Public Prosecutor *v* Loh Soon Aik Andrew
[2013] SGHC 16

Case Number	: Criminal Case No 30 of 2012
Decision Date	: 18 January 2013
Tribunal/Court	: High Court
Coram	: Choo Han Teck J
Counsel Name(s)	: Sharmila Sripathy-Shanaz, Issac Tan and Lin YinBing (Attorney-General's Chambers) for the Public Prosecutor; S Balamurugam (Straits Law Practice LLC) for Accused.
Parties	: Public Prosecutor — Loh Soon Aik Andrew

Criminal Procedure and Sentencing – Sentencing

18 January 2013

Choo Han Teck J:

1 The accused was 21 years old when he committed the three offences for which he was charged. The three offences included two offences of making two minors, both aged nine, commit acts of fellatio on him (on separate occasions) and one offence of inserting his finger into the vagina of an eight-year old girl. The accused pleaded guilty to the three charges under s 376(1)(b) and s 376(2)(a) of the Penal Code (Cap 224, 2008 Rev Ed). Two other charges, one under s 354(1) and one under s 354(2), were taken into account for the purposes of sentencing. For convenience, the three charges admitted as the first, second and third charges respectively are set out as follows –

1st Charge

Sometime in December 2010, at #09-2878 of Block 179 Ang Mo Kio Avenue 5, Singapore, did cause another person under 14 years of age to penetrate your mouth with his penis, to wit, by causing one XXX, a person then aged 9, (DOB 2 November 2001) to penetrate your mouth with his penis, without his consent, and you thereby committed an offence under Section 376(1)(b) of the Penal Code (Chapter 224), punishable under Section 376(4)(b) of the said Act.

2nd Charge

Sometime in December 2010, at #09-2878 of Block 179 Ang Mo Kio Avenue 5, Singapore, did sexually penetrate with a part of your body other than your penis, the vagina of a girl under 14 years of age, to wit, by inserting your finger into the vagina of one YYY, a person then aged 8 (DOB 17 April 2002), without her consent, and you have thereby committed an offence under Section 376(2)(a) of the Penal Code (Chapter 224), punishable under Section 376(4)(b) of the said Act.

3rd Charge

Sometime in January 2011, at #09-2878 of Block 179 Ang Mo Kio Avenue 5, Singapore, did cause another person under 14 years of age to penetrate your mouth with his penis, to wit, by causing

one ZZZ, a person then aged 8 (DOB 26 October 2002), to penetrate your mouth with his penis, without his consent, and you have thereby committed an offence under Section 376(1)(b) of the Penal Code (Chapter 224), punishable under Section 376(4) of the said Act.

The two charges taken into consideration are set out as follows –

4th Charge

Are charged that you, sometime in December 2010, at #09-2878 of Block 179 Ang Mo Kio Avenue 5, Singapore, did use criminal force on a person who was under 14 years of age, intending to outrage the modesty of that person, to wit, by using your hands to touch the penis of one AAA, a person then aged 10 (DOB 14 December 2000), and thereafter pull-back the foreskin on his penis, and you have thereby committed an offence under Section 354(1) of the Penal Code (Cap 224), punishable under Section 354(2) of the said Act

5th Charge

Are charged that you, sometime in December 2010, at #09-2878 of Block 179 Ang Mo Kio Avenue 5, Singapore, did use criminal force on a person who was under 14 years of age, intending to outrage the modesty of that person, to wit, by using your hands to touch the penis of one BBB a person then aged 10 (DOB 20 March 2000), and you have thereby committed an offence under Section 354(1) of the Penal Code (Cap 224), punishable under Section 354(2) of the said Act.

2 The facts were admitted by the accused without qualification. He met the first victim through the victim's classmate. The accused enticed the victim to join a club for computer games with promises of monetary rewards and access to his favourite games. On the pretext that a medical examination was necessary for membership into the club, the accused committed the offence under the first charge in the course of performing the medical examination on the first victim. Similar ploys were used by the accused on the second and third victims.

3 The accused was given a psychiatric examination by Dr Chan Lai Gwen ("Dr Chan") on 11 February 2011 and 18 February 2011. Dr Chan issued a medical report on 21 February 2011 in which she concluded that "[the accused] has Pedophilia (DSM IV 302.2)". She noted that it was the accused person's first encounter with the law. She also noted that no force had been used on the complainants. He had no history of drug or substance abuse, and was amenable to treatment (for his psychiatric condition). Dr Chan concluded her report with the opinion that —

> ... a considerable risk of reoffending is present. I would recommend that his access to potential victims be removed while he undergoes treatment, until his risk is reassessed and judged to be low.

In her assessment of the risk of reoffending, Dr Chan made the following statements:

> 22. In assessing the risk of reoffending, I have considered that this is Mr Loh's first contact with the legal system, and that there was apparently no force used on the victims, nor was there penetrative intercourse. There is no history of drug and alcohol abuse, no prior history of treatment failure, and he is now amenable to treatment.
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> 23. I have also considered that the victims were many, predominantly male, and were merely acquaintances. There is also a paucity of age-appropriate sexual and non-sexual relationships, as well as evidence of socio-occupational dysfunction. Also, there was self-

report of escalating urges resulting in the progression of sexual acts from touching to performing fellatio on 6 victims within 3 months.

4 Addressing me on sentence, the learned DPP submitted that the classical principles of sentencing may be divided into four broad categories: deterrence, retribution, prevention and rehabilitation: *R v James Henry Sargeant* (1974) 60 Cr App R 74 ("*R v Sargeant*"), a case in which the appellant was sentenced to 2 years' imprisonment for an affray. In the present case before me, the DPP submitted that the sentencing principles of deterrence (both general and specific), prevention and retribution ought to figure prominently and unmistakably in the sentencing equation in order to appropriately reflect the gravity of the offences perpetuated. Before me, the DPP submitted:

> ... the principle of deterrence dictates that the length of the custodial sentence imposed cannot be an insubstantial one in order to drive home the message to other like-minded persons that sexual offences perpetrated on young, vulnerable victims will not be tolerated and will be perennially viewed with grave and unrelenting disapprobation.

Again, after citing Lawton LJ in *R v Sargeant*, the learned DPP then referred to retributive justice and submitted that:

> ... the sentencing principle of retribution implores this Honourable Court to impose on the Accused a significant custodial term commensurate with the gravity of the offences in question, taking into account the aggravating features.

5 That case did not support any contention that deterrent principles and retributive principles can be applied at once in the same case. This was what Lawton LJ actually held at 77:

> What ought the proper penalty to be? We have thought it necessary not only to analyse the facts, but to apply to those facts the classical principles of sentencing. Those classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.

Reading Lawton LJ's judgment, it is obvious that he regarded retributive principles and deterrent principles separately. The learned Lord Justice did not hold that the court could or ought to mix deterrent and retributive principles into a potpourri, send the offender into prison and throw the key away. Indeed, Lawton LJ dealt with deterrent principles and retributive principles separately. He first considered the retributive principle and a lengthy custodial sentence based on that principle, and held (at 77) that "although society expects the courts to impose punishment for violence which really hurts, it does not expect the courts to go on hurting for a long time." He then went on to consider the deterrent principle and he was of the view (at 77) that the trial judge had "probably passed this sentence as a deterrent one." The learned appeal judge then considered the two aspects of deterrence – "deterrence of the offender and the deterrence of likely offenders" (at 77). The result of that appeal and the facts of that case are not relevant here, but this was what Lawton LJ had to say about deterrent sentences at 77:

> Experience has shown over the years that deterrence of the offender is not a very useful approach, because those who have their wits about them usually find the closing of the prison gates an experience which they do not want again. If they do not learn that lesson, there is likely to be a high degree of recidivism anyway. So far as deterrence of others is concerned, it is the experience of the courts that deterrent sentences are of little value in respect of offences

which are committed on the spur of the moment, either in hot blood or in drink or both. Deterrent sentences may very well be of considerable value where crime is premeditated. Burglars, robbers, and users of firearms and weapons may very well be put off by deterrent sentences. We think it unlikely that deterrence would be of any value in this case.

6 I need only add a brief point regarding the difference between retributive and deterrent principles in sentencing. Retributive justice is based on the principle that the punishment must fit the crime. That principle requires, among other things, that the correct accused has been charged for the correct offence before the court would begin to determine what punishment is just. It follows that in such a case, the seriousness of the offence and the mitigating factors are important and must be considered in order to determine the appropriate punishment. Hence, an offender who convinces the court that he is repentant and unlikely to reoffend will deserve a lighter sentence than one who is unrepentant and likely to reoffend. A deterrent sentence is thus inappropriate to do justice in the former. A deterrent sentence might coincide with a lengthy sentence based on retributive principles in the latter but the reasoning and basis are not the same. More explicitly, the court may impose a deterrent sentence on an accused who falls into the former category (and thus on the merits of his case, deserves a lower sentence) yet impose a lengthy deterrent sentence in the hope that it will discourage likely offenders.

7 The management of sexual offences and offenders is an extremely complex matter. No one judgment can adequately discuss the myriad issues of such a wide-ranging matter. Not every sexual offence has the same aetiology and not every offender, and even the victim of the offence, can be similarly compared. In some cases, the offender might have been affected by a psychological problem. In some of those cases, the psychological problem can be corrected. In this case, Dr Chan was of the view that the accused does suffer from a psychological problem which could be treated. However, she was of the view that until it is treated, there is a risk of offending. There is no report as to how such offenders would be given medical and psychological treatment, or what treatment is proposed, and how long such treatment would take. All these are important factors because the courts are very much concerned about sex offenders reoffending when they are released. It is preferable to have a shorter sentence if there is a strong likelihood of a successful treatment so that the offender can re-integrate into society. A sex offender who is not cured and not re-integrated poses a high risk of reoffending.

8 In the present case, the accused is very young and thus, without treatment, the only way to ensure that society is safe is to keep him in prison until he is old and grey, but that is hardly a just punishment. The courts have consistently meted out sentences of between eight to 12 years for the offences for which this accused was charged. I thus sentenced the accused to 10 years' imprisonment and 12 strokes of the cane in respect of the first charge, and nine years' imprisonment and 12 strokes of the cane each in respect of the second and third charges. Given the requirement by law that where an accused has been convicted of three similar offences in the same proceedings two of the sentences must be concurrent, the total length of imprisonment was 19 years because I ordered the sentences of imprisonment for the first and second charges to run concurrently and that of the third charge to run consecutively to that of the first and second charges. The maximum number of strokes of the cane is, by law, 24. Had I been satisfied that the danger of reoffending was low in this case, that is, there was a strong treatment regime and sound re-integration protocol, an overall sentence of about eight years might have been an appropriate and sufficient sentence.