IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 43

Criminal Appeal No 60 of 2017

Between

MUHAMMAD SUTARNO BIN NASIR

… *Appellant*

And

PUBLIC PROSECUTOR

… *Respondent*

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing]
[Criminal Procedure and Sentencing] — [Sentencing] — [Totality principle]
[Criminal Procedure and Sentencing] — [Sentencing] — [Rule against double counting]

Muhammad Sutarno bin Nasir
v
Public Prosecutor

[2018] SGCA 43

Court of Appeal — Criminal Appeal No 60 of 2017
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Quentin Loh J
30 July 2018

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

1 This is an appeal against the sentence imposed by the High Court on the appellant, who pleaded guilty to three charges: (a) aggravated rape punishable under s 375(3)(*a*)(i) of the Penal Code (Cap 224, 2008 Rev Ed); (b) house-breaking by night with theft punishable under s 457 of the Penal Code; and (c) possession of diamorphine in contravention of s 8(*a*) and punishable under s 33(1) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). The appellant admitted to breaking into the home of a 27-year-old female ("the victim") at night, punching her several times and raping her, and stealing items from her home. He also admitted to having ownership and possession of a straw of diamorphine, which had been recovered from a café that he had broken into on another occasion.

2 The High Court Judge ("the Judge") sentenced the appellant to an aggregate sentence of 21 years' imprisonment and 18 strokes of the cane. This comprised three consecutive sentences: 16 years and 18 strokes for the rape

offence, three years for the house-breaking offence, and two years for the drug possession offence. The appellant contends that his overall sentence is manifestly excessive and that the three sentences should run concurrently instead of consecutively.

Facts

3 The relevant facts are set out in the statement of facts which the appellant admitted to.

4 On 24 July 2016 at about 5am, the appellant was walking in the vicinity of the victim's housing estate intending to break into a house to steal items. He climbed through an open window on the second floor of a walk-up shop-house unit in which the victim and her grandmother resided.

5 After ransacking the living room, the appellant entered the victim's bedroom where he saw her sleeping. He covered the victim's mouth and squeezed her neck to prevent her from screaming. He then punched her in the face several times to silence and immobilise her. The victim pretended to have fainted in order to avoid being physically assaulted further. The appellant removed the victim's shorts and underwear and penetrated her vagina with his penis for about two minutes. The appellant then left the unit with the victim's mobile phone as well as the victim's and her grandmother's handbags.

6 The police and paramedics were called and the victim was brought to the hospital. The victim's medical report stated that she was distressed, dishevelled and vomiting. She had three bruises of about 1–2cm in length on her cheeks, chest and arm, a 2cm abrasion on her neck, a contusion on her lip, and experienced tenderness in her back.

7 The appellant was arrested later that morning at 10.20 am. The police found one glass bottle and two glass tubes in his pocket. The appellant admitted to ownership and possession of these items, which are utensils used for drug consumption.

8 The appellant's DNA was found on the victim's endocervical swab, and his semen and DNA were found on the victim's underwear. The victim's blood and DNA were detected on the inter-digital area of the appellant's left hand. The victim's DNA was also found on his penile swab.

9 The victim was subsequently referred to the Institute of Mental Health for a psychiatric assessment. She told her psychiatrist that she was extremely terrified in the immediate aftermath of the rape and that her fiancé broke up with her because she was raped. She reported struggling with thoughts of self-blame. The psychiatrist found that she was suffering from post-traumatic stress disorder with prominent intrusive memories of the event.

10 The statement of facts further relates an earlier incident which took place in the morning of 27 June 2016 when a manager of a café discovered that the café had been broken into. A small sling bag was found on the premises and it contained the appellant's expired passport as well as a straw containing not less than 0.15g of white granular powdery substance later analysed and found to contain diamorphine. The appellant admitted to having ownership and possession of the bag and its contents.

11 In the proceedings below, the appellant pleaded guilty to the charges of house-breaking by night with theft and aggravated rape in respect of his actions on 24 July 2016. He also pleaded guilty to the drug possession charge in respect of the diamorphine which was found on 27 June 2016.

12 The appellant agreed to the following five charges being taken into consideration for the purposes of sentencing ("TIC charges"):

(a) house-breaking by night with theft, punishable under s 457 of the Penal Code, by breaking a glass panel on a door of a post office to gain entry into a building used for the custody of property to commit theft of a jacket on 26 June 2016;

(b) house-breaking by night, punishable under s 456 of the Penal Code, by prying open the kitchen door of a café to gain entry into a building used for the custody of property on 26 June 2016;

(c) consumption of morphine in contravention of s 8(*b*)(ii) and punishable under s 33(1) of the MDA, on or before 24 July 2016;

(d) consumption of methamphetamine in contravention of s 8(*b*)(ii) and punishable under s 33(1) of the MDA, on or before 24 July 2016; and

(e) possession of utensils intended for the consumption of diamorphine in contravention of s 9 and punishable under s 33(1) of the MDA, on 24 July 2016.

Our decision

Sentence for the rape charge

13 We begin by considering the sentence imposed on the appellant for aggravated rape, which was the most serious charge against him. The sentencing framework for rape offences was laid down by this Court in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Terence Ng*"). Under this framework, cases fall within one of three sentencing bands depending on the number of offence-specific aggravating factors present.

14 The present facts place this case within Band 2, which comprises cases of a higher level of seriousness usually involving two or more offence-specific aggravating factors: *Terence Ng* at [53]. First, the appellant committed violence beyond what was necessary for the commission of the rape by punching and strangling the victim. Second, he caused the victim to suffer severe harm in the form of psychological trauma and physical injuries. As the Judge noted, the victim's medical reports and CT scans showed lesions suggestive of acute bleeding in the brain as a result of the appellant's repeated assault on her face. We observed in *Terence Ng* at [53] that "[c]ases which contain any of the statutory aggravating factors and prosecuted under s 375(3) of the Penal Code will almost invariably fall within this band", and the charge here was indeed brought under s 375(3)(*a*)(i) for "voluntarily causing hurt to the [victim]" in order to commit the offence. This case therefore falls within Band 2 of the *Terence Ng* framework, which suggests a sentence of 13 to 17 years' imprisonment and 12 strokes of the cane as a starting point.

15 The Prosecution submits that the appellant's use of violence and the psychological injuries suffered by the victim place this case at the upper-middle range of Band 2, which involves "offences marked by serious violence and those which take place over an extended period of time and which leave the victims with serious and long lasting injuries": *Terence Ng* at [53]. Relative to the present case, several of the cases cited in *Terence Ng* as examples within the middle to upper reaches of Band 2 involved more serious violence or aggravating factors such as gang rape or abuse of a position of trust: at [54], citing *Public Prosecutor v Ravindran Annamalai* [2013] SGHC 77, *Public Prosecutor v BNN* [2014] SGHC 7 and *Public Prosecutor v Mohamed Fadzli bin Abdul Rahim* [2008] SGHC 177. In our judgment, the case before us falls in the middle range of Band 2. We do, however, accept that an uplift to 18 strokes

of the cane from the starting point of 12 strokes for Band 2 cases is appropriate because of the violence used by the appellant and the severe consequences on the victim.

16 The next step is for the court to have regard to the offender-specific factors. The Prosecution submits that the appellant's plea of guilt is of limited mitigating value because of the overwhelming physical evidence against him. In our view, this ignores the point we made in *Chang Kar Meng v Public Prosecutor* [2017] 2 SLR 68 ("*Chang Kar Meng*") at [48] that offenders who plead guilty to sexual offences, even in cases where the evidence against them is overwhelming, ought ordinarily to be given at least some credit for having spared the victim the trauma of having to relive the experience in court and being cross-examined on it. Considering the public interest in encouraging offenders to plead guilty in such circumstances, some sentencing discount should be given for the appellant's plea of guilt, though we accept, as noted in *Terence Ng* at [71], that the precise weight to be placed on this will depend on the facts.

17 Although it is well-established that the presence of relevant antecedents and TIC charges can generally constitute offender-specific aggravating factors, the appellant's antecedents and TIC charges should not have featured in this analysis since none of them were in fact relevant to the rape charge. As these antecedents and TIC charges related to drug and property-related offences, it would have been more appropriate to consider them only in respect of the house-breaking and drug possession charges. We also emphasise the point recently made in *Public Prosecutor v Raveen Balakrishnan* [2018] SGHC 148 ("*Raveen*") at [87] that "if a factor has been fully taken into account at one stage in the sentencing analysis, it should generally not feature at another stage." The same TIC charges should not be relied upon as a basis for increasing the

sentences for more than one charge, otherwise this could amount to double counting.

18 For these reasons, we consider that the correct sentence for the rape charge should have been 14 years and 18 strokes of the cane, which is a reduction of two years from the sentence meted out by the court below.

Sentence for the house-breaking charge

19 Next, we turn to the sentence for the main house-breaking charge. Having regard to the two TIC charges for house-breaking, we think the sentence of three years' imprisonment was correct.

20 This puts the combined sentence for the rape and house-breaking charges at 17 years' imprisonment and 18 strokes of the cane. This is not out of line with the precedent cases involving rape and robbery such as *Chang Kar Meng*: see [76].

Sentence for the drug possession charge

21 Finally, we consider the sentence for the drug possession charge. As the appellant was previously convicted for possession of a controlled drug, the mandatory minimum punishment under the MDA is two years' imprisonment: s 8(*a*) read with s 33(1) and the Second Schedule to the MDA. In view of the appellant's other drug-related antecedents and the three drug-related TIC charges, we think the sentence should be increased from two years to three years' imprisonment.

Aggregate sentence

22 Having determined the individual sentence for each charge, the next stage is for the court to consider whether they should run consecutively or concurrently. In our judgment, the Judge was correct in ordering all three sentences to run consecutively. First, s 307(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) provides that where a person is sentenced to imprisonment for at least three distinct offences, the court must order the sentences for at least two offences to run consecutively. Second, the possession charge relates to a separate transaction which took place about a month prior to the rape and house-breaking offences. Third, although the latter two offences were temporally proximate, the offences of rape and house-breaking violate different legally-protected interests and should not be regarded as being part of a single transaction: *Chang Kar Meng* at [62]; *Mohamed Shouffee bin Adam v PP* [2014] 2 SLR 998 ("*Shouffee*") at [33]. Distinct offences should be punished separately with consecutive sentences so as to ensure that each legally-protected interest is properly vindicated. Otherwise, the imposition of concurrent sentences for unrelated offences would result in the perverse and unjust outcome of the offender not having to bear any real consequences for the further offending: *Raveen* at [41]–[46].

23 At this stage of the analysis, the court must consider whether the cumulative sentence is proportionate to the overall criminality of the offences by applying the totality principle. The principle has two limbs: first, to examine whether the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences committed, and second, to examine whether the effect of the aggregate sentence on the offender is crushing and not in keeping with his past record and future prospects. If an aggregate sentence is considered excessive, the court may opt for a different

combination of sentences to run consecutively or adjust the individual sentences: *Shouffee* at [58]–[59]; *Raveen* at [73].

24 The sentencing court must also bear in mind the aggregation principle referred to in *Raveen* at [77]–[80], which is that the totality principle should ordinarily apply with greater force in cases that involve longer aggregate sentences. The aggregation principle recognises the fact that aggregation in such cases may result in a compounding effect that bears more than a linear relation to the overall criminality of the case, and that longer sentences may induce feelings of hopelessness that destroy the offender's prospects of rehabilitation and reintegration. In view of the length of the appellant's overall sentence, we reduce the sentence for the possession charge back to the statutorily-prescribed minimum of two years' imprisonment.

25 For these reasons, we allow the appeal and reduce the appellant's aggregate sentence to 19 years' imprisonment and 18 strokes of the cane.

Sundaresh Menon	Andrew Phang Boon Leong	Quentin Loh
Chief Justice	Judge of Appeal	Judge

The appellant in person; and
Charlene Tay Chia and Nicholas Lai (Attorney-General's Chambers)
for the respondent.