Annis bin Abdullah v Public Prosecutor
[2004] SGHC 52

Case Number : MA 208/2003, CM 3/2004, Cr Rev 6/2004

Decision Date : 05 March 2004

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : S S Dhillon and Terence Hua (Dhillon Dendroff and Partners) for appellant; Khoo Oon Soo and Seah Kim Ming Glenn (Deputy Public Prosecutors) for respondent

Parties : Annis bin Abdullah — Public Prosecutor

Courts and Jurisdiction – High court – Judges – Power – Statement of facts – Whether High Court has power to amend – Section 256 Criminal Procedure Code (Cap 68, 1985 Rev Ed)

Criminal Law – Offences – Unnatural offences – Carnal intercourse against the order of nature by engaging in fellatio – Section 377 Penal Code (Cap 224, 1985 Rev Ed)

Criminal Procedure and Sentencing – Appeal – Adducing fresh evidence – Governing principles – Whether conditions of non-availability, relevance and reliability satisfied

Criminal Procedure and Sentencing – Charge – Alteration – Powers of High Court to amend charge and to convict accused on amended charge – Section 256 Criminal Procedure Code (Cap 68, 1985 Rev Ed)

Criminal Procedure and Sentencing – Mitigation – Plea of guilt – Whether protection of public an exception to general rule that plea of guilt will entitle accused to discount of sentence – Whether plea of guilt should be accorded mitigating weight

Criminal Procedure and Sentencing – Mitigation – Whether hardship caused to accused's family as result of imprisonment a mitigating factor

Criminal Procedure and Sentencing – Mitigation – Whether sexual promiscuity of young victim relevant in sentencing – Section 377 of the Penal Code (Cap 224, 1985 Rev Ed)

Criminal Procedure and Sentencing – Sentencing – Benchmark sentences – Ordinary sexual intercourse offences and those involving unnatural sexual intercourse by way of fellatio – Whether disparity between sentences imposed in respect of each of these offences overly large – Section 377 Penal Code (Cap 224, 1985 Rev Ed), s 140(1)(i) Women's Charter (Cap 357, 1997 Rev Ed)

Criminal Procedure and Sentencing – Sentencing – Principles – Whether deterrent sentence should be imposed where initial contact between sex offender and victim is via the Internet

Criminal Procedure and Sentencing – Sentencing – Principles – Whether deterrent sentence should be imposed where police officer commits offence outside scope of his official duties

5 March 2004

Yong Pung How CJ:

1 The appellant pleaded guilty before District Judge Wong Keen Onn in the District Court to one charge of having carnal intercourse against the order of nature under s 377 of the Penal Code (Cap 224, 1985 Rev Ed), and was sentenced to 24 months' imprisonment.

2 The charge against the appellant is set out below:

> You, Annis bin Abdullah, Male/27 years old, NRIC No. S/7616484/C, are charged that you, on or

about the 23rd day of April 2002, at about 10.00pm, at Chinese Garden Road, Singapore, had carnal intercourse against the order of nature with [the victim], female 16 years old, DOB 16 April 1986, to wit, by engaging in the act of fellatio with [the victim] and you have thereby committed an offence under section 377 of the Penal Code, Chapter 224.

3 The statement of facts presented by the Prosecution also stated that the victim was 16 years old at the time of the offence.

4 After the appellant was sentenced, it was discovered that the victim was only 15 years old at the time of the offence and that the Prosecution had made an error when preparing the charge and the statement of facts. The Public Prosecutor brought an application for criminal revision pursuant to s 268 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC"), seeking an amendment of the charge and of the statement of facts to reflect the true age of the victim at the time of the offence.

5 The appellant appealed against his sentence on the ground that it was manifestly excessive. He also filed a motion for leave to adduce fresh evidence at the hearing of his appeal.

6 I heard the appeal, the motion and the petition for criminal revision on 17 February 2004. At the end of the hearing before me, I granted the petition for criminal revision. I dismissed the motion and allowed the appeal against sentence. I now give my reasons.

Background facts

7 In March 2002, the appellant met the victim online in an Internet Relay Chat ("IRC") chatroom. They subsequently met at a barbecue gathering hosted by a mutual friend for Internet enthusiasts. After this meeting, the appellant and the victim kept in touch by way of telephone and IRC chatroom conversations. The victim later initiated a date with the appellant.

8 This date took place on 23 April 2002. At about 9.30pm that day, the appellant met the victim at the Jurong Entertainment Centre and the victim suggested that they go for a drive in the appellant's car. The appellant drove to Chinese Garden Road and parked his car there. The appellant and the victim remained in the car and they eventually became intimate. The appellant asked the victim whether she wanted to have sexual intercourse with him, but she indicated that she did not wish to do so. The accused then asked the victim to fellate him and she agreed. She performed fellatio until the appellant ejaculated and the appellant then drove her home.

9 The appellant and the victim did not meet again. The victim was later encouraged by friends to make a police report about this incident and a police report was lodged on 1 May 2002.

10 The appellant was 25 years old at the time of the offence. He was a police sergeant attached to the Police Coast Guard.

The decision below

11 The district judge noted that the Court of Appeal had established in *PP v Kwan Kwong Weng* [1997] 1 SLR 697 that fellatio performed as a substitute for natural sexual intercourse constituted an offence under s 377 of the Penal Code. The district judge noted that the appellant had admitted to all the essential ingredients of the offence and convicted him accordingly.

12 In sentencing the appellant, the district judge noted that the appellant had sought out the

teenage victim *via* the Internet to satisfy his lustful desires. In addition, the district judge was of the view that there were several aggravating factors present in this case, including the following:

(a) The appellant was a mature adult some ten years older than the victim;

(b) The victim was a teenager attending secondary school;

(c) The appellant had used the Internet as a medium to meet the victim and to engage in a criminal act which contributed to the victim's moral corruption; and

(d) The appellant was a serving police sergeant in the Singapore Police Force when he committed the offence.

13 The district judge also took into account a number of mitigating circumstances in the appellant's favour. The district judge noted that the appellant was a first offender and had pleaded guilty at the first opportunity. The district judge also noted that the appellant did not use trickery or force to coerce the victim into performing the act of fellatio.

14 On balance, the district judge was of the view that the aggravating factors in the present case outweighed the mitigating factors such that a substantial custodial sentence was justified. In light of this, the district judge imposed a sentence of 24 months' imprisonment on the appellant.

The petition for criminal revision

15 I now turn to the Public Prosecutor's petition for criminal revision.

Principles of revision

16 The revisionary powers of the High Court are conferred by s 23 of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) and s 268 of the CPC. Section 268 of the CPC provides that the High Court may, in an application for criminal revision, exercise, *inter alia*, its powers under s 256 of the CPC.

17 Section 256 provides, *inter alia*, that:

> At the hearing of the appeal the court may, if it considers there is no sufficient ground for interfering, dismiss the appeal or may —
>
> (a) …
>
> (b) in an appeal from a conviction —
>
> (i) reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a court of competent jurisdiction or committed for trial;
>
> (ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or enhance the sentence; or
>
> (iii) with or without the reduction or enhancement and with or without altering the finding, alter the nature of the sentence;
>
> (c) …

(d) …

Whether the High Court's revisionary powers include the power to amend the charge and the statement of facts

18 It is established law that the High Court's powers under s 256(b) of the CPC include the power to amend a charge and consequently convict an accused person on the amended charge: *Garmaz s/o Pakhar v PP* [1996] 1 SLR 401. The Court of Appeal noted in *Garmaz*, however, that such power is not unlimited and has to be exercised with great caution and not to the prejudice of the accused. The Court of Appeal further held that the test laid down by Cussen J in *Ng Ee v PP* [1941] 1 MLJ 180 was applicable in this regard. In *Ng Ee v PP*, Cussen J stated at 181 that the power to amend a charge on appeal was:

> … a power to be exercised with great caution, and only where it is clear beyond all doubt, from the nature of the offence and the record of evidence in the case, that to do so can in no way prejudice the case of the accused; it must be clear that … the proceedings at the trial would have taken the same course, and the evidence recorded been the same – that the [Prosecution's] evidence would have been unchanged (substantially) and the accused's defence the same.

19 In *PP v Koon Seng Construction Pte Ltd* [1996] 1 SLR 573 at 579, [21], I stated, in the context of the court's revisionary powers to amend a charge to which the accused person had pleaded guilty, that:

> The power of amendment is clearly not unfettered. It should be exercised sparingly, subject to careful observance of the safeguards against prejudice to the defence … The court must be satisfied that the proceedings below would have taken the same course, and the evidence recorded would have been the same. The primary consideration is that the amendment will not cause any injustice, or affect the presentation of the evidence, in particular, the accused's defence. These safeguards must be rigorously observed.

20 I should highlight here that the Public Prosecutor was applying to amend not only the charge, but also the statement of facts. Thus, the issue before me was whether the High Court's powers under s 256(b) of the CPC include the power to amend the statement of facts.

21 I was of the view that the High Court's powers under s 256(b) of the CPC were sufficiently broad to encompass the power to amend the statement of facts. In *Garmaz*, the Court of Appeal took pains to reject a strict and literal construction of s 256(b) of the CPC, holding at [28] that:

> [S]uch a construction would lead to incongruous results: on the one hand the court by that section is given extensive powers in respect of conviction, sentence and findings, and yet on the other it has no power to amend the charge, and the consequence of this is that it has no power even to correct any errors appearing in the charge. Such a position is untenable. Further, the High Court has the revisionary powers under ss 266–268 of the CPC. In view of these extensive express powers, *it is inconceivable that it was the intention of the legislature that the High Court, in the exercise of its appellate jurisdiction, should not have the power to amend the charge preferred against the accused and set the record straight. A more purposive construction should in our view be adopted.*
>
> [emphasis added]

22 While I noted that the question that was before the Court of Appeal in *Garmaz* related to the charge preferred against the accused, and not the statement of facts, I was of the view that a purposive construction of s 256(b) of the CPC should be adopted. This is because, following the Court of Appeal's decision in *Mok Swee Kok v PP* [1994] 3 SLR 140, it is clear that the court has a legal duty to record a statement of facts and to scrutinise it to ensure that all the elements of the charge are made out therein. In light of this, I did not feel that the drafters of the CPC could have intended that the court should not have the power to amend the statement of facts. I was of the view that it must have been the legislature's intention that the court should have such a power so that it is able to accurately record the relevant facts which must be taken into account when determining sentence.

23 For the avoidance of doubt, I should state that an amendment to the statement of facts should only be made where the safeguards set out in *Koon Seng Construction* and *Ng Ee* are observed.

Whether the High Court's revisionary powers should be exercised in the present criminal revision

24 It is established law that the High Court's powers of revision must be exercised sparingly. The principles governing revision were laid down in *Ang Poh Chuan v PP* [1996] 1 SLR 326, where it was held at 330, [17] that:

> [V]arious phrases may be used to identify the circumstances which would attract the exercise of the revisionary jurisdiction, but they all share the common denominator that there must be some serious injustice. Of course there cannot be a precise definition of what would constitute such serious injustice for that would in any event unduly circumscribe what must be a wide discretion vested in the court, the exercise of which would depend largely on the particular facts. But generally it must be shown that there is something palpably wrong in the decision that strikes at its basis as an exercise of judicial power by the court below.

25 In respect of a conviction under s 377 of the Penal Code, the age of the victim is irrelevant as an offence is made out regardless of the victim's age. The victim's age is, however, a critical factor which the court must take into account for the purposes of sentencing. In this regard, the Public Prosecutor submitted that public policy necessitated that underage victims, *ie* those below the age of 16 years, must be protected from sexual predators. I was of the view that the relative difference in age between the victim and the accused, as well as the victim's actual age, were both critical and relevant to the court's assessment of sentence.

26 I have stated on many occasions that there is no clear-cut test of what constitutes "serious injustice": see, for example, *Ng Kim Han v PP* [2001] 2 SLR 293 at [10]. However, on the present facts, there was little doubt that serious injustice would be caused if the appellant were to be sentenced on the basis that the victim was 16 years old, as stated in the charge and the statement of facts as initially drafted. This is because the age of the victim is a significant factor in sentencing under s 377 of the Penal Code, particularly where the victim's consent is presented to the court as a mitigating factor, as was the case here. I was of the view that the fact that the victim in the present case was below the age of 16 years was highly significant as the clear policy of Parliament has been to criminalise sexual activity involving girls below the age of 16 years. Section 140(1)(i) of the Women's Charter (Cap 353, 1997 Rev Ed), for example, makes it an offence to have carnal connection with any girl below the age of 16 years except by way of marriage. An offence is made out under s 140(1)(i) of the Women's Charter regardless of whether the victim consented to the act of carnal connection, on the basis that girls below the age of 16 years are incapable of legally consenting to sexual activity: *Tay Kim Kuan v PP* [2001] 3 SLR 567 at [13].

27 I was of the view that the misunderstanding as to the victim's true age would indeed suggest that there was something "palpably wrong" in the district judge's assessment of sentence. I have previously held that the High Court's revisionary powers exist to facilitate its supervisory and superintending jurisdiction over criminal proceedings before a subordinate court so as to correct a miscarriage of justice arising from the correctness, legality or propriety of any finding, sentence or order recorded or passed: *Koh Thian Huat v PP* [2002] 3 SLR 28 at [16].

28 I was therefore of the view that the present circumstances clearly justified the exercise of the High Court's revisionary powers and I ordered that the charge and the statement of facts be amended to reflect that the victim was 15 years old at the time of the offence.

The motion to adduce additional evidence

29 Before addressing the appellant's appeal against sentence proper, I turn now to consider the appellant's motion to adduce additional evidence at the hearing of the appeal. The appellant asserted that the fresh evidence would show that the district judge erred in imposing a deterrent sentence on the appellant.

30 In support of this contention, the appellant filed an affidavit which purportedly showed the following:

(a) The appellant did not get acquainted with the victim through the Internet;

(b) It was the victim who first initiated contact with the appellant a month after they had met at the barbecue function; and

(c) The victim had obtained the appellant's mobile phone number from a mutual friend and the appellant had only met up with the victim after she had called him several times.

31 The relevant principles governing the court's grant of leave to adduce additional evidence on appeal are found in *Juma'at bin Samad v PP* [1993] 3 SLR 338, where I applied the test set out by Denning LJ in *Ladd v Marshall* [1954] 3 All ER 745. The *Ladd v Marshall* test requires that all of the following three conditions are satisfied before the reception of fresh evidence can be justified:

(a) Non-availability: it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(b) Relevance: the evidence must be such that, if given at trial, it would probably have an important influence on the result of the case, although it need not be decisive; and

(c) Reliability: the evidence must be such as is presumably to be believed or in other words, it must be apparently credible, although it need not be incontrovertible.

32 *Juma'at* is therefore clear authority for the proposition that an application to introduce fresh evidence will only be allowed in extremely limited circumstances and only where the evidence is relevant, reliable and was not available at trial.

33 I was of the view that the appellant's application to introduce the fresh evidence should not be allowed as it did not satisfy the *Ladd v Marshall* test adopted in *Juma'at*.

34 The appellant asserted in his affidavit that an "in depth detailed complex analysis" of his

computer would reveal that he did not get acquainted with the victim through the Internet or though the IRC chatroom. However, this was a bare assertion and the appellant made no attempt to conduct such an analysis of his computer or to explain why the analysis would indicate that he did not meet the victim *via* the Internet. There was thus no question that the third condition of reliability was not satisfied. In fact, the reliability of this evidence was all the more suspect when I took into account the appellant's statement in his affidavit that his computer was "totally non-functional" when it was returned after investigations by the police.

35 On a separate note, I was rather puzzled that the appellant was seeking to assert that he did not meet the victim through the Internet or the IRC chatroom as this was wholly contrary to what was stated in the statement of facts to which he had admitted without qualification. The statement of facts provided, *inter alia*, that:

> Investigations disclosed that in March 2002, the complainant got to know the accused in the Internet Relay Chat (IRC) chatroom. Subsequently, they met at a barbecue function which was organised by a mutual friend at Pasir Ris. After their first meeting, the complainant and the accused kept in touch through the telephone and chatroom.

36 Similarly unreliable was the appellant's assertion that one "Yusnam", a mutual friend of the victim and the appellant, could confirm that it was the victim who had initiated contact with the appellant after she had seen him at the barbecue function. An affidavit from Yusnam was not filed. The appellant stated that Yusnam was not contactable when the appellant was sentenced below, but this did not explain why an affidavit from Yusnam had not been provided in support of the appellant's motion.

37 Finally, the appellant appended the call tracing records of the mobile phone he had been using from February to April 2002. These records were appended to show that the appellant only met up with the victim after she had called him four times. This evidence was clearly available at the time of the trial as the appellant could have obtained the call tracing records from his mobile phone service provider then. The appellant asserted that he did not know, at the time he was sentenced, that the call tracing records would assist his case as he had forgotten the victim's telephone number. The appellant alleged that his wife had come up with the idea to find the victim's telephone number using her father's name only *after* the appellant was sentenced. There was little doubt that this additional evidence would have been available for production at trial had reasonable diligence been exercised by the appellant. The condition of non-availability was therefore not satisfied.

38 Further, in respect of the call tracing records, the condition of relevance was also not met. In my view, it was highly unlikely that a finding that the victim had indeed called the appellant before the offence would have affected the district judge's decision to impose a deterrent sentence. The principal factors relied upon by the district judge in imposing a deterrent sentence were that the appellant, who was a police officer some ten years older than the victim, had used the Internet as a means to meet the victim and that this meeting subsequently led to unnatural sexual intercourse. Evidence that the victim had called the appellant before the offence was committed would not be inconsistent with these factors. Indeed, the district judge's observation that the appellant had "actively procured and participated in the commission of the offence" would remain valid even if it could be shown that the victim had called the appellant before the offence was committed, since the undisputed facts are that the appellant had brought the victim to Chinese Garden Road and asked for sex in his car. When she declined, he asked the victim to fellate him instead.

39 I therefore dismissed the appellant's motion.

The appeal against sentence

40 I now turn to the appeal against sentence. The appellant appealed against his sentence on the grounds that it was manifestly excessive.

41 In support of this contention, the appellant submitted that the district judge failed to give sufficient weight to the following mitigating factors:

(a) The act of fellatio was consensual and the appellant did not use trickery or force to coerce the victim into fellating him;

(b) The appellant is a first offender;

(c) The appellant pleaded guilty at the first opportunity and co-operated with the authorities; and

(d) There were exceptional ill-effects on the appellant's personal and family circumstances.

42 The appellant made further contentions relating to the aggravating factors relied on by the district judge. Specifically, the appellant contended that the district judge had erred in finding that the appellant had sought the victim *via* the Internet with a view to satisfying his lustful desires. The appellant also argued that the district judge erred in placing too much weight on the fact that the appellant's actions led to the moral corruption of the victim. The appellant contended that the district judge had erred in finding that a deterrent sentence was warranted on the present facts as the appellant had committed the offence outside the scope of his duties as a police officer.

43 Finally, the appellant submitted that the sentence imposed on the appellant by the district judge was not in line with the sentences imposed in other similar cases.

44 I shall now consider these contentions in turn.

Whether the district judge failed to give sufficient weight to mitigating factors

The act of fellatio was consensual and the appellant did not use trickery or force to coerce the victim into fellating him

45 The appellant submitted that the district judge had failed to accord any mitigating weight to the fact that the victim had consented to the act of fellatio. In support of his contention that consent is a relevant factor which should have been taken into account in sentencing, the appellant cited pp 318 to 320 of the *Sentencing Practice in the Subordinate Courts* (2nd Ed, 2003). At 319, it is stated that:

> Apart from making a distinction in sentencing on the basis of the form of the unnatural carnal intercourse, the other relevant facts would be consent or the lack thereof and the age of the victim. There are three broad categories: (1) between consenting adults, (2) between non-consenting adults and (3) those committed on young children.
>
> Offences between consenting adults would be viewed the least serious. …
>
> As for 'non-consenting' adults, they can expect a substantial term of imprisonment. …

> Where the victims are young, the principles of deterrence and the need to express society's revulsion would dictate a lengthy custodial sentence.

46 The appellant argued that the present case should fall under the "consenting adults" category, as "young victims" are children below 14 years old. The appellant submitted that the Court of Appeal's judgment in *Lim Hock Hin Kelvin v PP* [1998] 1 SLR 801 would support this position.

47 I was of the view that this submission was entirely without merit. The Court of Appeal in *Lim Hock Hin Kelvin* did not suggest, or even vaguely imply, that the court regards only victims under the age of 14 years as "young victims" whose consent is disregarded for the purposes of sentencing under s 377 of the Penal Code.

48 In *Lim Hock Hin Kelvin* at [20], the Court of Appeal observed, *inter alia*, that:

> [T]he starting position must be that where the victims are vulnerable children, the offence becomes much more serious and the punishment meted on such offenders has to reflect the gravity of the offence. The punishment for rape offences is much more serious where the victim is below 14 years and sexual intercourse takes place without her consent. Section 376(1) Penal Code provides that the maximum punishment for rape is imprisonment for life and the offender will also be liable to fine or to caning. Section 376(2) goes on to provide that the offender who commits rape by having sexual intercourse with a girl below 14 years of age without her consent is subject to a minimum punishment for a term of not less than eight years and shall be punished with caning with not less than 12 strokes. Even in England, it is still an offence to commit buggery on a boy aged below 16 years; the Wolfenden Report took the firm view of the necessity of protection of the young, despite the fact that it took the view that criminal law is not concerned with private morals or ethical means.

49 There is nothing in this extract which can be construed as saying that "vulnerable children" are those who are below 14 years of age. The age of 14 years is cited in respect of *an example* of an instance where the legislature has determined that children require special protection, specifically the statutory rape provisions in ss 375 and 376 of the Penal Code. The Court of Appeal did not say that *only* victims below 14 years of age are "vulnerable children" such that offences committed against them are more serious.

50 In my view, as a general guide, "young victims" should be those under 16 years of age. This would be consonant with the protection of young women under s 140(1)(i) of the Women's Charter which was enacted on the basis that girls under the age of 16 are deemed to be incapable of giving valid consent to a sexual act. I was of the view that this principle should be extended to s 377 offences, such that in cases where the victim is under the age of 16 years, his or her consent is irrelevant for the purposes of sentencing. The underlying principle in this regard is that young girls under the age of 16 may not have the experience or the maturity to make decisions in their own best interests about their own sexuality and that the law must step in to prevent their exposure to sexual activity regardless of their purported consent.

51 The present case would fall under this category of cases and the fact that the victim had agreed to the act of fellatio should not be accorded mitigating weight.

The appellant is a first offender

52 The appellant argued that the district judge had erred in placing no mitigatory weight on the fact that the appellant was a first offender with no previous convictions or antecedents.

53 I saw little merit to the appellant's argument. The district judge explicitly stated in his grounds of decision that he had been mindful that the appellant was a first offender.

54 In any case, the fact that the appellant was a first offender, while relevant, must be considered alongside other factors, including any aggravating factors against him. This was the approach I adopted in *Sim Gek Yong v PP* [1995] 1 SLR 537 at 541, [9]:

> Like any other personal factor put forward on the accused's behalf in mitigation, the absence of similar antecedents is something to be taken into account by the sentencing court and weighed in the balance against other, possibly opposing, factors. The first and foremost consideration in this balancing process, however, must be the public interest. Any sentence imposed must be such that it enables our criminal law not merely to punish crime effectively but also to prevent it.

The appellant pleaded guilty at the first opportunity and co-operated with the authorities

55 The appellant submitted that the appellant's plea of guilt should have been afforded more mitigatory weight by the district judge, particularly as the appellant was not arrested in circumstances in which the Prosecution would have had no difficulty in proving the charge against him. The appellant pointed out that, had the matter gone to trial, the Prosecution would have had to rely almost exclusively on the victim's evidence. Thus, the appellant's plea of guilt saved the victim the trauma of having to testify in court and consequently, relive her traumatic experience.

56 The Public Prosecutor was of the view that the appellant's plea of guilt was of limited mitigating value and *Lim Hock Hin Kelvin* was cited in support of this.

57 I agreed with the appellant's submission that on the present facts, the appellant's plea of guilt was a significant mitigating factor which should be accorded due weight. I noted, however, that the district judge had taken the appellant's plea of guilt into account during sentencing. In fact, the district judge not only stated that he was mindful that the appellant had pleaded guilty at the first opportunity but went on to observe that the appellant's plea of guilt was a "sign of genuine remorse".

58 That said, I should add that I was unconvinced by the Public Prosecutor's submissions on this point. In *Lim Hock Hin Kelvin*, I held that the protection of the public was an established exception to the general rule that the plea of guilt will entitle a convicted person to a discount of the sentence. In light of this, I declined to accord much weight to the guilty plea of the accused who had been convicted of several sex offences, including four charges under s 377 of the Penal Code.

59 However, in my view, the "public protection" exception applied in *Lim Hock Hin Kelvin* and in other cases like *Fu Foo Tong v PP* [1995] 1 SLR 448 applied with considerably less force in the present case. The accused in *Lim Hock Hin Kelvin* was a chronic paedophile who persistently targeted young children and used gifts to cajole and persuade them to engage in unnatural carnal intercourse. The offences were repeatedly committed over a period of time. The Court of Appeal therefore took the view that, in the interests of public protection, long-term incarceration was warranted.

60 In clear contrast, there was no evidence that the appellant in the present appeal is a paedophile. He was a first offender and did not resort to trickery to cajole the victim into performing the act of fellatio. Further, by pleading guilty, the appellant had indeed spared the victim the trauma of testifying in a contested trial. I was therefore of the view that his plea of guilt should be accorded due weight.

There were exceptional ill-effects on the appellant's personal and family circumstances

61 The appellant submitted that his personal circumstances were very "exceptional" and "extreme" as his father passed away in 1997, leaving the appellant to support his aged mother and sister. He also pointed out that he had lost his job as a result of the conviction and had been forced to "grovel and beg" his friends and colleagues for financial assistance.

62 It is settled law that hardship caused to the appellant's family as a result of the imprisonment of an offender has little mitigating value: *Lai Oei Mui Jenny v PP* [1993] 3 SLR 305 and *PP v Tan Fook Sum* [1999] 2 SLR 523. It is only in very exceptional or extreme circumstances that such hardship can be regarded as a legitimate factor in mitigating the sentence. Such circumstances were clearly absent in this case and I was utterly unconvinced that the district judge had erred in rejecting this as a mitigating factor in the present case.

Aggravating factors relied on by the district judge

63 I now turn to the appellant's contentions which related to the aggravating factors relied on by the district judge.

Whether the district judge erred in finding that the appellant had sought the victim via the Internet with a view to satisfying his lustful desires and whether the appellant's use of the Internet necessitated the imposition of a deterrent sentence

64 The appellant submitted that there was nothing in the statement of facts or mitigation plea which would suggest that the appellant had sought the victim *via* the Internet to satisfy his carnality. The appellant submitted that the district judge's finding could not be substantiated and that a deterrent sentence was not warranted on the facts of the present case.

65 I accepted the appellant's submission that the district judge's observation that the appellant had "roam[ed] the internet to meet with and thereafter morally corrupt immature adolescent girls through acts of unnatural carnal intercourse" was an overstatement. Be that as it may, the critical issue that was before me was whether a deterrent sentence was warranted on the present facts.

66 The district judge held, on the basis of *Tay Kim Kuan* ([26] *supra*), that where an offender uses the Internet as a medium to meet teenage girls to engage in criminal acts that corrupt their morals, that would be regarded as an aggravating factor. I was of the view that the district judge did not err in this regard. As I recently stated in *Rupchand Bhojwani Sunil v PP* [2004] SGHC 17 at [23]:

> [T]he reasoning behind the deterrent sentence [in *Tay Kim Kuan*] was the protection of the young and gullible from the perils of the Internet, in the form of unscrupulous people who hid their true identities and remained faceless while boldly preying on such young people.67 In *Tay Kim Kuan*, the accused had met the 15-year-old victim in an IRC chatroom. The victim and the accused subsequently kept in touch by way of IRC and telephone conversations, and later engaged in sexual intercourse.

68 The prevailing concern in the present case is the same as that in *Tay Kim Kuan*, which is to protect the young from the perils of the Internet and from the possibility of the Internet being abused, directly or indirectly, to facilitate the exploitation of young victims for sexual gratification. On the present facts, there was a clear nexus between the initial Internet contact and the commission of the offence, as the initial Internet contact very quickly led to the offence.

69 The appellant sought to persuade me that the initial Internet contact was merely a very remote link in the factual chain of events surrounding the offence, and that much of the interaction

between the appellant and the victim had been by way of telephone conversations and in the meeting at the barbecue gathering. He was not an unscrupulous sex offender who had remained faceless to the victim, since they had subsequently met up and spoken on the telephone.

70 I was of the view that this did not take the appellant very far. Naturally, any initial contact in an Internet chatroom would have to result in a physical meeting before an unnatural sex offence could take place. The offender would obviously not be able to hide his true identity and remain faceless indefinitely. However, the crucial point here was that the Internet had facilitated the offence, as it provided an avenue for the appellant to get acquainted with the victim and to ask her, very quickly thereafter, to perform fellatio on him. The district judge was therefore not wrong in finding that a deterrent sentence was warranted.

71 I should, however, point out that while the courts will generally consider imposing a deterrent sentence where the initial contact between a sex offender and a victim is *via* the Internet, each case must be determined on its own facts. There may well be cases where the court may decide that a deterrent sentence is not appropriate, such as where the link between the Internet contact and the offence is overly remote.

Whether the district judge erred by placing too much weight on the aggravating factor that the appellant's actions led to the moral corruption of the victim

72 The appellant argued that the district judge's finding that the appellant's actions led to the moral corruption of the victim was not supported by the statement of facts or mitigation plea and must be regarded as purely speculative. To buttress this contention, the appellant repeatedly stressed that the victim had voluntarily been physically intimate with the appellant and had even "groped his genital region of her own volition".

73 I saw no merit in the appellant's contention. It is undisputed that the appellant had asked the victim to perform the act of fellatio after she had declined to have sexual intercourse with him. Further, even if the victim was sexually experienced or promiscuous (and the appellant was unable to adduce any evidence in support of this), it is established law that this is wholly irrelevant in sentencing: *Tay Kim Kuan.*

74 The offender in *Tay Kim Kuan* had pleaded guilty to one charge under s 140(1)(i) of the Women's Charter. His counsel, in contending that the sentence imposed by the trial judge was manifestly excessive, submitted that the victim had had a long history of sexual intercourse with older men and had tempted the appellant by sharing her lurid experiences with him. I rejected these submissions, observing at [17] that:

> … I had no doubt that the complainant in the present case was no innocent virgin to begin with and admittedly, had had her fair share of sexual experiences before sleeping with the appellant. Nevertheless, the offence committed by the appellant with a girl just one-third his age remained a serious one for which the law provides no excuse. If the appellant was indeed anything as sensible and mature as his counsel made him out to be, then all the more he should have known better than to further the moral corruption of one whom he knew or thought was already debauched. Instead, he had no reservations about taking advantage of the easy opportunity which presented itself to him and exploited it fully to gratify his lust.

Whether the district judge erred in finding that a deterrent sentence was warranted because the appellant was a police officer

75 The appellant submitted that the district judge had erred in holding that a deterrent sentence was warranted because the appellant had been a police officer at the time of the offence. The appellant contended that in cases where the offender is a law enforcement officer, a deterrent sentence is warranted only where the offence is committed in the course of his duty.

76 It was clear that the district judge had regarded the fact that the appellant was a police officer at the time of the offence as a strong aggravating factor. The district judge cited *PP v Gurmit Singh* [1999] 3 SLR 215 in support of his view that a severe sentence was warranted to deter like-minded individuals and to uphold the public interest that those who are vested with the duty to uphold and enforce the law should not be let off lightly when they deliberately flout the law.

77 The appellant contended, however, that *Gurmit Singh* was only authority for the proposition that a deterrent sentence should be imposed where a law enforcement officer commits an offence *in the course of his duties*. The appellant submitted that the holding in *Gurmit Singh* did not extend to cases where a law enforcement officer commits offences *outside* the scope of his official duties.

78 I was of the view that, while the public is entitled to expect the highest standards from the police force, the fact that the appellant was a police officer at the time of the offence should not have been regarded as an aggravating factor in the present case.

79 It could not be disputed that the offence was completely unrelated to the appellant's status as a police officer. There was no evidence, for example, that the appellant sought to exploit his position as a police officer to coerce or pressure the victim to perform the act of fellatio. This stood in marked contrast with the facts of *Gurmit Singh*, where a police corporal forged acknowledgement slips reflecting that he had returned exhibits of shoplifting cases investigated by him, when in actual fact he had retained the exhibits for his own use. The accused in *Gurmit Singh* clearly abused his position as an investigating officer in committing the offences of forgery and he violated the trust reposed in him to prosecute offences fairly and ethically.

80 Further, I made clear in *Gurmit Singh* that a deterrent sentence was necessary on the facts of the case because the accused had committed the forgery offences in the course of his duty. In this regard, I noted at [11] that:

> In this case, it seemed clear to me that a deterrent sentence was warranted as the respondent had been a police officer *who had committed these offences in the commission of his duty*. The public is entitled to expect the highest standards from the police force. It would be sending the wrong signals to the public if a police officer who had committed forgery got off with only a fine. [emphasis added]

81 I further noted at [17] that:

> It seemed clear to me that in the circumstances of the case, *where the accused was a police officer and had committed these offences in the course of his duty*, it was in the public interest that a committal sentence be given. The whole purpose of the law is to maintain order and discipline and it was left to police officers to enforce the law. A deterrent sentence ought to be given to the respondent in view of this aggravating factor. [emphasis added]

82 It was therefore my view that, in this case, the mere fact that the appellant had been a police officer should not have been regarded as an aggravating factor. While the courts will not hesitate to punish police officers who abuse their powers to commit offences, a deterrent sentence may not be warranted in cases where a police officer offends outside the scope of his official duties

and does not abuse his position to commit criminal mischief.

Whether the sentence imposed on the appellant by the district judge was in line with the sentences imposed in other similar cases

83 Finally, I turn to consider whether the sentence imposed by the district judge was in line with the sentences imposed in similar cases.

84 In sentencing the appellant, the district judge relied on three cases – *PP v Wong Siu Fai* [2002] 3 SLR 276, *Adam bin Darsin v PP* [2001] 2 SLR 412 and *PP v Peh Thian Hui* [2002] 3 SLR 268 – in which sentences of five years' imprisonment were imposed for s 377 offences. The district judge also considered *PP v Pok Raymond* [2003] SGHC 18 where sentences of two years' imprisonment were imposed in respect of each of three s 377 charges preferred against the accused.

85 The district judge was of the view that, following *Adam bin Darsin*, an appropriate sentence for an offence of unnatural carnal intercourse by way of fellatio would be in the region of five years, subject to any mitigating or aggravating circumstances that may be present.

86 As both the appellant and the Public Prosecutor made submissions on this issue, it would be useful to summarise their submissions at this juncture and I now proceed to do so.

The appellant's submissions

87 The key contention advanced by the appellant was that the sentence imposed by the district judge was manifestly excessive as it was not in line with the sentences imposed in other cases involving offences under s 377 of the Penal Code and s 140(1)(i) of the Women's Charter.

88 One of the cases cited by the appellant was *PP v Netto Michael George* [2000] SGHC 261. In *Netto Michael George*, the accused was charged with a number of sex offences, including aggravated rape, unnatural carnal intercourse by way of fellatio and aggravated outrage of modesty. He was also charged with one count of housebreaking by night. The accused had raped the victim and forced her to perform fellatio, while placing a knife on her back and threatening to kill her if she did not comply. Amarjeet Singh JC (as he then was) sentenced the accused to 12 months' imprisonment in respect of the s 377 offence.

The Public Prosecutor's submissions

89 The Public Prosecutor was of the view that the appellant's sentence of 24 months imprisonment was a "significant departure" from the general sentencing practice in dealing with carnal connection cases involving ordinary sexual intercourse, pursuant to s 140(1)(i) of the Women's Charter. The Public Prosecutor noted that, if the sentence imposed by the district judge were to be upheld, there would be "some conflict … in the sentencing benchmarks", in that there would be a fairly large difference between the sentence imposed by the courts for the full act of sexual intercourse in carnal connection cases such as *Tay Kim Kuan* (which was 12 months' imprisonment), and the present sentence imposed for oral sex (which is 24 months' imprisonment). The Public Prosecutor submitted that some reconciliation might be required.

90 Underlying this submission was the Public Prosecutor's view that there is 'little difference in the moral culpability of an accused person who engages in ordinary sexual intercourse rather than unnatural sexual intercourse with a young girl'. The Public Prosecutor was of the view that the same sentencing tariff should apply to both offences.

91 I turn now to consider whether the starting point for sentencing in respect of an offence of fellatio under s 377 of the Penal Code is five years imprisonment.

Whether the "starting point" for sentencing under s 377 of the Penal Code is five years' imprisonment

92 I was of the view that the district judge had erred in relying on cases such as *Adam bin Darsin* and *Peh Thian Hui* in concluding that the starting point for sentencing in respect of an offence of fellatio under s 377 against a young victim is "in the region of five years' imprisonment". This is because the cases cited by the district judge involved accused persons who shamelessly abused their positions of trust and repeatedly engaged in the sexual exploitation of young victims. These precedents can therefore be distinguished from the present case.

93 In *Adam bin Darsin*, the accused faced no less than 23 charges for s 377 offences, and only eight charges were proceeded with. He had eight male victims, whose ages ranged between 12 and 15 years old, and the offences were repeatedly committed over a period of one year. The victims respected the accused, regarded him as a family member and called him "uncle". The accused had taken pains to win the trust of his victims' families, so that he could have easy access to the victims to satisfy his sexual urges. I should also point out that 15 charges were taken into consideration for the purpose of sentencing. It is trite law that the effect of taking into consideration outstanding offences is to enhance the sentences that would otherwise be awarded: *PP v Mok Ping Wuen Maurice* [1999] 1 SLR 138. In light of this, a five-year sentence of imprisonment for each of the eight charges was condign.

9 4 *Peh Thian Hui* can also be easily distinguished from the present appeal. The accused repeatedly raped and molested his lover's biological daughter for a period of four years, starting from the time when the victim was nine years old. When the victim was 13 years old, the accused ordered the victim to perform fellatio on him, and this formed the subject matter of the s 377 charge, to which the accused pleaded guilty. The accused also pleaded guilty to a total of nine other charges, with 52 other charges taken into consideration in sentencing. Tay Yong Kwang JC (as he then was) imposed a deterrent sentence as he was of the view that "Peh's perversion must never be allowed to touch and affect another girl's life. He must be kept out of society … for a very substantial period of time". Tay JC therefore imposed a sentence of five years' imprisonment in respect of the s 377 charge.

95 In my view, the difficulty with attempting to fix a "starting point" for sentencing of fellatio offences under s 377 is that the sheer number of different factual scenarios which could underlie such offences render such an exercise unfruitful and unhelpful. Each case will turn on its own unique facts and the court must always be mindful of this. That said, past cases are indubitably instructive and may serve as critical sentencing guidelines for the court. In respect of the present appeal, I found two cases – *PP v Pok Raymond* and *PP v Netto George Michael* – particularly helpful.

96 In *PP v Pok Raymond,* the accused had posted a message on an Internet chatroom asking for a girl to pose as his temporary girlfriend and engage in petting with him in exchange for money. The victim responded to the accused's message and met with the accused. On their first meeting, the victim and the accused engaged in fellatio and sexual intercourse. On their second meeting, the victim declined to fellate the accused when he asked her to do so, but he pulled her head towards his penis, causing her to give in and to fellate him reluctantly. This act formed the subject of a charge under s 377 of the Penal Code.

97 The accused was convicted of five other charges in respect of the same victim and two

other victims, for offences of anal intercourse, carnal connection with a 14-year-old girl, rape and aggravated rape. In addition to the six charges, the accused agreed that one charge of carnal connection and two charges of rape be taken into consideration in sentencing. The accused had related antecedents for military offences committed during National Service; significantly, these offences included an attempt to peep into a ladies' toilet and an entry into a female officer's bunk to search for her undergarments. It was also undisputed that the accused had resorted to blackmailing some of his victims so that he could use them as "virtual sex slaves". The accused had even caused one of his victims to contract a sexually transmitted disease. Despite these aggravating factors, the accused was only sentenced to 24 months' imprisonment for the fellatio offence, which is the same sentence as that received by the appellant in the present appeal.

98 I was of the view that there were significant differences between the culpability of the accused in *Pok Raymond* and the appellant in the present appeal, warranting that the appellant receive a sentence which was markedly lower than 24 months' imprisonment.

99 The sentence imposed by the district judge was also problematic when considered alongside the sentence imposed in respect of the s 377 offence in *Netto Michael George*. There were several aggravating circumstances in that case. In the course of a housebreaking perpetrated by the accused, the victim was forced to perform fellatio. The accused was armed with a knife and had threatened to kill the victim if she did not comply. Notwithstanding this, and the fact that the accused had antecedents, the High Court sentenced him to 12 months' imprisonment in respect of the s 377 offence. This works out to only half of the sentence imposed on the appellant in the present case.

Disparity between sentences imposed for carnal connection offences and sentences imposed for fellatio offences

100 I also accepted the Public Prosecutor's point that there was a striking disparity between the appellant's sentence and sentences imposed by our courts in respect of carnal connection offences under the Women's Charter.

101 In *Tay Kim Kuan*, for example, the accused was a 45-year-old man who was convicted under s 140(1)(i) of the Women's Charter for engaging in sexual intercourse with the victim, who was 15 years old at the time of the offence. As I alluded to earlier, the accused had met the victim in an IRC chatroom, and I had no hesitation in imposing a deterrent sentence in order to protect the young from the perils of the Internet. I sentenced the accused to 12 months' imprisonment and the maximum fine of $10,000.

102 The circumstances in *Tay Kim Kuan* were quite similar to those in the present case and there were only two key differences between the cases:

(a) the subject matter of the charge in *Tay Kim Kuan* was ordinary sexual intercourse, whereas the present case deals with unnatural sexual intercourse; and

(b) the appellant in the present case was a police officer, whereas the accused in *Tay Kim Kuan* was not.

103 As I observed earlier, I was not persuaded that the fact that the appellant was a police officer should be regarded as an aggravating factor in this case.

104 Further, as submitted by the Public Prosecutor, it was simply incongruous for there to be such

a large disparity between the sentences imposed in respect of ordinary sexual intercourse cases and those imposed in cases of unnatural sexual intercourse by way of fellatio. I acknowledged that engaging in ordinary sexual intercourse with a girl under the age of 16 years is an offence under the Women's Charter whereas unnatural sexual intercourse cases fall within the ambit of s 377 of the Penal Code. However, where young victims are concerned, both offences, and the rationale for their criminalisation, are aimed at the protection of young victims from exploitative sexual activity, whether unnatural or not. In this light, I was of the view that there should not be an overly large disparity between sentences under the two provisions.

Conclusion

105 Taking into account all the circumstances of the case, I was drawn to conclude that the appellant's sentence was manifestly excessive. Thus, I allowed the appellant's appeal against sentence and reduced the sentence to a term of imprisonment of 12 months.

Appeal against sentence allowed. Motion dismissed. Petition for criminal revision allowed.

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