AQW *v* Public Prosecutor
[2015] SGHC 134

Case Number : Magistrate's Appeal No 155 of 2014

Decision Date : 19 May 2015

Tribunal/Court : High Court

Coram : Sundaresh Menon CJ

Counsel Name(s) : The appellant in person; Christine Liu and Claire Poh (Attorney-General's Chambers) for the respondent.

Parties : AQW — Public Prosecutor

Criminal Law – Offences – Sexual offences – Sexual penetration of minor under 16

Criminal Law – Statutory offences – Children and Young Persons Act – Sexual exploitation of child or young person

Criminal Procedure and Sentencing – Sentencing – Benchmark sentences – Sexual activity with minor under 16

19 May 2015

Sundaresh Menon CJ:

1 The appellant pleaded guilty in the court below to three proceeded charges, all of which arose out of sexual activity that he engaged in with a male minor ("the minor") over the course of one night. At the time of the offences, the minor was a few weeks shy of his 15th birthday. One charge was for the offence of sexual penetration of a minor under s 376A(1)(*c*) of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"), while the other two charges were for the offence of sexual exploitation of a young person under s 7(*a*) of the Children and Young Persons Act (Cap 38, 2001 Rev Ed) ("CYPA"). Three other charges were taken into consideration: two of these arose also out of that night of sexual activity with the minor with the remaining one for the possession of obscene films.

2 The District Judge sentenced the appellant to 15 months' imprisonment for the offence under the Penal Code and ten months' imprisonment for each of the two offences under the CYPA. The imprisonment terms for the Penal Code offence and one of the CYPA offences were ordered to run consecutively, making a total sentence of 25 months' imprisonment. The appellant considered that this was manifestly excessive and he appealed. Although he was represented by counsel in the court below, he conducted his appeal in person.

3 At the conclusion of the hearing before me, I allowed the appeal. I reduced the sentence for the Penal Code offence to ten months' imprisonment and the sentences for each of the CYPA offences to six months' imprisonment. Given that the appellant had been convicted and sentenced to imprisonment for three distinct offences, I was bound by s 307(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) to order that the imprisonment terms for at least two of the offences run consecutively. I therefore ordered the imprisonment terms imposed for the two CYPA offences to run consecutively for an aggregate sentence of 12 months' imprisonment. I gave brief oral grounds for my decision but I also indicated that I would give my detailed grounds in due course, and this I now do.

Facts

4 The appellant was, at the time of his offences, a 35-year-old teacher at a junior college and an officer with the Ministry of Education. Sometime in November 2012, he used a Facebook account that he operated under a pseudonym to contact the minor. The two began communicating on Facebook, and then on Skype. The appellant introduced himself using another assumed name and told the minor that he was a 19-year-old living alone at home as his parents were overseas. In turn, the minor told the appellant that he was 14 years old. Eventually, they agreed to meet in person and to spend time together at the appellant's flat.

5 On 2 December 2012, the appellant picked the minor up from a bus interchange around 4pm. They ate at a hawker centre before proceeding to the appellant's flat. The minor was then left alone there while the appellant ran some errands. When the appellant returned, he took the minor to a restaurant for dinner at which they were accompanied by a teenage boy who was the appellant's friend. Thereafter, the appellant and the minor returned to the flat, where the minor watched television while the appellant packed for an overseas trip that he would make on the following morning. At around 10pm, the appellant left the flat and returned about half an hour later.

6 At about midnight on 3 December 2012, the appellant and the minor proceeded to bed. As they lay next to each other, the appellant hugged the minor and then began to kiss him. The minor reciprocated. The appellant proceeded to undress first himself and then the minor. He applied some lubricant to both their penises before rubbing his penis against the minor's. The appellant used his hands to masturbate the minor until they both had erections. This act of masturbation gave rise to one charge under s 7(*a*) of the CYPA ("the First Charge").

7 Next the appellant fellated the minor. His act of causing the minor's penis to penetrate his mouth gave rise to one charge under s 376A(1)(*c*) of the Penal Code ("the Third Charge"). After some more sexual activity, they fell asleep.

8 At 6am, the appellant used his hands to masturbate the minor. This gave rise to another charge under s 7(*a*) of the CYPA ("the Fifth Charge"). There is no suggestion that the minor was coerced into any of these acts. Thereafter, the minor went back to sleep and the appellant left for the airport. The minor left the flat in the early afternoon of that day and deposited the house keys in the letterbox as instructed by the appellant. The appellant and the minor had no further contact after that night.

9 As I have mentioned, there were three other charges that were taken into consideration with the appellant's consent. One was under s 7(*a*) of the CYPA, which arose out of the appellant's act of having the minor masturbate him. Another was under s 376A(1)(*a*) of the Penal Code, and it arose out of the appellant's act of penetrating the minor's mouth with his penis. The last was under s 30(1) of the Films Act (Cap 107, 1998 Rev Ed), and it arose out of the appellant's possession of five video files containing obscene films.

The statutory provisions governing sexual offences against minors

10 The title of s 376A(1) of the Penal Code is "Sexual penetration of minor under 16". However, the offence is wider than the title might suggest. It is not confined to situations where a man uses his penis to penetrate the vagina, anus or mouth of a minor under 16 years of age (s 376A(1)(*a*)), or where a person uses a part of his or her body, or anything else, to penetrate sexually the vagina or anus of a minor (s 376A(1)(*b*)). Instead, it also encompasses situations where the act of penetration is performed by the minor. The relevant provision in the present case is s 376A(1)(*c*), under which it

is an offence to cause a male minor to penetrate, with his penis, the vagina, anus or mouth of any other person. According to the plain words of the statute, this offence in all its various forms is made out regardless of whether the penetration occurred with the minor's "consent". The appellant's act of fellating the minor, the subject-matter of the Third Charge, clearly fell within the parameters of s 376A(1)(*c*).

11 The title of s 7 of the CYPA is "Sexual exploitation of child or young person". As it suggests, a potentially wide range of criminal acts can be covered. The key element is that there must be some "obscene or indecent act" involving any child or young person, or at least an attempt to bring about such an act. In this regard, a "child" refers to one under 14 years of age and a "young person" refers to one above 14 but under 16 years of age. Where the obscene or indecent act in question involves not only the minor but also some other person, including an accused, the relevant provision is s 7(*a*). Where no other person is involved, it is s 7(*b*). Here, the appellant's acts of masturbating the minor, the subject-matter of the First and Fifth Charges, undoubtedly amounted to the commission of offences under s 7(*a*).

12 The Penal Code offence of sexual penetration carries more severe penalties than the CYPA offence of sexual exploitation. As to the former, an offender may be punished with imprisonment of a term of up to ten years and/or a fine with no prescribed limit where the minor is under 16 but above 14 years of age: s 376A(2) of the Penal Code. This was the case here. Under s 7 of the CYPA however, the maximum sentence is five years' imprisonment and a $10,000 fine where, as in the instant case, the offender has not previously been convicted of this offence. These, together with other offences, are designed to operate conjunctively in order to achieve a common policy objective and this is clear from the following statement made in Parliament by Dr Vivian Balakrishnan, Minister for Community Development, Youth and Sports (*Singapore Parliamentary Debates*, *Official Report* (10 January 2011) vol 87 at col 2104): "Together, the penalties within the CYPA and the Penal Code should provide for adequate deterrence against sexual exploitation of children and young persons".

The key considerations in sentencing for sexual offences against minors

13 It is thus readily apparent that the offences under s 376A(1) of the Penal Code and s 7 of the CYPA have the common objective of protecting a class of vulnerable people, namely minors under the age of 16, from sexual exploitation. Given this objective, the twin notions of (a) the vulnerability of the minor and (b) the degree to which the accused has exploited the minor constitute the key considerations in sentencing for these offences. I shall now consider how this broad idea, framed at that high level of abstraction, might be applied to the facts of particular cases. In connection with this, I have also considered the sentencing approach that is followed in the United Kingdom ("UK") for sexual offences against minors. The Prosecution briefly alluded to this in its submissions but I note that the relevant offences defined by the Sexual Offences Act 2003 (c 42) (UK) ("the UK Act") do not correspond exactly with the prescribed offences under our law. In the circumstances, I have not sought to transplant the UK Sentencing Council's guidelines in their entirety into our sentencing framework although I consider that there is utility in considering the UK Act and guidelines. I do so below, because such guidelines help to guide the exercise of the wide discretion that the sentencing judge has in the context of an offence that has no prescribed minimum punishment and carries a maximum punishment of ten years' imprisonment and an unlimited fine.

14 The UK Sentencing Council's guidelines use what might be called a Harm/Culpability matrix in which three categories of "Harm" and two bands of "Culpability" are delineated for each sexual offence against minors defined in the UK Act. As to Harm, Category 1 is the most serious and Category 3 the least; and as to Culpability, the "A" band is more serious than "B". There are thus six possible Harm/Culpability permutations with sentencing ranges and starting points prescribed for each

permutation. While harm and culpability are undoubtedly important, for the purposes of our sentencing framework, I prefer to analyse the sentencing considerations by reference to the vulnerability of the minor and the degree of exploitation by the accused. Nevertheless, it will be apparent from the discussion that follows that there is a considerable overlap in the sort of factors that are considered and indeed, one might say that the extent of exploitation of a minor is often directly proportional to the degree of harm inflicted on him or her.

Vulnerability of the minor

15 It is not difficult to see why the vulnerability of the minor ought to be a key consideration in sentencing for sexual offences against minors. The more vulnerable the minor is, the more protection he or she will require, and the more reprehensible will be the conduct of an offender in exploiting him or her for the offender's own gratification. Thus, on principles of deterrence and retribution, offences against more vulnerable minors ought to be visited with heavier punishments.

16 One factor that goes towards the vulnerability of the minor is of course the minor's age. The younger the minor, the more vulnerable he or she will likely be found to be. Significantly, this generalisation has a measure of statutory force in the laws of Singapore and of the UK. In Singapore, the maximum imprisonment term for an offence under s 376A of the Penal Code is ten years if the minor is above 14 and under 16 years of age, but if the minor is under 14, the maximum term increases to 20 years: s 376A(3). In the UK Act, there are offences triggered only where the minor is under 13 years of age, such as sexual assault of a child under 13 (s 7). Those offences carry heavy sentences, with rape (s 5) and assault by penetration (s 6) punishable up to life imprisonment. On the other hand, where the minor is above 13 but under 16 years of age, sexual activity with that minor is not an offence unless the offender is over 18 years old and does not reasonably believe that the minor is above 16 (s 9). The maximum punishment for this offence is not life imprisonment, but 14 years' imprisonment.

17 While age is a factor that weighs in the assessment of the minor's vulnerability, there are also other factors involved in the equation. On that note and more generally, the UK Sentencing Council guidelines make it clear that the vulnerability of the minor is to be taken into account in sentencing. For the offences under ss 5–8 of the UK Act, one of the factors considered to elevate a case beyond Category 3 Harm to Category 2 or even Category 1 is where the minor is "particularly vulnerable due to extreme youth and/or personal circumstances". There is no attempt to list these "personal circumstances", but some that immediately come to mind include physical infirmity, intellectual disability, and psychological and/or emotional problems afflicting the minor.

18 The vulnerability of the minor may also arise from situational circumstances that are not inherent to the minor himself or herself. For instance, there might be some form of relationship between the offender and minor that places the latter in a position of special vulnerability with respect to the former, for instance, where the offender is the minor's teacher or spiritual guide or caregiver and in that capacity there exists a degree of trust and confidence. A few other examples of such situational vulnerability may be found in the UK Sentencing Council guidelines: the minor might have become more vulnerable through the consumption of alcohol or drugs, or by the fact that the offender acted in concert with other people in committing the offence.

Exploitation of the minor

19 Aside from the minor's vulnerability, the other key consideration in sentencing for sexual offences against minors is the degree of exploitation to which the offender has subjected the minor. This refers to the extent to which the offender has interfered with and violated the minor's rights.

One facet of this is the nature of the sexual contact between the offender and the minor, and it is evident that the Singapore and UK legislation both differentiate between various forms of sexual contact, the most egregious being penile penetration of the vagina, anus or mouth, and non-penile penetration of the vagina or anus. In Singapore, as I have noted, such penetrative sexual activity is punishable by up to ten years' imprisonment under s 376A of the Penal Code (assuming the minor is not under 14 years old) whereas non-penetrative sexual activity is punishable by a lower maximum sentence of five years' imprisonment under s 7 of the CYPA, leaving aside the sentences prescribed in ss 354 and 354A of the Penal Code. In the UK Act, penetrative sexual activity with a child under 13 (ss 5 and 6) may be punished with up to life imprisonment, whereas non-penetrative sexual activity with minors of that age attracts a lower maximum of 14 years' imprisonment. Penetrative sexual activity is regarded as the most serious because it represents the greatest intrusion into the bodily integrity and privacy of the minor, and involves the highest potential for physical, psychological and emotional damage to the minor. Hence the perpetration of such activity on a minor represents the greatest degree of exploitation as compared to other forms of sexual activity and accordingly, merits greater sanction.

20 A further distinction may be drawn within the class of non-penetrative sexual activity. In the UK Sentencing Council guidelines on the offences under ss 9 and 10 of the UK Act, Category 1 Harm is constituted by penetrative sexual activity, Category 2 by non-penetrative sexual activity consisting of touching or exposure of naked genitalia or naked breasts, and Category 3 by all other non-penetrative sexual activity. It is not difficult to see that there is greater invasion of bodily integrity and privacy, and hence a greater degree of exploitation, when genitalia and breasts are involved, which warrants a harsher sentence. It might even be possible to draw yet more nuanced distinctions, for instance, to say that touching of genitals is more exploitative than touching of breasts, but I leave that for consideration and determination when an appropriate case arises.

21 The extent of an offender's exploitation of a minor also depends on many other factors that I shall not endeavour to list exhaustively. In this connection, it is helpful to refer to the UK Sentencing Council guidelines because they identify a substantial number of factors that courts should pay heed to. For instance, in the guidelines on the various sexual offences against children under 13, most, if not all, of the factors that elevate a case beyond Category 3 Harm to Categories 2 or 1 relate to the degree of exploitation of the minor, including: (a) violence or threats of violence, (b) penetration using large or dangerous objects, (c) abduction and/or prolonged detention, (d) forced entry into the minor's home, and (e) any additional degradation or humiliation. Other examples of increased exploitation occur when the offender records, retains and/or shares sexual images and/or uses those images to blackmail the minor, or abuses trust placed in him by the minor. Factors such as cruelty, sex slavery or sadomasochistic practices would also constitute aggravated exploitation of the minor.

The relevance of age

22 I have touched on the relevance of the minor's age (see [16] above). The Prosecution in this case placed much reliance on the age of the accused. There were two specific aspects of this which were raised by the Prosecution and which, in particular, I consider – the relevance of the age disparity between offender and minor as well as the fact that the offender lied to the minor about his age. The Prosecution argued that these factors called for a higher sentence to be imposed on the appellant. Indeed, I note that in the UK Sentencing Council guidelines on the offences defined by ss 9 and 10 of the UK Act, two of the factors said to elevate a case beyond "B" Culpability to "A" Culpability are a significant disparity in age and the fact that the offender lied about his age.

23 Where the age disparity is concerned, I find myself in complete agreement with the remarks of Chao Hick Tin JA in the recent case of *Public Prosecutor v Qiu Shuihua* [2015] SGHC 102 at [19]–[24].

The main points that emerge from that decision are these: (a) the age of the offender is relevant so far as it goes towards the prospects of the offender's rehabilitation; (b) the absolute age of the offender, as well as the age disparity between offender and minor, may be relevant but would not be decisive and determinative; (c) so far as a greater age disparity tends to cause more pronounced public outrage, it would be wrong for the court to give effect to such outrage by handing down a harsher sentence because public perceptions may be premised on "irrational social stereotypes" and "an incomplete understanding of the facts"; and (d) far more important than matters of age would be the "way the offence was committed" and "the circumstances leading to the offence".

24 In my judgment, an undue focus on age may distract the court from the key considerations of the minor's vulnerability and the degree of exploitation of the minor. Undoubtedly, the *minor's* age generally goes towards his or her vulnerability, but I do not think that the *age disparity*, without more, necessarily says very much about the extent to which the offender has exploited the minor. Assuming a 14-year-old minor, and comparing the case of a 23-year-old offender who forcibly subdues the minor in the course of committing a sexual offence with the case of a 45-year-old who carries out an identical sexual act in circumstances wholly devoid of any coercion or pressure, it seems obvious to me that the former case is deserving of harsher punishment notwithstanding the far smaller age disparity. Therefore, the age disparity, without more, ought ordinarily to be given little, if any, weight in sentencing. I have said "ordinarily" because it is conceivable for instance that the age disparity reveals something about the offender such as his motivations or his prospects for rehabilitation or his enhanced ability to influence the minor that may have a bearing on sentencing.

25 I turn to the fact of an offender's lying about his age. While this may be relevant to sentencing because it tends to suggest a more significant degree of exploitation of the minor, it is extremely important that this not be viewed in isolation but rather that it be seen in the light of all the circumstances of the case. For instance, if an offender has lied about his age but has not otherwise attempted to conceal his identity or his whereabouts, and there is no evidence that the minor set much store by the offender's age, the *totality* of the circumstances would suggest a fairly low degree of exploitation. Against that background, the offender's untruth fades into relative insignificance. Hence, I would prefer to see these factors as markers that may warrant closer consideration but the court must then assess their real significance in all the circumstances.

Other general observations

26 I reiterate that the two key considerations in sentencing for sexual offences against minors are, first, the vulnerability of the minor, and second, the degree of exploitation to which the offender has subjected the minor. Certain factors will, by themselves, indicate a high level of vulnerability or exploitation – for instance, the minor's extreme youth, or violence inflicted on the minor in subduing him or her – and accordingly warrant a steep increase in the sentence to be imposed. On the other hand, there are factors which, viewed in isolation, may tend to suggest higher levels of exploitation, but when seen together with all the circumstances of the case might turn out to be of peripheral importance. I consider that the age disparity between offender and minor and the fact of an offender's lying about his age are examples of such factors, and the proper approach is not to focus minutely and mechanistically on them but to attend to the overall picture that emerges from the entirety of the facts.

27 It follows from all I have said that the highest end of the sentencing scale is reserved for cases in which the minor is particularly vulnerable and where the offender has exploited the minor to a significant degree by subjecting him or her to penetrative sexual activity in circumstances involving a great deal of coercion that might include violence. As against this, courts should be careful not to impose excessive punishments on offenders in situations where the minor is not particularly

vulnerable, as where he or she is not far off from 16 years of age and manifests no physical, psychological, intellectual or other sub-normality, and where the offender has subjected the minor to no coercion, intimidation, blackmail or any pressure of that sort and there has not been any kind of abuse of trust. This seems to be the situation in the instant appeal.

28 The broad comments I have put forward are of course but a limited source of guidance as to the more specific question of what the appropriate sentence in the present case should be. Accordingly I turn now to consider the sentencing precedents that were brought to my attention by the parties.

Sentencing precedents

Sexual penetration of minor: s 376A of the Penal Code

29 In relation to the offence under s 376A of the Penal Code, the pertinent precedents that the Prosecution placed before me were all unreported cases emanating from the District Court. Focusing for the time being on the question of what would be an appropriate sentence to impose for the single charge under s 376A of the Penal Code that the appellant was convicted of, as opposed to the question of what would be the appropriate aggregate sentence taking into account all the charges, I found that three of the precedents provide a convenient starting point. These precedents all concerned male offenders in their mid-twenties who engaged in fellatio as well as non-penetrative sexual acts with male minors who were around 14 years of age whom they had met online or through mobile phone applications, in circumstances involving no apparent coercion of the minors into sexual activity. Thus, at least at first glance, the levels of vulnerability and exploitation in those precedents appear to approximate well with that in the present appeal. The offenders in all three precedents were sentenced to 12 months' imprisonment on each s 376A charge that they faced, which involved fellatio.

30 The first case is *Public Prosecutor v Suhaimi bin Shamsudin* (DAC 38971/2013 and others, unreported) ("*Suhaimi*"), which involved the very same minor as in the present case. There, the 23-year-old offender met the 14-year-old minor on "Grindr", a mobile phone application targeted at homosexual individuals. They met on two separate occasions at HDB staircase landings to engage in sexual activity. On both occasions they hugged and kissed and engaged in mutual masturbation before fellating each other. The Prosecution proceeded on just two s 376A charges against the offender, one for performing fellatio on the minor and the other for receiving it; a number of other charges, all arising from those two occasions of sexual activity, were taken into consideration. He was sentenced to 12 months' imprisonment per charge with both terms running concurrently. The total sentence was thus 12 months' imprisonment.

31 The second case is *Public Prosecutor v Lim Zhixiang Adin* (DAC 22916/2013 and others, unreported) ("*Adin Lim*"). The 24-year-old offender got to know the 14-year-old minor on Facebook. They subsequently exchanged telephone numbers and communicated with each other through text messages. One day, the minor informed the offender that he had run away from home and they arranged to meet. They checked into a chalet. At night, after having some drinks, they began hugging and kissing. They removed their clothes and the offender performed fellatio on the minor. Following this, they slept for a few hours. Waking up in the middle of the night, they resumed sexual activity, and this time the minor penetrated the offender's anus with his penis. The minor later contracted a sexually-transmitted disease that was "likely from anal intercourse". The offender faced two s 376A charges, one for performing fellatio on the minor and the other for causing the minor's penis to penetrate his anus. Two other charges, both arising from that night of sexual activity, were taken into consideration. He was sentenced to 12 and 15 months' imprisonment on the fellatio and

anal intercourse charges respectively, with these terms to run concurrently so that the total sentence was 15 months' imprisonment.

32 The third case is *Public Prosecutor v Alex Fong Guo Yuan* (DAC 12314/2010 and others, unreported). The 26-year-old offender and the 13-year-old minor became acquainted on a website and they began talking to each other using an online instant messaging program. In the course of these chats the offender asked the minor if he was interested in meeting for sex and the minor said yes. They did this on two separate occasions. The first occasion took place in the back of the offender's vehicle; there, the offender penetrated the mouth of the minor for about 20 minutes. The second occasion took place in a hotel room on another day. The offender penetrated the mouth of the minor before penetrating his anus. The offender faced three charges, two for fellatio and one for anal intercourse while two other charges arising from sexual activity on another occasion were taken into consideration. He was sentenced to 12 months' imprisonment on each fellatio charge and 24 months' imprisonment on the anal intercourse charge, with the terms for one fellatio charge and the anal intercourse charge to run consecutively, making a total of 36 months' imprisonment.

33 Turning to the other precedents, there is one in which an unusually high sentence of 24 months' imprisonment was meted out for a charge involving fellatio under s 376A of the Penal Code. This is *Public Prosecutor v Chock Choon Seng* (DAC 904172/2014 and others, unreported) ("*Chock Choon Seng*"). The offender was a 37-year-old man who got to know the 14-year-old minor through a mobile phone application designed for homosexual people to meet one another. One day, they met in the offender's home. The offender began to touch the minor's penis while the minor was still clothed, whereupon the minor told the offender "that he did not want to do this" only for the offender to reply "never mind" and tell the victim that he "will get used to it". The offender continued to touch the minor before removing the minor's clothes and taking nude photographs of him. The offender masturbated the minor and performed fellatio on him, and then the offender got the minor to perform fellatio on him. While his penis was inside the minor's mouth, the offender "held the [minor's] head and moved the [minor's] head in an upward and downward motion". After this sexual encounter the minor tried to cease contact with the offender but the offender threatened to post the minor's naked photographs online if he refused to meet him.

34 The offender faced three charges, one for having the minor perform fellatio on him, one for masturbating the minor (under s 7 of the CYPA), and one for criminal intimidation in threatening to release the minor's naked photographs. He was sentenced to 24 months' imprisonment on the fellatio charge. This was ordered to run consecutively with a sentence of 12 months' imprisonment imposed on the charge under s 7 of the CYPA. The total sentence was thus 36 months' imprisonment.

35 There is good reason why the circumstances of *Chock Choon Seng* warranted a significantly higher sentence for the s 376A charge. There was an element of coercion and pressure involved in that the offender had overridden the minor's expressed reluctance to engage in sexual activity and had used a measure of force in getting the minor to perform fellatio on him. Furthermore, the offender had taken nude photographs of the minor with which he then sought to blackmail the minor. Thus the degree of exploitation in this precedent was substantially greater than in the other precedents, and it does not affect the preliminary conclusion that may be drawn from those other precedents. Thus far, it may be said that these cases suggest a starting point of around 12 months' imprisonment for cases in which offenders in their mid-twenties engaged in fellatio (and other sexual acts) with male minors around 14 years old whom they had met online or through mobile phone applications, in circumstances involving no apparent coercion of the minors or the exertion of any pressure on them.

36 Imprisonment terms of less than 12 months were imposed in three other cases that were brought to my attention. The first is *Public Prosecutor v Chee Ee Cheong* (DAC 910581/2014,

unreported). The 31-year-old offender in that case, who worked as a lifeguard at a public swimming pool, met the 15-year-old minor at the pool. One day, while they were in the bathroom, the offender signalled to the minor and indicated that he should follow him into a shower cubicle. The offender then masturbated the minor before performing fellatio on him. He faced one charge for the act of fellatio, with a charge taken into consideration for rubbing his penis against the minor's anus. He was sentenced to ten months' imprisonment.

37 The second case is *Public Prosecutor v Parthiban a/l Maniarsu* (DAC 2849/2013, unreported). The 25-year-old offender became acquainted with the 15-year-old minor on Facebook. After communicating with each other for about a month, they arranged to meet. They went to a park, and there, the offender asked the minor to perform fellatio on him, which he did. That was apparently the full extent of the sexual activity between them. The offender faced one charge for fellatio, and he was sentenced to seven months' imprisonment. The lower sentence imposed in this case might perhaps be explained on the basis that the sexual act was an isolated, one-off incident.

38 The third of these cases, in which the sentence was less than 12 months' imprisonment, is *Public Prosecutor v Chen Qiang* (DAC 47804/2013, unreported) ("*Chen Qiang*"). The 21-year-old offender got to know the 15-year-old minor through a social networking website. Prior to their sexual activity, they talked on the phone, communicated online and met in person once. The minor was "enamoured" with the offender but the offender "treated him as a friend only". The sexual activity took place on two occasions. On the first, the offender and the minor went to the former's flat. After they hugged and kissed, the offender asked the minor to perform fellatio on him; the minor refused initially but relented after the offender repeated his request several times. The second occasion also took place in the offender's flat. Similarly, they hugged and kissed before the offender asked the minor to perform fellatio on him, which he did. The offender faced two charges for those two occasions on which fellatio took place and he was sentenced to nine months' imprisonment on each charge. The sentences were ordered to run concurrently for a total sentence of nine months' imprisonment.

39 These precedents all involved male minors. The Prosecution also cited two precedents involving female minors who performed fellatio on offenders in their mid-twenties for which the offenders were sentenced to 14 and 12 months' imprisonment. Additionally, the appellant cited the case of *Public Prosecutor v Ong Theng Kiat* (DAC 33921/2013, unreported) ("*Ong Theng Kiat*") in which a 61-year-old offender penetrated the vagina of a 14-year-old minor with his penis and engaged in a substantial number of other sexual acts with her. The offender faced two charges under s 376A of the Penal Code arising out of two instances of vaginal intercourse, and he was sentenced to ten months' imprisonment on each charge, with the sentences to run concurrently, making a total sentence of ten months' imprisonment.

40 Given that there are already a substantial number of sentencing precedents involving male minors, I do not think that it is particularly helpful to look to the precedents involving female minors, even though I do not see any reason why the gender of the minor should make a difference in sentencing. The appellant placed much reliance on *Ong Theng Kiat* but the seemingly lenient sentence in that case might in large part be explained on the basis that the offender was, at the time of his offences, suffering from "major depressive disorder of mild intensity" due to the death of his wife.

41 In my judgment, in the light of all these precedents, a sentence of between ten and 12 months' imprisonment would be the appropriate starting point for an offence under s 376A of the Penal Code where (a) the sexual act that took place between the offender and the minor was fellatio, regardless of which party performed and which received the fellatio, (b) the minor is 14 years old or above, and does not appear to be particularly vulnerable, (c) the offender did not coerce or pressure the minor

into participating in the sexual act, and (d) there was no element of abuse of trust. This is intended to be no more than an indicative guide; there may be cases in which unusual circumstances call for a departure from the benchmark I have identified, such as, for instance, where the offender is suffering from a mental impairment such as diminishes his responsibility for his actions.

Sexual exploitation of child or young person: s 7 of the CYPA

42 There is a High Court precedent for the offence under s 7 of the CYPA, namely, *Public Prosecutor v Low Chuan Wee Anthony* [2011] SGHC 258 ("*Anthony Low*"). The offender there faced three charges of rape under s 376 of an older version of the Penal Code (Cap 224, 1985 Rev Ed) and four charges under s 7 of the CYPA. He was a 42-year-old martial arts instructor at the time of the offences and the victim was his 13-year-old martial arts student. The four charges under s 7 of the CYPA comprised the following: (a) one charge of hugging and kissing the victim, (b) one charge of hugging and kissing her and caressing her breasts, and (c) two charges of hugging and kissing her and caressing her breasts and vulva; the respective terms of imprisonment imposed were (a) six months, (b) nine months and (c) one year per charge. There was no challenge to the sentences for the charges under the CYPA.

4 3 *Anthony Low* might ultimately be of limited assistance because that case was decided in the context of a different sentencing regime, in that the maximum punishment at the time was two years' imprisonment and a fine of $5,000, as compared to the current maximum of five years' imprisonment and a $10,000 fine. As See Kee Oon JC has pointed out in the recent case of *Pittis Stavros v Public Prosecutor* [2015] SGHC 67 at [61]–[62], when there has been legislative amendment of the maximum prescribed punishment, this might well signal the need for a corresponding change in the appropriate sentence to be imposed in response to the same criminal conduct since the court's duty is to utilise the full sentencing range available to it – subject to the caveat that such change is not invariable and all the circumstances of the case must be given due consideration. It is unfruitful to speculate what the sentence in *Anthony Low* would have been had that been decided under the present sentencing regime.

44 There is then *Chock Choon Seng*, the facts of which have already been narrated above at [33]. To reiterate, the offender there faced one charge under s 7 of the CYPA for masturbating the minor. He was sentenced to 12 months' imprisonment for this offence. As I have noted above at [35], the circumstances in that case were aggravated and inevitably called for a heavier sentence.

45 The Prosecution put before me four other District Court precedents, but in my judgment, they were of limited utility. There does not exist a great deal of similarity between the present facts and the facts of those cases. Moreover, three of the precedents were, like *Anthony Low*, decided under the older and more lenient CYPA sentencing regime. In particular, two of the precedents are rather different in that they involved the inchoate offence of attempting to procure the commission of an obscene or indecent act by a minor, which attempts were ultimately unsuccessful. I shall describe these two precedents briefly, and the only reason I do so is to demonstrate that they are rather removed from the facts of the case before me.

46 In *Public Prosecutor v APA* [2010] SGDC 544, the offender was a 31-year-old primary school teacher who sent lewd text messages to two 13-year-old male minors, one of whom was a student in the secondary section of the school which the offender taught at. The offender asked one minor to meet him for the purpose of viewing pornography and masturbating together, and he asked the other minor to masturbate so that he could view the act using the video function on his mobile phone. Neither request was acceded to by the minors. The offender faced two charges corresponding to his attempts to procure the commission of obscene acts by the two minors, and he was sentenced to

ten months' imprisonment per charge with the terms running concurrently for a total sentence of ten months' imprisonment.

47 In *Public Prosecutor v AZN* [2012] SGDC 155, the offender was a 48-year-old teacher who sent numerous sexually-explicit text messages to a 13-year-old female minor whose class he taught for a time as a relief teacher. He also asked her if she would masturbate him. Fortunately no sexual contact actually arose as a result of this. The offender was sentenced to ten months' imprisonment on the single charge that he faced. Both these precedents were decided under the older CYPA sentencing regime.

48 The remaining two District Court precedents cited by the Prosecution involved offenders who touched minors inappropriately but with no genital contact made. In *Public Prosecutor v Yeo Chang Yong* (DAC 40504/2013, unreported), the offender was a 26-year-old teacher who taught a 14-year-old minor in her secondary school. Nothing untoward happened during the period in which the offender actually taught the minor, but early the following year the minor added the offender as a friend on Facebook. Thereafter the offender tutored the minor privately over Skype. One day he arranged to meet her for dinner. Before this they went for a walk in a park, and there the offender touched the minor's breasts, at one point putting his hand under her blouse, pulling her bra down and fondling her exposed nipples. He was sentenced to eight months' imprisonment on this charge under the older, more lenient CYPA sentencing regime.

49 Finally, in *Public Prosecutor v Siti Norlelawati Binte Mohamed Jelani* [2014] SGDC 64 ("*Siti Norlelawati*"), the offender was a 42-year-old female teacher who taught at the school which the 13-year-old male minor attended. She because acquainted with him because the minor played football with her son and because the minor's sisters were under her charge in a dance class. On two occasions the offender took the minor to a park and kissed him on the lips, putting her tongue in his mouth; she also gave him love bites both times, once on his shoulder and once on his neck. She faced two charges corresponding to the two instances of inappropriate touching and was sentenced to six months' imprisonment on each charge. These terms were ordered to run concurrently for a total sentence of six months' imprisonment.

50 Having discarded these as relevant benchmarks, I am faced with a paucity of pertinent precedents for the offence under s 7 of the CYPA. In the circumstances, I consider the appropriate sentence for this offence by reference to the sentence for the offence under s 376A of the Penal Code. The Penal Code offence concerned the performance of fellatio on the minor, whereas the CYPA offence involved masturbating the minor; the former is a more intrusive and invasive act than the latter, and thus warrants heavier punishment, all other things being equal. In my judgment, a sentence of between six and eight months' imprisonment would be appropriate where (a) the sexual act that took place between the offender and the minor involved touching of naked genitalia, regardless of whose genitalia it was, (b) the minor is 14 years old or above, and does not appear to be particularly vulnerable, (c) the offender did not coerce or pressure the minor into participating in the sexual act, and (d) there was no element of abuse of trust.

51 It might perhaps be observed that the sentence imposed in *Siti Norlelawati* fell within this indicative range of six to eight months' imprisonment for offences involving touching of genitalia even though it involved less exploitative contact between offender and minor. This might be explicable on the basis of (a) the minor's greater vulnerability by virtue of his being younger, and (b) the position of trust and confidence that the offender had over the minor, which together point towards there being a more vulnerable minor and more exploitative conduct on the part of the offender in touching him inappropriately.

Multiple offences and the aggregate sentence

Multiple offences and the aggregate sentence

52 The discussion thus far has focused on the appropriate sentences for individual offences. But as is apparent from the precedents, offenders are often convicted of multiple offences. Where there are three or more offences, the sentences for at least two of the offences must run consecutively. This was the situation in the present case and it presented a potential difficulty in comparing this case to precedents in which the court was at liberty to order only concurrent sentences – in particular, *Suhaimi* and *Adin Lim*.

53 The level of the offender's criminality in *Suhaimi* was, in my view, strikingly similar to that in the present appeal. In fact, the very same minor was involved. Yet the aggregate sentence imposed on the appellant, 25 months' imprisonment, was more than twice the total sentence of 12 months' imprisonment imposed in *Suhaimi*, and it appears that the main reason for this was simply that the District Judge in this case was obliged to order consecutive sentences. As for *Adin Lim*, that case, like the instant appeal, involved a single night of sexual activity in which the sexual acts for which the offender was charged took place a number of hours apart, separated by a period of sleep. Thus any conclusion that the sexual acts in *Adin Lim* were part of a single transaction and so warranted concurrent sentences would equally apply in this case. The accused was sentenced to 12 months' imprisonment for the act of fellatio and 15 months' imprisonment for anal intercourse even though the latter resulted in the minor contracting a sexually-transmitted disease. In the present case, the court was obliged to run at least two sentences consecutively, but this was a function of the number of charges that were proceeded with, rather than the overall criminality of the actions of the accused. In all the circumstances, and in particular, having considered the cases of *Suhaimi* and *Adin Lim*, I was inclined to the view that the aggregate sentence of 25 months' imprisonment imposed on the appellant was manifestly excessive.

54 I have already dealt at length with the issue of imposing consecutive sentences in *Mohamed Shoufee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [20]–[81] and I do not propose to add to my observations there. I would only reiterate that, should an offender be convicted of three or more offences but in circumstances where those offences might fairly be considered to be part of one transaction and/or where the imposition of consecutive sentences would result in an aggregate sentence that offends the totality principle, it is open to the court to *reduce* the sentences that would otherwise have been imposed in respect of the *individual* offences in order to arrive at an aggregate sentence that is just and appropriate. This might be especially pertinent in the context of sexual offences where a single session of sexual activity often discloses multiple distinct offences.

My decision

55 There is no question that the offences that the appellant was charged with are offences that exist for the protection of the young and vulnerable. But the mere fact that a minor has been violated does not in itself say much about what the sentence should be. In my judgment, it is also important to have regard to the principle that, as far as possible, like cases should be treated alike. Another aspect of the same principle is that the punishment to be imposed in each case must be proportionate to the totality of the criminal behaviour that is evident.

56 In the present case, I did not see the presence of the more common aggravating factors that are found in cases involving sexual offences against minors. In particular, there was no evidence of threats, coercion, or violence. Indeed, there was no evidence either that *any* pressure was brought to bear on the minor or that the appellant had abused a relationship or a position of trust. It was therefore incumbent on the Prosecution to explain how the individual and aggregate sentences might nonetheless be justified.

57 The Prosecution relied on three main aggravating factors. First, it relied upon the age disparity between the appellant and the minor, as well as the fact that the appellant had told the minor that he was 19 years old. But as I have said, this ought to be considered against all the circumstances of the case with the underlying question being whether there was a significant degree of exploitation of the minor that went beyond the fact that *any* sexual activity with a minor is exploitative. In my judgment the answer to that underlying question was no. The facts show that the appellant met the minor in the later part of the afternoon, and fully eight hours had elapsed before the offences were committed, during which time the minor was left alone in the appellant's home at various times. The minor could have left at any time, and if the appellant's age was at all a material concern for the minor, he had ample opportunity to clarify this after having met and spoken to the appellant.

58 All told, aside from the inherently exploitative nature of the sexual acts in question, it seemed to me that there was no specific or aggravated exploitation in this case, and this was no less the case just because the appellant had misrepresented his age or because the age disparity between him and the minor was substantial. It seemed to me also that there was no force at all in the submission that because in the case of *Suhami*, the offender was in his mid-20s, as compared to the appellant who was in his 30s, this somehow made that a less serious case than the present.

59 Furthermore, I was satisfied that the appellant has good prospects of rehabilitation. Placed before me were letters written by his two brothers, which told a remarkable story of his having helped them, in a financial, academic, and emotional sense, to get through an extremely challenging home environment. In my judgment this spoke well of the appellant's capacity for overcoming setbacks, and suggested that he was similarly equipped to surmount the obstacle he now faces arising from his criminal conviction and incarceration. If the age of the offender is a relevant factor in sentencing to the extent that a longer sentence may be warranted where by reason of his age the court is able to conclude that he has diminished prospects for rehabilitation, then in cases such as the present, where the court has reason to believe that he has very good prospects of rehabilitation despite his age, that should count for, rather than against, the offender for the purposes of sentencing.

60 The second aggravating factor urged upon me by the Prosecution was that the appellant had misused the Internet in committing his offences, and this called for an enhanced sentence. But there is no basis on the facts before me to suggest that the appellant had used the Internet with the intent of committing the offence. It is not in dispute that the appellant befriended the minor sometime in November 2012 through the Internet and that they then met some days or weeks later on 2 December 2012; beyond the fact that they had befriended one another over Facebook, nothing else in this case seemed to concern the use of the Internet. It was not evident to me how this sole fact could constitute an aggravating factor – I do not see how, for instance, it would have been a less serious offence if the appellant had instead met the minor at a party or through some mutual acquaintance.

61 In any event, a large number of the precedents discussed above also involved offenders and minors who met over the Internet. In some cases, the initial contact took place on Facebook or an instant messaging programme; in other cases, offender and minor encountered each other on mobile phone applications targeted at homosexual activities. Internet use in this case is thus no warrant for imposing a higher sentence than in those other cases. I would add that the Prosecution sought to make something of the fact that the appellant had used a false moniker on Facebook to meet the minor. In my judgment, that was irrelevant in the circumstances of this case. The use of a false moniker is aggravating only in so far as it suggests an intent and/or attempt to conceal identity and avoid detection. On the facts of this case, I cannot see how it can be said that this was what the appellant sought to do: he brought the minor to his flat so that it was clear to the minor where he lived, and he even left the minor in the flat with his keys when he left for the airport on the morning

following their night of illicit activity. Had he taken the minor to a hotel or other place unconnected to him and truly left no trace of his real identity, the position might be different, but those were not the facts before me.

62 The third aggravating factor put forward by the Prosecution was that the appellant had committed the offence with a significant amount of premeditation. But contrary to that submission, I found that there was little, if any, evidence of planning. The facts reveal that the appellant met the minor at 4pm and left him at home for some hours, before the two went out for dinner with another friend of the appellant; thereafter, the appellant came back to his flat, packed for his overseas trip, left the minor alone at home again, and returned at 10.30pm. At midnight, they went to bed, and there the offence occurred. On these facts, it was not possible to conclude that the appellant had intended at the outset to engage in sexual activity with the minor. If that was his plan all along, he might have been expected to carry it out to fruition at an earlier time. On balance, this had features of an offence that was committed without much premeditation. This did not mean it was to be treated lightly; only that it should not be treated more harshly than other cases.

63 In summary, the Prosecution did not persuade me that the appellant's conduct was especially reprehensible such that it justified the marked departure from precedent that was represented by the individual and aggregate sentences imposed on him below. I thus concluded that the sentences imposed were manifestly excessive and that the appeal was to be allowed.

Conclusion

64 For the third charge, which was under s 376A of the Penal Code, I set aside the sentence of 15 months and instead sentenced the appellant to a term of imprisonment of ten months – I considered that a figure at the lower end of the indicative range earlier identified at [41] was appropriate given the appellant's good prospects of rehabilitation. As to the First and Fifth Charges, both of which were under s 7 of the CYPA, I set aside the sentence of ten months' imprisonment for each of those and instead sentenced the appellant to six months' imprisonment for each of those offences.

65 There remained the matter of choosing which sentences were to run consecutively. If I were to order that one of those consecutive sentences be the term of ten months' imprisonment imposed for the third charge, it would mean that the aggregate sentence would be 16 months' imprisonment. In my judgment, that would have been excessive because the offences in truth constituted a single transaction, and it was not possible to square that outcome with the results that were reached in *Suhaimi* and *Adin Lim*. Rather than re-calibrate the sentences for the individual offences, I chose instead to run the sentences for the first and fifth charges consecutively for an aggregate term of 12 months' imprisonment with the sentence for the third charge to run concurrently. In all the circumstances, I considered this to be a just sentence.