IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 32

Criminal Appeal No 35 of 2017

Between

PUBLIC PROSECUTOR

… Appellant

And

CHUA HOCK LEONG

… Respondent

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Fellatio] — [s 376(1) of the Penal Code (Cap 224, 2008 Rev Ed)]

[Criminal Procedure and Sentencing] — [Sentencing] — [Aggravating factors]

[Criminal Procedure and Sentencing] — [Sentencing] — [Principles] — [Discretion to impose imprisonment in lieu of caning]

Public Prosecutor
v
Chua Hock Leong

[2018] SGCA 32

Court of Appeal — Criminal Appeal No 35 of 2017
Andrew Phang Boon Leong JA, Judith Prakash JA and Tay Yong Kwang JA
26 June 2018

Andrew Phang Boon Leong JA (delivering the judgment of the court *ex tempore*):

1 This is an appeal by the Prosecution against the mandatory minimum sentence of eight years' imprisonment imposed on Chua Hock Leong ("the Respondent") for performing fellatio on a person under 14 years of age, an offence under s 376(1)(*b*) of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code") and punishable under s 376(4)(*b*).

2 The Respondent was charged with fellating a young boy, who was 12 years of age ("the Victim"), without the Victim's consent, in a male toilet within Tampines Eco Park ("the park") on 27 January 2016. The Respondent claimed trial to the charge and was convicted in the High Court by the trial judge ("the Judge") on 21 July 2017. No appeal has been filed against the conviction.

3 Before the Judge, the Prosecution submitted that the appropriate sentence would be at least 12 years' imprisonment and a further 24 weeks' imprisonment in lieu of the mandatory 12 strokes of the cane (the Respondent could not be caned in view of his age). The Defence submitted that the mandatory minimum sentence of eight years' imprisonment would be adequate. The Judge imposed a sentence of eight years' imprisonment. No written grounds of decision were issued in respect of both conviction and sentence, with the Judge certifying on 24 July 2017 that the decision of the court was as recorded in the transcript of 21 July 2017. In that transcript, the Judge delivered his oral decision on sentence in the following paragraph, as follows:

> Now, the circumstances of the offence depends on the case to case [*sic*] and the nature of each offence and each charge. Here, I have taken into account the place, the nature and the evidence of the offence as testified by the …[V]ictim and yourself and I am taking into account that this is the first offence by you, a man aged 63, having lived hitherto a life unblemished by criminal record. I have taken into account that all sexual offences will have varying degrees of impact on the victim and the age of the [V]ictim and his statements as to how it has affected him or her are therefore relevant and I have taken into account all of that in this case, including the observations I have made from the testimony of the boy himself in Court and what he has said and the way he has testified.
>
> In the circumstances, I am therefore imposing a sentence of imprisonment of 8 years with effect from today.

4 With respect, we disagree with the Judge that the mandatory minimum sentence of eight years' imprisonment was appropriate.

5 First, sentences of at least ten years' imprisonment have been imposed in the past in cases which had broadly similar facts to those of the present case. For instance, in *Public Prosecutor v Selvaraju Jayaselvam* (Criminal Case No 14 of 2009, unreported), the accused was a 26-year old male and the victim was an eight-year-old boy. The accused had been dispatched to perform repair

works at the victim's school when he chanced upon the victim. The accused then followed the victim to the toilet and asked the victim to check if the flushing systems in the cubicles were functioning properly. The victim went into one of the cubicles and tested the flush. The accused then entered the same cubicle and fellated the victim by sucking on his penis without his consent. The accused *pleaded guilty* to one charge under s 376(1)(*b*), punishable under s 376(4)(*b*) of the Penal Code. Another charge for attempting to penetrate the victim's mouth with his penis was taken into consideration for the purposes of sentencing. No other notable aggravating factor was present. The accused, who was a first-time offender, was sentenced to ten years' imprisonment and 12 strokes of the cane. We should also mention that just like the present case, there was only one victim involved, there was no prior existing relationship between the victim and the offender and there was only a single instance of fellatio, although there was another charge taken into consideration. As far as precedent goes, it generally follows that given that the Respondent here had *claimed trial*, the sentence, if any, ought to be higher than ten years' imprisonment.

6 Second, in line with the objective of utilising "the full spectrum of sentences" enacted by Parliament so as to avoid "a clustering of sentencing outcomes" (see *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Terence Ng*") at [14]), the mandatory minimum sentence should be reserved for offenders who have strong mitigating factors in their favour and where there are no aggravating factors present. Given that there are no mitigating factors in the present case (the Respondent claimed trial to the offence, thereby placing the Victim in the invidious position of recounting an event that he would surely want to forget), it follows that the sentence cannot be the mandatory minimum

sentence. On this basis alone, the sentence imposed by the Judge is clearly wrong in principle.

7 Third, we are of the view that there *were*, in fact, *aggravating factors* present in this case that justified a sentence higher than the mandatory minimum sentence.

8 Whilst we disagree with the Prosecution that there was premeditation or abuse of trust in the present case, we find that the harm caused to the Victim was an aggravating factor. Even though the Victim was not diagnosed to be suffering from any post-traumatic stress disorder, the offence had caused psychological harm to the Victim. The victim impact statement showed that the Victim was so adversely affected by the incident that he became emotionally and socially withdrawn. He no longer went out of his house unaccompanied. Unlike in the past, he often wished to be alone and found social interaction difficult to enjoy. He also did not wish to go back to the park again but had no choice but to go there when asked to do so by his friends as he was unable to tell them what had happened. Such visits caused him distress. As a result of the incident, he also became very afraid of talking to elderly men. In short, the Victim's life has been damaged significantly as a result of the Respondent's actions, a factor that must be taken into account in sentencing (see *Terence Ng* at [44(h)]).

9 We also find that in claiming trial to the offence, the Respondent had displayed an "evident lack of remorse" (see *Terence Ng* at [64(c)]). This was clearly apparent to us from the manner in which he chose to conduct his defence at trial. He portrayed the Victim as a sexual predator who would ask an elderly stranger whether he wanted to "play" (*ie*, have sex) and who could even suggest going to a hotel to do it. The

Respondent also testified that the Victim kept touching his own private parts and the Victim's penis was erect beneath his shorts, thereby implying that the Victim was highly experienced sexually. The Respondent also claimed that the Victim had touched and talked about the Respondent's "sperm" after the Respondent had masturbated. His counsel also cross-examined the Victim on whether he watched pornography.

10 For completeness, we note that, during the course of its submissions, the Prosecution had referred to the benchmarks set by us in *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 ("*Pram Nair*") for the offence of digital penetration using a finger under s 376(2)(*a*) of the Penal Code. After some consideration, we do not find the present occasion to be an appropriate case to deal with the applicability or otherwise of the benchmarks set in *Pram Nair* to offences involving fellatio under s 376(1) of the Penal Code. Since the present appeal can be decided without the application of any benchmarks but instead, as evident from our reasoning above, on an application of first principles, we see no need to set benchmarks for fellatio offences in this case and prefer to leave the question to be addressed on a more appropriate occasion.

11 For these reasons, we find that an appropriate sentence in this case ought to be at least **ten years'** and **six months' imprisonment**.

12 We turn now to consider whether imprisonment in lieu of caning should be imposed on the Respondent. Since the offence is punishable under s 376(4)(*b*) of the Penal Code, 12 strokes of the cane is mandated by law. Given the Respondent's age, however, no caning can be imposed on him (see s 325(1)(*b*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC")). In lieu of caning, the Prosecution submitted in the proceedings below that an additional imprisonment term

of 24 weeks should be imposed. The Judge declined to exercise his discretion to do so under s 325(2) of the CPC. With respect, we are of the view that the Judge erred in not imposing imprisonment in lieu of caning on the Respondent. In our view, the Judge failed to consider the objective of general deterrence in relation to adults over the age of 50 who might otherwise commit such sexual offences against minors.

13 A three-member coram of the High Court, hearing a Magistrate's Appeal in *Amin bin Abdullah v Public Prosecutor* [2017] 5 SLR 904 ("*Amin*") held that enhancement of the sentence in lieu of caning is warranted, amongst other things, where there is a need to compensate for the *deterrent* effect of caning that was lost by reason of the exemption (at [59]). On this factor, Sundaresh Menon CJ stated as follows in *Amin* (at [66]):

> … the court should consider whether an additional term of imprisonment is *needed* to replace the lost deterrent effect of caning, **having regard to *why* the offender was exempted from caning**. We are here addressing, in particular, the sentencing **objective of general deterrence which looks to deter other like-minded individuals**, who are similarly situated as the offender before the court, from engaging in similar conduct. The key question is whether such potential offenders would have known before committing the offence that by reason of their own circumstances, they would be exempted from caning. If so, then an additional term of imprisonment in lieu of caning may be more readily seen as necessary or appropriate in order to compensate for the general deterrent effect lost **because the offender knows he or she will be exempted from caning**. [emphasis in italics in original; emphasis added in bold]

14 In this case, the Respondent committed the offence when he was 61 years old – most offenders of a similar age would know that they cannot be caned on account of their age (see also *Amin* at [67]). Further, we are of the view that an additional imprisonment term is necessary here to underscore the principle of *general deterrence*. The Respondent, who was at least five times

older than the Victim in age and whom the Victim had addressed as "Uncle", was in a prime position to advise the Victim not to play truant from school. Instead of doing that, he had exploited the unsuspecting minor by befriending him in a public place and then forcing himself upon the Victim to satisfy his own depraved sexual desires. The offence committed by the Respondent offends "the sensibilities of the general public" and a "deterrent sentence is therefore necessary and appropriate to quell public disquiet and the unease engendered by such crimes" (see *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 at [25(c)]).

15 For these reasons and in line with the indicative guidelines for imprisonment terms in lieu of 12 strokes of the cane stated in *Amin* at [90], we find it appropriate to impose an additional imprisonment term of six months on the Respondent.

16 In the circumstances, we allow the appeal. We enhance the Respondent's sentence to ten years and six months' imprisonment with an additional imprisonment term of six months in lieu of caning, making a total of 11 years' imprisonment.

Andrew Phang Boon Leong	Judith Prakash	Tay Yong Kwang
Judge of Appeal	Judge of Appeal	Judge of Appeal

Terence Chua and Nicholas Lai Yi Shin (Attorney-General's Chambers) for the appellant;
Narayanan Vijay Kumar (Vijay & Co) and Mathew Kurian (Regent Law LLC) for the respondent.
