressed earlier, each case must be considered on its own facts; *it would be an abdication of the judicial function of a sentencing court to formulate and apply blanket rules without due regard to the unique facts* which are capable of arising in each case. … [emphasis added]

17 Therefore, there cannot be a blanket rule that requires a lower sentence to be meted out whenever there exists a relationship between the parties. The court must always bear in mind the object behind the law to criminalise such an act. To have such a blanket rule may also send out the wrong signal to people in relationships with minors, that the court, to a certain extent, condones fornication in such circumstances.

18 The fact of there being in existence a relationship between the parties must be assessed in the circumstances of the case (see [16] above). I would only add that while a relationship may be, to a limited (if not very limited) extent, indicative of the nature of the consent given by the minor for offences under s 376A of the Penal Code and s 140(1)(*i*) of the Women's Charter, the court must still inquire as to the exact circumstances under which that consent was given. An offender who coerces his long-time girlfriend, who is still under 16, into having sexual intercourse with him cannot be deemed less culpable on account of that relationship alone.

Age of the offender

19 In relation to the second point, I agreed that the age of the offender is a relevant factor to be considered. It is first and foremost relevant when the court considers the sentencing pillar of rehabilitation. However, in the specific context of sexual offences against minors, certain clarifications need to be made. I noted that counsel for the Respondent sought to rely on the observations of the court made in *Public Prosecutor v Kunasekaran a/l Ponniah* [1993] SGHC 253 ("*Kunasekaran*") as follows:

> The offence of carnal connection with a girl under the age of 16 as provided by s 140(1)(*i*) of the

> Women's Charter, Cap 353 constitutes a very broad band of guilt. The offensive conduct can range from sexual intercourse with a girl by a teenager who began a chaste relationship with the girl to that of a mature adult who is over 30 deliberately planning and seducing such a girl. In between would again be cases at the lower end of seriousness where a young man picks up such a girl after a party to ascending situations of seriousness where a person is in a position of trust to the girl, or where he is acting in loco parentis.

20 From both *Tay Kim Kuan* and *Kunasekaran*, it would appear that the age of the offender and the age difference between the parties are factors relevant to the sentence to be imposed. As was acknowledged by the court in *Tay Kim Kuan*, the age of the offender could also indicate whether the decision to commit the offence was consciously calculated or a result of "the false steps of youth" (at [13]). That said, the dichotomy between "chaste relationship" and "deliberately planning and seducing such a girl" are likely to be the crucial considerations in sentencing. Age of the offender *per se* cannot be decisive. Although it is a factor, the court should ultimately address its mind to the way the offence was committed—whether it was committed in a calculated, systematic manner, or whether it arose as a result of impulse without planning.

21 A young offender does not necessarily deserve a lighter sentence on account of his youth *alone*. Youth only suggests a higher probability of rehabilitation. In the specific context of sexual offences against minors, it must be emphasised that a lighter sentence should be premised on the offence being committed as a result of impulse in the absence of planning. If it can be shown that the young offender had taken systematic and calculated steps to commit the offence, then he may well deserve the normal range of punishment in spite of his youth.

22 In determining whether the offence was committed in a calculated, pre-meditated manner, all the circumstances must be considered – how did the offender and the victim first meet; was it the victim who sought out the offender; how long was the duration of their relationship before moves were made to advance their relationship to a more intimate level; and who initiated those moves and if it was the victim, what was the offender's response – these, and others too, will show whether the offence was calculated and planned and whether the offender sought out young girls to exploit their gullibility or precociousness. In this regard, the existence of a relationship over a period of time would be a relevant factor.

23 There is one other observation in the GD of the district judge which I would like to comment on. He seemed to have placed significant weight on the likely reactions of the public as to the type of offence that was committed. At [24] of the GD, the district judge mentioned that a sentence must reflect the feelings of outrage and revulsion of the public. He then proceeded to explain (at [25]):

> In my view, a similar observation can be made for offences of underaged sex in general. Where there is a significant age gap between the offender and the complainant, the feeling of outrage is greater as it is more likely to be perceived as a case of a mature adult cynically exploiting a young and vulnerable person to satisfy his own sexual desires. This is perhaps one of the reasons why the High Court in *PP v Kunasekaran a/l Ponniah* made a distinction between "teenagers" and "mature adults" above the age of 30. On the other hand, where the age gap is smaller, the feeling of outrage may be less as the case may be viewed as a lapse of judgment in the course of a genuine relationship.

24 While I agree that a sentence may sometimes need to reflect the feelings of outrage and revulsion of the public, it must be borne in mind that such feelings of outrage and revulsion must arise from knowledge of the actual facts of the case and not on "perceptions" that are premised entirely on irrational social stereotypes. As I have explained above, while the age of the offender is a relevant

consideration, it is not determinative; it is the circumstances leading to the offence which are critical. The court should guard against public perceptions which are premised on an incomplete understanding of the facts.

Concluding observations

25 In light of the discussion above, I was of the view that the applicable sentencing considerations which apply to cases involving s 376A may be set out as follows:

(a) Real consent is not a mitigating factor but the absence of it could be an aggravating factor (assuming its absence would not constitute the offence of rape).

(b) The court should examine the circumstances under which the consent was given. The existence of a relationship between the offender and the victim may not, of itself, be a mitigating factor. While it may suggest to a limited extent that the consent was given by the victim willingly, the court must still examine the exact circumstances under which the consent was given.

(c) While the age of the offender and age gap between the offender and the victim are pertinent factors, the more important consideration is how the offence was committed –whether it was committed in a calculated and systematic manner or whether it was an unexpected momentary loss of self-control on the part of the offender.

(d) As to the manner in which the offence was committed, factors such as the victim being the one who sought out the accused and the existence of a relationship may be relevant in showing that the offence was not a product of a calculated and systematic approach towards seeking out young girls to engage in sexual activities.

With these principles in mind, I now explain why I enhanced the sentence imposed by the district judge for the penile-vaginal penetration offence.

Application of the principles

26 I was of the opinion that the district judge had placed too much emphasis on the existence of a supposed "genuine" relationship. Even assuming that there was a "genuine" relationship between the Respondent and the victim (see [27] below), what was clear was that the victim had in fact refused to engage in sexual intercourse with the Respondent and it was because of the Respondent's emotional blackmail that caused the victim to succumb and consent to having sex with him. This is clearly an aggravating factor which the district judge had failed to give sufficient weight to in determining the appropriate sentence.

27 In any event, I was of the view that no such relationship existed between the parties and that the district judge was clearly wrong in finding that a "genuine" relationship existed. In the Respondent's own mitigation plea below, he had stated that he has a "girlfriend" who "still believes in him and is willing to continue their relationship even after his sentence." [note: 2] When pressed further as to this relationship with that "girlfriend", counsel for the Respondent admitted that the Respondent was engaged in a pre-existing relationship with someone other than the victim at the time of the offences. To my mind, the victim loved the Respondent or was infatuated with him but the same could not be said of the Respondent. Their relationship was, at best, unilateral. The Respondent was taking advantage of the victim's affection for him.

28 I must, however, acknowledge that, on the day when the parties had sex, it was not the Respondent who enticed the victim to come over to his flat. It was the victim, on hearing that he was not well and was on leave at home, who voluntarily came to see him. This was because she cared for him. Nonetheless, it will be recalled that two days before, when she went to see him at his workplace (and that was only their third meeting), the Respondent had already displayed his real intentions in relation to this young and impressionable girl. He led her to a private place where he had digital sex with her. While it was the victim who voluntarily came to his flat on the day that they had penile sex, it was the Respondent who took advantage of her presence to pursue what must have been his intention from the day they had digital sex. It is pertinent to note that while she did not object to his indulging in digital penetration two days earlier, she did refuse to engage in penile sex. He exploited the situation by resorting to blackmail and threatening to terminate their relationship if she did not agree to it. While he had not planned for it to happen that day, which is a mitigating factor, he had clearly taken advantage of her soft spot for him, especially when he then already had someone else as a girlfriend. There was no genuine relationship as far as he was concerned. I did not think that this could be said to be an instance where the Respondent had succumbed to temptation –not when he had to resort to emotional blackmail to make her agree. I find that this was his plan after he discovered the extent of the victim's affections towards him when she gave him a pendant with the word "love". The digital penetration incident which occurred on that day was, in my view, just the precursor.

29 As for the two charges taken into consideration, I noted that they related to one instance of digital-vaginal penetration and another instance of penile-vaginal penetration committed also on 16 November 2012 when the victim visited the Respondent at his home. As the two charges taken into consideration arose from the same transaction as the penile-vaginal penetration of offence, I agreed with counsel for the Respondent that little weight should be accorded to them.

30 I was also cognisant of the various cases cited before me that dealt with the benchmark sentences for offences relating to penile-vaginal penetration of a minor. Despite the fact that the age of the offenders fell within a wide range, the sentences imposed ranged from ten to twelve months' imprisonment. This was also regardless of whether there existed a relationship between the parties.

31 It was especially aggravating for the Respondent to have emotionally blackmailed the victim into copulating with him. In light of this, I was inclined to impose the benchmark sentence. Nonetheless, I took into consideration the fact that it was the victim who sought him out on that day. I therefore imposed the sentence of ten months' imprisonment for the offence of penile-vaginal penetration, which fell within the lower end of the benchmark.

32 As for the offence of digital-vaginal penetration, no authorities were placed before me to demonstrate the appropriate benchmark sentence. I therefore did not disturb the district judge's sentence of two months' imprisonment. In any event, as the sentences for the two offences would have been ordered to run concurrently, any adjustment of the sentence for the digital-vaginal penetration charge would not have had an effect on the Respondent's total length of imprisonment.

Conclusion

33 For the reasons given, I allowed the appeal of the prosecution and enhanced the sentence imposed on the Respondent in the terms set out above (at [3]).

[note: 1] Statement of Facts (Amended), p 2 at [8] (found in Record of Proceedings, p 8).

[note: 2] Respondent’s Plea of Mitigation, p 8 at [31] (found in Record of Proceedings, p 42).