

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 93

Criminal Reference No 2 of 2019

Between

Public Prosecutor

... Applicant

And

Bong Sim Swan, Suzanna

... Respondent

JUDGMENT

[Criminal Procedure and Sentencing] — [Criminal references]
[Criminal Procedure and Sentencing] — [Sentencing] — [Benchmark
sentences] — [Domestic maid abuse]

This judgment is subject to final editorial corrections to be approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Public Prosecutor
v
Bong Sim Swan, Suzanna

[2020] SGCA 93

Court of Appeal — Criminal Reference No 2 of 2019
Sundares Menon CJ, Andrew Phang Boon Leong JA, Tay Yong Kwang JA
10 June 2020; 21 August 2020

23 September 2020

Judgment reserved.

Tay Yong Kwang JA (delivering the judgment of the court):

1 This is our decision on the consequential orders following our judgment in *Public Prosecutor v Bong Sim Swan, Suzanna* [2020] SGCA 82 (“the earlier judgment”), which was the Prosecution’s application to refer three questions of law to the Court of Appeal. The respondent, Bong Sim Swan, Suzanna (“the Respondent”), was convicted by the trial judge (“the Trial Judge”) on one charge of voluntarily causing hurt to a domestic worker (“the Victim”) in her employment and was sentenced to 20 months’ imprisonment and ordered to pay compensation of \$38,540.40 to the domestic worker. This was reduced on appeal to a sentence of eight months’ imprisonment and compensation of \$1,000 by the High Court judge (“the Judge”).

2 In the earlier judgment, we declined to answer the first question posed by the Prosecution as we did not consider it necessary to do so. We answered the other two questions in the following manner:

(a) Question 2: In applying the sentencing framework for a maid abuse offence punishable under s 323 read with s 73 of the Penal Code set out in *Tay Wee Kiat and another v Public Prosecutor and another appeal* [2018] 4 SLR 1315 (“*Tay Wee Kiat*”), should the court take into account psychological harm that arises from a sustained pattern of abuse, *ie*, multiple incidents of the offender causing hurt to the domestic maid, even though separate charges were not preferred for the other incidents of abuse?

Answer: Yes, there is no requirement that the psychological harm must be proved through a source independent of the offender’s own previous acts even though those acts could also amount to other offences.

(b) Question 3: Does the fact that an offender knew, or was aware of the likelihood, of a victim’s pre-existing injury or particular vulnerability that arose from previous proved incidents which could have been but were not made the subject of separate charges, when he assaulted the victim on that particular part of the body constitute an aggravating factor in sentencing?

Answer: Yes, the offender’s knowledge or awareness is relevant when considering the level of harm, both physical and psychological, suffered by the victim and the culpability of the offender.

3 At [91] of the earlier judgment, we directed the parties to submit on the consequential orders in respect of the imprisonment term and the compensation order in the light of our answers to the questions set out above. The parties have done so.

4 The Prosecution submits that the sentence of imprisonment should be enhanced from eight months to 18 months and the compensation sum should be increased from \$1,000 to \$3,000 for the following reasons:

(a) Applying the framework set out in *Tay Wee Kiat*, the psychological harm should be categorised as “more serious psychological harm”. The Judge’s categorisation of “less serious psychological harm” was predicated upon a fundamental misapprehension of law as he failed to consider that the Respondent had engaged in a sustained pattern of abusive behaviour.

(b) The indicative sentencing range was six to 18 months’ imprisonment and the mid-point of 12 months’ imprisonment was an appropriate starting point.

(c) An uplift of at least six months’ imprisonment was warranted to account for the aggravating factors, which were the use of a weapon (a glass bottle containing medicated oil) and the Respondent’s awareness of the Victim’s worsening eyesight.

(d) Alternatively, the Prosecution submits that if the court does not disturb the categorisation of psychological harm, an enhancement to 18 months’ imprisonment is still warranted on the ground of culpability.

(e) The Prosecution also submits that the Judge failed to account for psychological harm in the compensation order and the sum should be increased to \$3,000.

5 On the other hand, the Respondent submits that there should not be any increase in either the imprisonment term or the compensation sum:

- (a) The answers to the questions did not affect the categorisation of psychological harm as this was a finding of fact.
- (b) The sentence of eight months' imprisonment was proportionate in the light of all the relevant facts. These were:
 - (i) that the Judge's indicative sentence of five months' imprisonment was higher than it should have been;
 - (ii) that it was unfair to enhance an indicative sentence in a manner that sentenced a person for uncharged offences; and
 - (iii) that the Trial Judge had doubts about the Victim's account of the abuse.
- (c) In relation to the compensation order, the Respondent submits that there was no evidence of any medical expenses incurred or any loss of earnings suffered by the Victim as a result of the bruise and, considering the Respondent's financial status, a compensation sum of more than \$1,000 would be oppressive to her.

6 In answering Questions 2 and 3 raised by the Prosecution, we observed at [54] and [57] of the earlier judgment that the questions arose from the principle propounded by the Judge that the Respondent's awareness of the Victim's worsening eyesight had to be established independently of any potentially criminal conduct for which the Respondent was not charged. As a result, the Judge excluded consideration of the fact that the Respondent knew about the Victim's vulnerability because she was the very cause of the Victim's condition, a fact which would have enhanced the Respondent's culpability.

7 Step 2 of the *Tay Wee Kiat* framework requires the sentencing court to determine the extent of physical and psychological harm to derive an indicative starting sentence. The Prosecution concedes that the extent of physical harm is not within our remit in this criminal reference. As for psychological harm, both the Trial Judge and the Judge held that this was a case of “less serious psychological harm”. The Trial Judge did so even though she proceeded correctly by taking into account the fact that the Respondent knew about the Victim’s previous injuries because she was the person responsible for them. While we explained at [81] to [83] of the earlier judgment that we were puzzled by that finding, we emphasised that this was still a finding of fact that was not within the province of a criminal reference on questions of law. For that reason, we do not think we can change the categorisation of psychological harm with its indicative starting range of three to six months’ imprisonment.

8 However, we explained at [88] of the earlier judgment that the fact that the Respondent knew about the Victim’s particular vulnerability because she was the person responsible for it meant that the Respondent’s level of culpability should be at a much higher level than if her awareness of the Victim’s worsening eyesight had come solely from what the Victim told her. We also observed at [78] that “[c]oncomitant with psychological harm suffered by a victim is the level of culpability exhibited by an offender”.

9 In our view, the indicative starting range should be given a significant uplift to reflect the Respondent’s high culpability. Bearing in mind the Respondent’s use of the glass bottle, the entire relationship between the Respondent and the Victim and the persistent abuse culminating in the incident on 17 May 2015, we think that the sentence of eight months’ imprisonment should be enhanced to 14 months’ imprisonment to reflect more accurately the true level of the Respondent’s culpability.

10 On compensation, however, we decline to vary the order made by the Judge. Both the Trial Judge and the Judge agreed that there was psychological harm and on the categorisation of the psychological harm. However, it is not clear how they chose to compensate for it. The Trial Judge had awarded compensation of \$10,000 for pain and suffering without identifying the proportions for physical and psychological harm. The Judge reduced this on appeal to \$1,000, also without identifying the proportions for each type of harm. Bearing in mind their view that the psychological harm was in the “less serious” category (a view to which we have expressed our reservation), it is highly likely that their compensation awards focused on the physical harm. That would explain why the Judge reduced the compensation amount for pain and suffering by 90% when he held that the only injury proved to have been caused by the incident in question was the bruise. A failure to compensate for psychological harm was not the issue before us in this criminal reference and if there was an error in not providing any compensation or sufficient compensation, that would not have arisen from the error of law that we identified.

11 As the High Court explained in *Tay Wee Kiat and another v Public Prosecutor and another appeal* [2018] 5 SLR 438 at [7], a compensation order does not form part of the sentence imposed on the offender and its purpose is not to punish. The Respondent’s increased culpability has already been factored into the enhanced imprisonment term and, on the facts here, it could have no bearing on the compensation sum.

12 For the reasons set out above, we enhance the sentence of imprisonment from eight months' imprisonment to 14 months' imprisonment. However, we do not vary the compensation order made by the Judge.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Judge of Appeal

Tay Yong Kwang
Judge of Appeal

Mohamed Faizal SC, Li Yihong and Sheryl Yeo (Attorney-General's
Chambers) for the applicant;
Sui Yi Siong, William Khoo Wei Ming and Flora Koh Swee Huang
(Eversheds Harry Elias LLP)
for the respondent.
