IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 69

Magistrate's Appeal No 63 of 2015

Between

Low Gek Hong

… *Appellant*

And

Public Prosecutor

… *Respondent*

ORAL JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Forms of punishment]

[Criminal Procedure and Sentencing] — [Mitigation]

Low Gek Hong
v
Public Prosecutor

[2016] SGHC 69

High Court — Magistrate's Appeal No 63 of 2015
See Kee Oon JC
5 February; 15 April 2016

15 April 2016 Judgment reserved.

See Kee Oon JC:

1 This is an appeal against sentences imposed by the District Court in respect of six charges under s 323 read with s 73(2) of the Penal Code (Cap 224, 2008 Rev Ed). The appellant had pleaded guilty to these charges and consented to have a further 12 charges involving various related offences taken into consideration for the purpose of sentencing. Nine of these 12 charges were also in respect of offences under s 323 read with s 73(2) of the Penal Code, with the remaining three charges falling under s 352, s 506 and s 509 read with s 73(2) of the Penal Code respectively.

2 The offences in question all involved the abuse of a foreign domestic worker, Ms Tin War War Khing ("the victim"), who worked in the appellant's household and was employed by the appellant's mother. They were committed

over a duration of about 3 months, from December 2011 to February 2012. On appeal, the appellant sought to persuade the court to set aside the custodial sentences in favour of Community-Based Sentences ('CBS"), such as a Mandatory Treatment Order ("MTO"), a Short Detention Order and/or a Day Reporting Order or any suitable combination of CBS.

Background facts

3 On 3 June 2013, the appellant pleaded guilty in a District Court to the abovementioned six charges. After several adjournments, the District Judge first called for a pre-sentence report to determine her suitability for probation or to comply with a MTO. The probation report (P5) contained a reference to the appellant suffering from major depressive disorder, having regard to a medical report dated 2 April 2013 prepared by Dr Johnson Fam ("Dr Fam"). In the MTO report dated 25 September 2013 (P6), the IMH psychiatrist Dr Leong Oil Ken ("Dr Leong") noted that she was previously diagnosed (by Dr Fam) to be suffering from major depressive disorder but stated that "there was *no direct contributing relationship* between her depression and her offences" [emphasis added]. He further observed that the appellant was "under fairly significant caregiver stress" and that could have had "some indirect effect on her level of frustration tolerance". He stated that he was inclined to recommend a MTO as "one of her sentencing options".

4 In a supplementary report dated 21 October 2013 (P7), Dr Leong stated that the major depressive disorder which was diagnosed in April 2012 by Dr Fam "*can be considered* a contributing factor which *could* cause [the appellant] to commit the offences" [emphasis added]. As the District Judge evidently took the view that the opinions expressed by Dr Leong in his two reports (P6 and P7) were inconclusive, he decided to convene a post-

conviction (Newton) hearing upon the prosecution's application to question Dr Leong.

5 The Newton hearing did not commence until 3 January 2014 and the subsequent hearing dates were intermittently distributed over the course of the next ten months or so up to 14 October 2014. All in all, 3½ days were spent hearing evidence as to whether the appellant did suffer from major depressive disorder which could be said to be "a psychiatric condition which is susceptible to treatment" and "one of the "contributing factors for [her] committing the offence(s)", having regard to the language of s 339(3) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC"). After various other adjournments to obtain clarifications and for other reasons, the District Judge ultimately found on 29 April 2015 that she did not suffer from major depressive disorder. The appellant was eventually sentenced to two months' imprisonment for all the charges except for one (DAC 46283/2012 – which involved pouring hot water onto the victim's back), for which she received a sentence of five months' imprisonment. The District Judge's grounds of decision ("the GD") is reported at *Public Prosecutor v Low Gek Hong* [2015] SGDC 192.

6 The District Judge ordered three of the sentences to run consecutively, resulting in an aggregate sentence of nine months' imprisonment. He reasoned that the offences were serious and both specific and general deterrence required custodial sentences of substantial length to be imposed. Specifically, he pointed to various aggravating factors including the serious injuries, the sustained duration of the abuse, the number of incidents as well as the egregious nature of many of the instances of hurt caused.

7 As revealed in the Statement of Facts which the appellant had admitted to without qualification, the victim was made to suffer prolonged and extensive abuse over the duration of three months or so beginning from December 2011. The District Judge summarised these instances of abuse at [65] of the GD, where he noted that the appellant "started to abuse the victim approximately three months into the victim's employment. The [appellant] used a pair of scissors, a mug filled with hot water, a metal hanger, sandals and a cup to assault the victim. Further, the [appellant] scratched the victim's face, arms, ears and also bit her on her arms and hands. This abuse went on for 3 months."

8 The context of the appellant's offending conduct however would also merit some elaboration. It was not disputed that the appellant had taken on the role of caregiver to her bedridden father along with her mother, after he had become dependent on a life-support machine in 2009. The victim was engaged as a domestic helper only in September 2011 to assist in household chores and also to take care of the appellant's father.

My decision

The Newton hearing and s 339(9) of the CPC

9 It is unfortunate that this case has taken considerable time to reach a conclusion after the appellant pleaded guilty in June 2013. The conduct of the Newton hearing and the numerous adjournments were major contributors to the length of time it took for the District Judge to resolve the issue of whether the appellant did suffer from major depressive disorder and if so, whether it was causally linked to her commission of the offences.

10 I note that it was the prosecution that made the application to question Dr Leong on 11 December 2013, leading to the District Judge's decision to convene a Newton hearing. In their reply submissions tendered for this appeal, the prosecution now submits that the Newton hearing ought not to have been convened at all as s 339(9) of the CPC makes it clear that the opinion of the psychiatrist shall be "final and conclusive". They contend that the District Judge thus had no power to seek clarifications, much less to order a Newton hearing to determine any "disputed" point(s) arising from Dr Leong's report of 25 September 2013 ("the 1st report"). The prosecution recognises the potential absurdity of their approach[1] but maintains that a strictly literal reading should be adopted, no matter how "disconcerting" this position might seem[2]. With great respect, I am unable to see merit in the prosecution's submission. It appears to be premised on an unnecessarily restrictive reading of s 339(9) of the CPC.

11 To my mind, if an obvious clerical or administrative error results in the wrong report (*eg*, one which contains wholly erroneous contents) being tendered to the court, surely that "opinion" cannot be accepted as being "final and conclusive" such that the court is precluded from seeking any clarification whatsoever. Alternatively, if the report erroneously draws conclusions that are obviously at odds or internally inconsistent with the remainder of the report, it surely cannot be that the court is expected to unquestioningly adopt such conclusions on account of the report being "final and conclusive". I do not see why there must be a blanket prohibition on any form of enquiry or

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1 Para 8 of the Respondent's Reply Submissions viz. "[T]he Court is bound to accept the opinion of a psychiatrist and cannot seek "clarifications", even if the opinion of the psychiatrist is plainly absurd or patently incorrect on its face".

2 Para 10 of the Respondent's Reply Submissions.

clarification if the report is unclear and particularly where it draws manifestly wrong, illogical or absurd conclusions.

12 Having made these observations, I should add that a Newton hearing should generally be a measure of last resort. In this regard, I am of the view that the District Judge had incorrectly exercised his discretion to convene a Newton hearing. The 1st report plainly did *not* conclude that the appellant *was* suffering from major depressive disorder at the material time. Dr Leong conceded that he made no such independent finding but was relying on Dr Fam's diagnosis from April 2012. More importantly, Dr Leong opined from the outset that there was "*no* direct contributing relationship" between her disorder and the commission of the offences.

13 I note that in his supplementary report dated 21 October 2013 ("the 2nd report"), Dr Leong again chose not to make definitive observations that the appellant's major depressive disorder *was* a contributing factor for her commission of the offences. He postulated that it "*can be considered*" a contributing factor but went on to say in non-committal and tenuous terms that it "*could cause*" her to commit the offences. A similar vague phrase fraught with ambiguity ("could have caused") was used in his additional clarification report dated 30 March 2015 (P13) where he added a further gloss by referring to her condition as an "*indirect* contributory factor". This qualified characterisation falls short of the requirement specified in s 339(3)(*c*) of the CPC which makes no mention of "indirect contributory factors".

14 I do not think all this was a mere matter of semantics. If there was a valid finding that the appellant had a relevant psychiatric condition, either it was a contributing factor that caused the commission of the offences or it was not. But Dr Leong had *not* been prepared to say that it was so from the outset,

even after a simple clarification was sought. These considerations would have been sufficient to dispose of the matter. In that sense, therefore, the prosecution had correctly opined that the report was "final and conclusive".

15 The duty of the appointed psychiatrist in preparing the MTO report is to assist the court and he must state his opinion definitively to the best of his ability, avoiding ambiguity or room for vagaries and subjectivity in interpretation. If he fails to do so or is not prepared to do so and yet goes on to recommend that the offender is suitable for a MTO, any such recommendation is inherently unreliable and ought to be rejected. The essential point I wish to make is that if a psychiatrist does *not* state clearly in his MTO report that any psychiatric condition *is* "one of the contributing factors" of the offending conduct in question (in the language of s 339(3)(*c*) of the CPC), then as far as the court is concerned it must mean that he has made *no* such finding. Put another way, if he had been prepared to make such a finding, the natural and reasonable assumption is that he ought to and would have specifically said so.

16 The psychiatrist's duty is cast in binary terms: if there is a finding of a relevant psychiatric disorder, he must state whether it was a contributing factor to the commission of the offence(s). If he does not do so, the matter should ordinarily end there; the purpose of s 339(9) of the CPC in providing for his opinion to be "final and conclusive" is precisely to avoid or at least minimise the possible protraction of the sentencing process with satellite litigation aimed at challenging or re-interpreting what the psychiatrist has stated, or not stated, as the case may be.

17 I do recognise that in the circumstances the District Judge found himself in a quandary. Had he proceeded on this basis in assessing the contents of the 1st and 2nd reports, he would have arrived at the same

conclusion which he did at [62] of the GD – that the appellant did *not* suffer from major depressive disorder at the material time when the offences were committed. Any psychiatric condition she might have suffered from was in any event *not* a contributing factor for her commission of the offences. In the result, I agree with the prosecution that the Newton hearing ought not to have been convened, albeit on different grounds.

The District Judge's reasons and conclusion

18 Although I am of the opinion that the matter had been unduly protracted, I find that the District Judge had ultimately arrived at the correct conclusion in determining that neither probation nor community-based sentencing would be appropriate for the appellant. He took note that the degree of pain and suffering endured by the victim was extensive, given the number and severity of the assaults on her as well as the sustained and prolonged nature of the abuse she suffered at the appellant's hands.

19 It was however not wholly accurate for the District Judge to describe the appellant's conduct as "deliberate and planned", let alone "calm, collected and deliberate" in respect of the 8th charge involving pouring hot water onto the victim or "controlled and deliberate" in respect of the 9th charge (at [30] of the GD). They were no doubt intentional and deliberate acts. They were not one-off instances but were persistent. But I am unable to discern from the facts any evidence of anything resembling calm planning or control; the acts in question appeared to be rash, thoughtless and spontaneous outbursts and (over)reactions on the appellant's part. This did not make them significantly less aggravated in any event.

20 In my view, the District Judge had correctly taken most of the relevant aggravating and mitigating factors into account in deciding that a custodial

sentence was necessary, except for one troubling aspect. With respect, it appears that he had not adequately considered the finding of "fairly significant caregiver stress" on the part of the appellant. There is clear evidence of this condition affecting her even though it did not translate into a finding that she had suffered from major depressive disorder from the outset when the offences were committed. However, no mention of this aspect as a mitigating factor is made in any part of the GD. A passing reference to it appears at [62] where he accepted that she may well have experienced caregiver stress since her father's illness in 2009. But it would appear that he had decided that it did not merit any consideration, taking instead the view that it had not "inevitably morphed into any form of mental illness or a psychiatric depressive disorder before or during the time of her offences".

21 I differ from the District Judge's view; the uncontroverted fact that the appellant was suffering from "fairly significant caregiver stress" ought to have been given due weight in determining her overall culpability. It was clearly something which took a serious toll on her both mentally and physically. The trying circumstances she found herself in rendered her more prone to unpredictable and irrational acts including those involving violence on the victim. I do not condone her conduct, much less excuse it, but I am not inclined to believe that she would have behaved or reacted in a similar fashion under ordinary circumstances.

Conclusion

22 The prosecution did not appeal against the sentences but alluded to the leniency of the sentence imposed in respect of DAC 46283/2012, which involved pouring hot water over the victim's back. Visible second-degree burn injuries and scalding were noted in the medical report from Changi General

Hospital dated 6 May 2012 (P3), along with a host of other injuries including bruises and scratches as well as a fracture to her left hand little finger proximal phalanx base.

23 I agree with the District Judge that deterrence is necessary and a substantial custodial sentence is justified. In my assessment, the individual sentences as well as the aggregate sentence of nine months' imprisonment appear to err more on the side of leniency, particularly in view of the prolonged and sustained nature of the abuse and the seriousness of the assaults as evidenced by the range of injuries inflicted on the victim. Indeed, higher individual sentences might well have been warranted to reflect the appellant's culpability. As such, notwithstanding my observations above at [20] – [21] in relation to the relevance of "caregiver stress" as a mitigating factor, I am unable to see sufficient basis to reduce the sentences. In the overall analysis, I am drawn to conclude that the sentences imposed are not manifestly excessive. The appeal is therefore dismissed.

See Kee Oon
Judicial Commissioner

Diana Ngiam and Sunil Sudheesan (Quahe Woo & Palmer LLC) for the appellant;
April Phang and Marshall Lim Yu Hui (Attorney-General's Chambers) for the respondent.
