IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 42

Criminal Appeal No 4 of 2020

Between

Isham bin Kayubi

… *Appellant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Case No 34 of 2019

Between

Public Prosecutor

And

Isham bin Kayubi

EX TEMPORE JUDGMENT

[Criminal Law] — [Offences] — [Sexual offences] — [Rape] — [Section 375(1)(*a*) of the Penal Code]

[Criminal Law] — [Offences] — [Sexual offences] — [Sexual assault by penetration] — [Section 376(1)(*a*) of the Penal Code]

Isham bin Kayubi
v
Public Prosecutor

[2020] SGCA 42

Court of Appeal — Criminal Appeal No 4 of 2020
Andrew Phang Boon Leong JA, Steven Chong JA and Quentin Loh J
27 April 2020

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Andrew Phang Boon Leong JA (delivering the judgment of the court *ex tempore*):

Introduction

1 The appellant faced six proceeded charges consisting of four counts of rape, an offence under s 375(1)(*a*) of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") and two counts of sexual assault by penetration, an offence under s 376(1)(*a*) of the Penal Code. These pertained to two 14-year-old female victims, each of whom was brought to the appellant's flat under false pretenses before being made to engage in sexual acts against her will.

2 At the conclusion of his trial, the appellant was convicted on all of the charges and the High Court judge ("the Judge") imposed a global sentence of 32 years' imprisonment and 24 strokes of the cane (see *Public Prosecutor v Isham bin Kayubi* [2020] SGHC 44 ("the GD")). The appellant appeals against his conviction and sentence.

Facts

3 The appellant's charges cover three separate incidents: two involving the first victim and one involving the second victim. We observe at the outset that the victims' narratives of their respective encounters with the appellant bear striking similarities. The thrust of their evidence at trial was as follows.

The first victim

4 The first victim was introduced to the appellant on the evening of 29 October 2017. She agreed to take care of his flat in exchange for a mobile phone and accompanied him home. Whilst there, the appellant pulled the first victim into his bedroom and instructed her to remove her clothes. He made her fellate him and raped her twice. The appellant recorded videos of these assaults on his mobile phone and forced the first victim's continued compliance by threatening to make the videos go "viral". He also said he would call his friends to come over and "gang bang" her unless she complied with his demands. The appellant sent the first victim home in the early hours of 30 October 2017. He gave her $20 and warned her not to tell anyone about what had happened, or else he would make the videos of her assault go "viral".

5 The appellant next saw the first victim on the evening of 2 November 2017 at the void deck of her then-boyfriend's flat. Afraid he would make good on his threat to circulate the abovementioned videos, the first victim agreed to speak with the appellant at a nearby coffee shop. To her shock, the appellant took her on his motorcycle to the coffee shop near *his flat* instead. The first victim accompanied the appellant up to his flat to put down his motorcycle helmet. Thereafter, he brought her to the void deck to talk. At around midnight, the appellant asked the first victim to follow him back to the flat. In the flat, he

raped her again, repeating his threat to make the said videos go "viral". He then took her home.

The second victim

6 On 22 September 2017, the second victim received a Whatsapp message from an unknown sender, who turned out to be the appellant. The pair remained in intermittent contact. On 14 October 2017, the second victim asked to borrow $20 from the appellant. This prompted him to offer her $150 to clean his flat, a proposal she accepted. The appellant picked up the second victim on the afternoon of 15 October 2017 and took her to his flat. Once there, he pulled her into his bedroom and removed her clothes. He raped the second victim and forced her to fellate him, threatening to call fellow members of his motorcycle gang to come over to the flat if she did not cooperate. These acts were recorded on his mobile phone. Sometime later, the appellant sent the second victim home and gave her $20, a motorcycle helmet and a Bluetooth earpiece.

Proceedings below

7 The appellant was unrepresented at the trial below after his two assigned counsel from the Criminal Legal Aid Scheme ("CLAS") discharged themselves with his consent. He refused to state if he would enter a defence to the charges when called upon to do so. Instead, he repeatedly requested an adjournment to engage legal counsel. The Judge held that the appellant had impliedly elected not to give a defence (see the GD at [47]). Nevertheless, he understood the appellant's defence to essentially consist of two limbs. First, that the victims had consented to their sexual acts with the appellant, and that they were neither threatened nor coerced. Further or alternatively, that the appellant was the victim of a conspiracy or fabrication of evidence (see the GD at [52]–[53]).We pause to note that these two defences are completely inconsistent on the facts.

8 The Judge found there to be strong corroborative evidence that the appellant had performed the relevant sexual acts on the victims. In that regard, the sexual acts against the victims were captured on videos which were recorded on the appellant's mobile phone. The timestamps of the videos matched the times when the victims were in the appellant's flat when the sexual acts were committed. Further, the 3 November incident involving the first victim was corroborated by the detection of the appellant's semen on the first victim's intra-vaginal swabs and on the interior front of her panties. In addition, the Judge found that both victims were credible and reliable witnesses whose evidence was generally internally and externally consistent (see the GD at [62]). The Judge also accepted their accounts that the appellant had coerced them into complying with his sexual demands using various threats (see the GD at [83], [85] and [90]). Thus, in his view, the elements of the charges had been proven beyond a reasonable doubt. The Judge rejected the appellant's contention that he had been falsely implicated, this being entirely unsubstantiated by any evidence whatsoever (see the GD at [92]).

9 On the issue of sentencing, the Judge applied the respective frameworks for rape and sexual assault by penetration laid down by this court in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Terence Ng*") and *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 ("*Pram Nair*"). He determined that the present case fell within Band 2 of both frameworks and imposed a sentence of 16 years' imprisonment and 12 strokes of the cane for each rape charge, and 12 years' imprisonment and eight strokes of the cane for each sexual assault by penetration charge. The terms for two of the rape charges were ordered to run consecutively for a global sentence of 32 years' imprisonment and 24 strokes of the cane.

Substance of appeal

10 The appellant maintains, on appeal, that his encounters with the victims were entirely consensual, referencing objective evidence such as Whatsapp messages and closed-circuit television ("CCTV") footage in support of this contention. Conversely, he claims that there is nothing to substantiate the victims' claims that they were threatened by the appellant. He argues that these are deliberate falsehoods intended to frame him. Underscoring these submissions is the appellant's request for a retrial with the benefit of legal advice, the implication being that his initial lack of representation denied him a fair hearing.

Our decision

11 We deal first with the issue of whether the Judge should have granted the appellant leave to engage a lawyer. In *Tan Chor Jin v Public Prosecutor* [2008] 4 SLR(R) 306 at [54], we held that an accused person's right to counsel is not absolute. In determining whether there has been a contravention of this right, the court takes a "broad-based, fact centric approach", factoring in the competing interests of other concerned parties, while maintaining a focus on whether "any *undue unfairness or prejudice* has been caused to the accused as a result of his lack of legal representation" [emphasis in original] (at [68]).

12 The appellant's predicament at trial was, in fact, one of his own making. He was, in fact, previously represented by lawyers assigned to him by CLAS but both counsel discharged themselves at the end of 2018 with his consent. He *chose* not to avail himself of the more than ample time and opportunity which he had thereafter to obtain alternative legal representation. His sudden attempt to invoke the right to counsel at the eleventh hour must accordingly be weighed against the welfare of the victims, whose anxieties would have been prolonged

by a delay to the trial, as well as the need to ensure the due administration of criminal justice. A further adjournment, there having *already* been a vacation of the appellant's original trial dates, would have caused considerable injury to these competing interests. In the circumstances, the Judge correctly determined that the appellant's right to counsel (which had in fact been accorded to him) should not take precedence.

13 In any event, it is clear to us that the appellant's request was no more than a final disingenuous attempt to stall court proceedings. The appellant's conduct at trial was nothing short of bizarre, characterised by incidents of incoherent speech, indecent exposure and even the faecal smearing of his shirt as well as the glass panel surrounding the dock after having soiled himself (indeed, he also refused to cooperate to change out of his soiled prison attire). The appellant consequently underwent psychiatric evaluation at various stages of the trial beginning on 1 August 2019, whereupon he was remanded at the Institute of Mental Health for observation and assessment. The resulting medical report prepared by Dr Jerome Goh Hern Yee categorically certified him fit to plead (see the GD at [10]). Further, upon the commencement of the trial proper in January 2020, the appellant was examined on more than three different occasions by doctors from the Singapore Prison Service. *All* of them opined he was fit to plead and stand trial. The Judge accordingly found that there was no medical explanation underlying the appellant's alarming behaviour; these were volitional acts for which the he had no reasonable excuse (see the GD at [17]). He was actively seeking to disrupt the progress of his trial. Viewed in context, his request for legal representation was − and remains − another tactic by which to achieve this outcome.

14 Needless to say, the court takes a very serious view of those who attempt to abuse the judicial process. Even where they are unrepresented, short shrift

will be given to accused persons who seek unnecessary adjournments or wilfully delay court proceedings in any other manner. Where accused persons still choose to engage in such obstructive behaviour, they must also be prepared to bear the consequences that arise therefrom. We affirm the Judge's decision to proceed on the basis that the appellant, by refusing to state his intended course of action after being called upon to give his defence, had elected not to give evidence. Having been deliberately uncooperative, the appellant is not entitled to assert that he was unfairly deprived of the opportunity to present his case.

15 We observe that the appellant was nevertheless afforded the opportunity to and did in fact selectively participate in the trial, becoming "less uncommunicative" from the second day of the hearing (see the GD at [15]) and, by the third day of the hearing, he "was able to respond normally to [the Judge's] directions, cross-examine the Prosecution's witnesses and even put his defence(s) to them" (see the GD at [16]). We also note that the Judge afforded the appellant every opportunity to present his case (including permitting him, at his request, an adjournment to peruse the transcripts of the hearing and to prepare his written closing submissions after the Prosecution had made its closing submissions) (see the GD at [46]).

16 As already noted earlier, in his written submissions on appeal, the appellant argues that he wants "to take a stand" at a "retrial", and to "[t]ake trial with a lawyer". For the reasons which we have just set out above, this argument is wholly without merit. In oral submissions before us, the appellant claimed that, as in the proceedings below, he was legally unrepresented and therefore at an unfair disadvantage. However, it is clear that he had put himself into this particular situation by the decisions he had made earlier, as we have also explained above. We also note that despite his alleged inability to represent himself, the appellant took no steps to engage a counsel both during and after

the conclusion of his trial. Once again, he only raised this point at the eleventh hour when he appeared before us. We are satisfied that this is not a genuine attempt to engage counsel and is, once again, an attempt to stall court proceedings.

17 We now turn our attention to the main issue before us: did the victims consent to the sexual acts that form the basis of the charges? This question turns on whether the appellant actually made threats of harm that operated on the victims' minds at the material time. In this regard, we see no reason to disturb the Judge's findings as to the veracity of the victims' accounts, which are supported by other witness and objective evidence (see the GD at [83] and [85]). Further, as we have already noted, there are notable parallels that can be drawn between the victims' testimonies. Both of them agreed to go to the appellant's flat for the first time on the understanding that they had taken on a job. Once there, they were pulled into the bedroom by the appellant who forced them to engage in sexual activity and recorded these acts on his mobile phone. He then sent the victims home and gave them money. It is unclear how the victims, who did not know one another, could have independently fabricated such similar narratives. A far more intuitive conclusion is that they were telling the truth.

18 The victims say that they only complied with the appellant's demands out of fear. They both knew the appellant was a member of a motorcycle gang and his threats to call over fellow members to the flat incited panic and distress. To make matters worse, the first victim was also told that the videos of her assault would be circulated online. Her concern that the appellant would make good on this threat stopped her from immediately lodging a police report. She also felt pressured into speaking with the appellant on the evening of 2 November 2017. It is trite that consent given under fear of injury, this being any harm to one's body, mind, reputation or property, is not deemed to be

consent as understood in law. The victims agreed to participate in the relevant sexual acts because they believed that such harm would otherwise befall them. There was a clear lack of consent.

19 As against this, the appellant seeks to place weight on lift CCTV footage from the morning of 3 November 2017, which shows the first victim smiling at the appellant as she accompanied him up to his flat. She was not afraid but happy to be with him. In our judgment, this footage does not unequivocally show that the first victim was a willing participant to the sexual acts that followed. A similar point can be made in respect of a Whatsapp conversation between the appellant and second victim after he sent her home on 15 October 2017. The appellant says that this exchange evidences the fact that their sexual encounter was consensual. Yet this blatantly overlooks the reason why the second victim re-initiated contact with the appellant. She only messaged him because she wanted to learn how to use the Bluetooth earpiece he had given her. She then ceased any further communication. Seen in context, her conduct does not in any way advance the appellant's case.

20 We are therefore fully satisfied that the victims did not consent to the relevant sexual acts. For the sake of completeness, we also agree with the Judge that the appellant had in fact performed the relevant sexual acts on the victims (a point that he no longer denies in his written submissions on appeal) despite having mounted two completely inconsistent factual defences in the trial below. On appeal, he argues that both victims had consented to these acts, an argument which we have rejected. We further agree with the Judge that there is no evidence whatsoever in support of any argument that the appellant might make that he was the victim of a conspiracy or fabrication of evidence. The appeal against conviction is accordingly without merit and is dismissed.

21 This leaves the appeal against the appellant's sentence, which he regards as "unreasonable". We agree with the Judge that there are a number of offence-specific aggravating factors in the present case that justify its classification under Band 2 of the *Terence Ng* and *Pram Nair* frameworks. The appellant specifically targeted vulnerable victims who, by virtue of their youth, were susceptible to manipulation and abuse. They naïvely placed their trust in the appellant, who appeared to be a well-meaning adult offering them work in exchange for either a mobile phone or money. Abusing this trust, the appellant proceeded to lure the victims into an unfamiliar and isolated environment where he could easily intimidate them into complying with his demands. This heinous premeditated conduct was also accompanied (as the Judge found) by threats of harm, the recording of the sexual acts he had perpetrated on the victims on his mobile phone as well as the failure to use a condom when he engaged in penile-vaginal intercourse with both victims (thus creating a risk of pregnancy and/or the transmission of sexually-transmitted diseases (see the GD at [103])).

22 This conduct is further aggravated by certain offender-specific factors. Of particular concern are the appellant's related antecedents for which he was sentenced in February 2008. These are two charges of carnal intercourse against the order of nature and two charges of carnal connection with a girl under 16. Four similar charges were also taken into consideration for sentencing. As noted by the Judge, the substance of these previous convictions demonstrates an alarming pattern of predatory behaviour towards vulnerable members of society. This calls for a severe enough sentence to deter future wrongdoing of a similar nature (see the GD at [98]). The Judge also found that the appellant had "displayed an astonishing lack of remorse for his actions" (see the GD at [105]). There were also no relevant mitigating factors whatsoever. The Judge accordingly calibrated the appellant's sentences towards the higher end of the

Terence Ng and *Pram Nair* Band 2 ranges. In our judgment, the final outcome is in no way manifestly excessive but a just and proportional sentence in line with all the offence-specific and offender-specific aggravating factors as well as the complete absence of mitigating factors.

Conclusion

23 For the foregoing reasons, we dismiss the appeal.

Andrew Phang Boon Leong Judge of Appeal	Steven Chong Judge of Appeal	Quentin Loh Judge

The appellant in person;
James Chew, Jane Lim and Angela Ang (Attorney-General's Chambers) for the respondent.