IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 21

Criminal Appeal No 33 of 2019

Between

BRJ

… *Appellant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Case No 38 of 2019

Between

Public Prosecutor

And

BRJ

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Outrage of modesty]

BRJ
v
Public Prosecutor

[2020] SGCA 21

Court of Appeal — Criminal Appeal No 33 of 2019
Sundaresh Menon CJ, Steven Chong JA and Chao Hick Tin SJ
23 March 2020

23 March 2020

Sundaresh Menon CJ (delivering the judgment of the court *ex tempore*):

1 This is an appeal against the sentence imposed for an offence of outrage of modesty of a person under 14 years of age, punishable under s 354(2) of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code").

2 The appellant is a 48-year-old man. He pleaded guilty to two charges of outrage of modesty of a person under 14 years of age, punishable under s 354(2) of the Penal Code (respectively, the "first offence" and the "second offence"). The victim is a ten-year-old girl who was slightly over the age of eight at the time of the offences. Two charges under s 293 of the Penal Code for exhibiting obscene objects to the victim were taken into consideration for the purposes of sentencing. The High Court judge ("the Judge") sentenced the appellant to 18 months' imprisonment and three strokes of the cane for the first offence, and to 30 months' imprisonment and six strokes of the cane for the second offence. The Judge ordered the sentences to run consecutively.

3 This appeal is only against the sentence of imprisonment for the second offence. The salient facts pertaining to the second offence are summarised as follows. The victim is the child of the appellant's neighbour and addressed the appellant as *gu zhang* ("aunty's husband" in Mandarin). There was a close friendship between the two families, with the victim's parents having entrusted the key to their main gate to the appellant's parents-in-law. The second offence took place on 1 December 2017. About a week before this date, the appellant spoke to the victim about going to her house on that day. He began telling his wife over the next few days that he had to work on 1 December 2017 even though he was not scheduled for work on that day. On the day of the offence, the appellant went to his workplace with his wife. He headed back to the victim's house while his wife ran some errands, and let himself into the victim's house using the key entrusted by her parents to his parents-in-law. The appellant went to the victim's parents' bedroom and watched pornographic videos with her. He then undressed the victim and himself. The victim walked to her bedroom naked and lay on her bed. The appellant followed after her and climbed onto her bed. He then licked and touched her nipples. He touched her vulva with his finger but stopped when she told him that it was "painful". He showed her a pornographic cartoon on his mobile phone and then rubbed his penis against her vagina before eventually ejaculating on the area of her vulva.

4 In the proceedings below, the parties and the Judge relied on the sentencing framework established in *GBR v Public Prosecutor and another appeal* [2018] 3 SLR 1048 ("*GBR*"). In *GBR* at [27]–[30], the Judge identified three categories of factors that would affect the classification of the offence at hand into appropriate sentencing bands. These factors may be categorised as follows: (a) those pertaining to the degree of sexual exploitation; (b) those pertaining to the circumstances of the offence; and (c) those relevant to the harm

caused to the victim. These factors are analysed in the context of sentencing bands under the *GBR* framework as follows:

> (a) Band 1: Less than one year's imprisonment, with caning generally not imposed. Cases in this category include those which do not present any (or at most one) offence-specific aggravating factors, for example, those that involve a fleeting touch or a touch over the clothes of the victim and do not involve the intrusion into the victim's private parts (*GBR* at [32]).
>
> (b) Band 2: One to three years' imprisonment, with caning nearly always imposed, starting at three strokes of the cane. Cases which involve two or more aggravating factors will almost invariably fall within Band 2. Cases at the higher end of Band 2 would be those involving the skin-to-skin touching of the victim's private parts or sexual organs, or involving the use of deception by the accused person (*GBR* at [33]–[35]).
>
> (c) Band 3: Three to five years' imprisonment, with caning imposed, starting at six strokes of the cane. Cases in this band are those which, by reason of the number of the aggravating factors, are the most serious instances of aggravated outrage of modesty (*GBR* at [37]).

5 The Prosecution highlighted the following offence-specific factors in its sentencing submissions below:

> (a) In relation to the degree of sexual exploitation, the offence here involved a "prolonged assault" and skin-to-skin contact with the victim's private parts.

(b) In relation to the circumstances of the offence, it was noted as follows:

(i) The offence was premeditated as evidenced by the fact the appellant had arranged with the victim to visit her house and had lied to his wife of the need to work several days ahead of time, evidently with a view to concealing his whereabouts at the material time.

(ii) There was abuse of trust because the victim's family had allowed the appellant to enter their house freely and the victim looked to him as a close avuncular figure. The appellant did not tell the victim's parents that he wanted to visit the victim's house while they were away and gained entry using the key that had been entrusted to his family.

(iii) The appellant showed the victim a pornographic cartoon before outraging her modesty.

(iv) The victim was extremely vulnerable as she was just eight years and four months old at the time.

(v) The appellant caused pain to the victim when using his fingers to touch her vulva.

(vi) The appellant exposed the victim to the possibility of sexually transmitted diseases as he rubbed his bare penis and ejaculated on her exposed vulva.

6 The Prosecution submitted, in these circumstances, that the indicative sentence for the second offence was 42 months' imprisonment and six strokes

of the cane. The sentence of imprisonment should then be adjusted to 36 months to take into account the appellant's plea of guilt.

7 The Judge made the following observations in his oral grounds on sentence:

(a) The victim was very young, and was significantly younger than the upper limit of 14 years for the s 354(2) offence.

(b) The touching was sustained. There was skin-to-skin contact by the appellant, first with his fingers which caused pain to the victim, and then with his penis.

(c) There was premeditation and organised planning, as the appellant had arranged with the victim to meet her and had made the effort to deceive his wife as to his whereabouts in order to commit the offence.

(d) There was abuse of trust, albeit less aggravating than in a familial context, given the close relationship between the two families and the entrustment of the house key by the victim's family to the appellant's family.

(e) The appellant had shown obscene material to the victim.

8 The Judge then assessed the appropriate sentence in the following way. He considered that the second offence fell within Band 3 of the *GBR* framework, and the starting point for sentencing was 36 months' imprisonment and six strokes of the cane. Having regard to the appellant's plea of guilt, expression of remorse, cooperation with the authorities and lack of antecedents, the sentence was adjusted to 30 months' imprisonment and six strokes of the cane.

9 The appellant's main argument on appeal is that the sentence of imprisonment is manifestly excessive and that the Judge misapplied the *GBR* framework. He submits that the Judge ought to have found that the second offence fell within the higher end of Band 2 of the *GBR* framework instead.

10 We begin by observing that in our judgment, *GBR* affords a workable framework for the purpose of sentencing in this context. The contrary was not in any event suggested to us. Having said that, we do not accept the appellant's contention as to how that framework was to be applied in this instance. In our judgment, this was a case of serious sexual abuse: there was significant intrusion involving the victim's private parts, in the form of the appellant's sustained skin-to-skin contact with the victim's nipples, vulva and vagina. In addition, multiple offence-specific aggravating factors were present, as we have recounted above. We do not see how the Prosecution's submissions that we have summarised at [5] can meaningfully be challenged. We agree with the Judge that the second offence falls within Band 3 of the *GBR* framework and that the indicative starting point is 36 months' imprisonment. Having regard to the sentencing discount that was merited by the appellant's plea of guilt, which saved the victim from having to testify at trial, the Judge's ultimate sentence of 30 months' imprisonment is, in our judgment, entirely justifiable and cannot be described as manifestly excessive.

11 Finally, counsel for the appellant sought to persuade us that there were other cases in which the circumstances of the offences had been more serious, and yet the offenders had been meted out sentences that were less harsh. We have two brief observations in this regard. First, it will almost always be unhelpful to try to look for fine distinctions between particular cases. It is to avoid such fruitless efforts that sentencing guidelines are developed to help courts arrive at broadly consistent outcomes. For instance, counsel for the

appellant sought to rely on the facts in *GBR* itself, where the offender was sentenced to a term of 25 months despite the circumstances of the offence seeming to be comparable to those at hand. But as we pointed out to counsel, that was a case involving a victim who was 13 years old, as compared to the victim here, who was a little over eight. So this was not a case of comparing like with like. Second, it may well be the case that some of the sentences imposed in other cases decided in the State Courts and cited by the appellant were unduly lenient. That does not aid us in in any way in addressing the key issue before us, which is whether the Judge erred in the exercise of his sentencing discretion.

12 For the reasons we have given, we are satisfied that he did not err, and we therefore dismiss the appeal against sentence.

Sundaresh Menon Chief Justice	Steven Chong Judge of Appeal	Chao Hick Tin Senior Judge

Peter Keith Fernando, Kavita Pandey and Renuga Devi Sivaram (Leo Fernando LLC) for the appellant;
Eugene Lee and Michelle Lu (Attorney-General's Chambers) for the respondent.