IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 106

Criminal Appeal No 11 of 2021

Between

Muhammad Alif Bin Ab Rahim

… *Appellant*

And

Public Prosecutor

… *Respondent*

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Principles]

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v
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17 November 2021

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

Introduction

1 This is an appeal by Muhammad Alif bin Ab Rahim (the "appellant") against the High Court Judge's (the "Judge") decision in *Public Prosecutor v Muhammad Alif bin Ab Rahim* [2021] SGHC 115 ("GD"). The appellant pleaded guilty to three charges, one for aggravated rape under s 375(1)(*a*) punishable under s 375(3)(*b*) of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") and two for aggravated sexual assault by penetration ("SAP") under s 376(1)(*a*) punishable under s 376(4)(*b*) of the Penal Code. The provisions of the Penal Code relevant to the sexual offences in this case are those applicable at the time when the offences were committed in 2017, prior to the legislative amendments made by the Criminal Law Reform Act 2019 (No 15 of 2019). The same applies to the subsequent references to the Penal Code in this judgment.

Seven other charges were taken into consideration for sentencing ("TIC"), four of which relate to sexual assault on the same victim. The Judge sentenced the appellant to an aggregate sentence of 28 years' imprisonment and 28 strokes of the cane. Caning was limited to the maximum permitted of 24 strokes.

2 Before the hearing, we also appointed a young *amicus curiae*, Mr Hiew E-Wen Joshua ("Mr Hiew"), to address the issue of whether the totality principle should bear on the aggregate sentence that was imposed in this case, and if so, how that should be done.

Facts

3 The facts are summarised from the Statement of Facts ("SOF") which the appellant admitted to in the hearing below. At the time of the offences, the victim was a 13-year-old secondary student (the "Victim"), and the appellant was a 32-year-old male. The Victim was acquainted with the appellant through one of her friends, Mr H, and addressed the appellant as "Uncle". Mr H's mother, Ms Y, was then in a romantic relationship with the appellant.

4 On 24 October 2017, the Victim was walking to Kallang Riverside Park ("the Park") when she ran into the appellant, who suggested that they buy drinks and go to the Park to chat. The Victim trusted the appellant and followed him. They were sitting at the end of the jetty at the Park when the appellant suddenly leaned forward to kiss her. He sat on top of her at her hip area, pressing her down. He lifted her shirt and bra and kissed and licked her breasts (subject matter of the 2nd TIC charge for aggravated outrage of modesty).

5 The appellant forced open the Victim's mouth and poured alcohol in. When the Victim tried to run, he pushed her against the fence and stood in front of her such that she was hemmed in. He dragged her to the ground, licked her

vagina and penetrated her vagina with his finger (subject matter of the 3rd TIC charge for aggravated SAP).

6 Sometime between 9.01pm and 10.59pm, the appellant climbed on top of the Victim and held her wrists forcefully to press her down, causing the Victim to suffer a bruise. The appellant slapped her face when she resisted. He applied hair gel to his penis, inserted his penis into her vagina without her consent, and moved his penis in and out of her vagina (subject matter of the 1st proceeded charge for aggravated rape).

7 The appellant then lifted the Victim's legs and placed them on his shoulder. He penetrated the Victim's anus with his penis without her consent. He covered her mouth with his hands such that she was unable to shout for help, and also caused her to suffer abrasions on her back (subject matter of the 4th proceeded charge for aggravated SAP). Later, the appellant carried the Victim by the waist such that her knees and elbows were on the ground and penetrated her anus with his penis (subject matter of the 5th TIC charge for aggravated SAP).

8 The appellant then laid the Victim on her back and penetrated her vagina with his penis the second time (subject matter of the 6th TIC charge for aggravated rape). He then asked the Victim to suck his penis. When she refused, he forcefully opened her mouth and inserted his penis into her mouth without her consent (subject matter of the 7th proceeded charge for aggravated SAP). The appellant later ejaculated on the Victim's bare chests and breasts. He did not use any condom or other form of protection.

9 Thereafter, he threatened the Victim not to tell anyone about the incident. The Victim crawled from the jetty to a grass patch near the toilet, and

sent voice messages to various persons, asking for help and informing them that she had been raped. The appellant returned on a bicycle and threatened her again not to tell anyone before leaving again. The Victim's aunt, Mr H and her friends went to the Park to look for the Victim and eventually located her. The Victim's grandmother also arrived at the Park subsequently.

10 Mr H asked his mother, Ms Y, to go to the Park, as the Victim had named the appellant as her rapist. When Ms Y asked the appellant if he had seen the Victim, the appellant denied having done so. The appellant and Ms Y then proceeded to the Park. The appellant was dressed in different clothes from the ones he had worn during the commission of the offences. The Victim again pointed out the appellant. The appellant denied raping the Victim and also threatened the Victim's grandmother, stating that he would find the Victim's family if anything happened to him. He fled the scene when he saw police officers approaching.

11 The appellant was subsequently found hiding in a wooden cupboard in the bedroom of Ms Y's home and placed under arrest. He gave a false statement that he was looking for Ms Y at the Park and had never met the Victim that night. A year later, the appellant gave a different version of events, claiming that the Victim had come onto him and requested for sex.

12 The SOF attached a report from KK Women and Children's Hospital dated 15 November 2017 by Dr Michelle Lim ("Dr Lim's Report"), as well as Child Guidance Reports pertaining to the Victim. The SOF also attached a psychiatric assessment report by Dr Tan Ming Yee Giles ("Dr Tan") of the Institute of Mental Health ("IMH Report") pertaining to the appellant. The SOF further summarised the probative DNA results from various case exhibits and body swabs sent to the Health Sciences Authority ("HSA") for forensic analysis.

Decision below

13 The Judge identified the following offence-specific factors (see the GD at [12]–[20]):

(a) The Victim was only 13 years of age when the offences were committed. However, the Judge noted that this consideration was already reflected in the charges, which were framed as aggravated forms of sexual assault.

(b) Serious harm was inflicted on the Victim as significant violence was used in the course of the sexual assaults. The Victim suffered various physical injuries, exhibited clear symptoms of trauma and had to undergo regular treatment to help her cope.

(c) The Prosecution further suggested that the appellant had deliberately inflicted special trauma on the Victim in committing repeated rape and penetrations of her anus and mouth, and subjecting her to a full panoply of penetrative activities.

(d) The appellant took advantage of the fact that the Victim was acquainted with him and exhibited significant opportunism in his conduct, although the Prosecution did not suggest that the offences were premeditated.

(e) The appellant took deliberate steps to conceal his offences.

(f) The appellant penetrated the Victim multiple times without using any protection.

14 On the basis of the above factors, the Judge agreed with the Prosecution that the charges for aggravated rape and aggravated SAP would fall minimally within the higher end of Band 2 of the sentencing frameworks laid down by this court in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 and *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 for rape and SAP respectively (see the GD at [21]). The Judge further agreed with the Prosecution that the appropriate indicative starting point sentences were 17 years' imprisonment and 18 strokes of the cane in respect of the charge for aggravated rape, and 15 years' imprisonment and 12 strokes of the cane in respect of the two charges for aggravated SAP (see the GD at [23]).

15 Turning to the offender-specific factors, the appellant was traced for multiple offences. In particular, when he was last imprisoned for various offences in August 2014, he had been convicted of a similar offence of SAP alongside an offence of snatch theft, with one charge of aggravated outrage of modesty taken into consideration. The appellant's offending in the present case revealed an escalation in offending conduct barely a year after he was released in September 2016. There were also four similar charges taken into consideration. Further, the appellant was unremorseful (see the GD at [25]–[29]).

16 The Judge disagreed with the appellant's submissions that he did not use excessive force calculated to cause serious harm or deliberately inflict special trauma on the Victim. The Judge found that the SOF spoke for itself in documenting the Victim's extensive physical and psychological injuries (see the GD at [32]).

17 The Judge noted that the appellant was assessed to have borderline intelligence and antisocial personality disorder but found that this did not impair

his ability to function as an ordinary member of society. More importantly, the appellant was clearly able to understand the nature and consequences of his conduct. He had "ample consciousness and presence of mind to deny the commission of the offences and change into a different set of clothes to evade detection". He also threatened the Victim and her grandmother to try to deter them from implicating him. Further, he did not have qualms fabricating different versions of events, including alleging that the Victim led him to engage in consensual sexual activity (see the GD at [34]–[35]).

18 The Judge gave the appellant a two-year reduction in sentence per proceeded charge to give him some credit for his plea of guilt, despite such plea only being entered on the first day of trial. The Judge considered that there were no other mitigating factors apart from his late plea of guilt. A substantial sentence was necessary given that the appellant had reoffended soon after his SAP offence, and there has also been a serious escalation in his offending conduct (see the GD at [37]–[38]).

19 The Judge therefore sentenced him to 15 years' imprisonment and 16 strokes of the cane for the offence of aggravated rape; and 13 years' imprisonment and 12 strokes of the cane for each of the charges for aggravated SAP. The Judge sentenced the appellant to an aggregate sentence of 28 years' imprisonment and 28 strokes of the cane (limited by statute to 24 strokes), with the 1st charge for aggravated rape and the 4th charge for aggravated SAP to run consecutively (see the GD at [39]–[40]).

Issues on appeal

20 On appeal, the appellant sought to retract his plea. In relation to the charges for aggravated SAP, he argued that there were evidential gaps and a

lack of medical evidence such that the charges could not be proven beyond a reasonable doubt. In particular, he relied on two pieces of evidence in support of his case. First, he cited Dr Lim's Report which stated that the "[r]ectal examination was normal – there were no lacerations on visual inspection nor on proctoscopy examination". Second, he made reference to one section of the test results conducted by the HSA as summarised at [36] of the SOF, namely, that the appellant's "DNA and semen were not found in the [Victim's] vaginal, anal, oral and vulval swabs". The appellant also disputed the accuracy of several facts in the SOF and argued that certain facts contained in the SOF had not been proven by the Prosecution.

21 In addition, the appellant appealed against the sentence imposed, on the basis that the sentence was manifestly excessive. In his letter to the Court dated 3 June 2021, he submitted that he had been diagnosed to have low intelligence since adolescence. He therefore had difficulties with managing complex social situations, weighing consequences, and making appropriate choices. He had also been diagnosed with an anti-social personality disorder. The appellant asked that the court take cognisance of his low intelligence, which caused him to have difficulty deciding whether to plead guilty or to claim trial.

22 In relation to the appellant's sentence, there is a final issue of whether the sentence should be reduced on account of the totality principle. On this, Mr Hiew urged the court to reduce the appellant's global sentence to 24 to 26 years' imprisonment and 24 strokes of the cane.

23 We deal with these three issues in turn.

Retraction of plea

24 The appellant's application to retract his plea of guilt fell within the first category of cases in *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 ("*Dinesh*"), that being an attempt to retract a plea at the *post-sentence* stage. This court in *Dinesh* considered that it would be rare for an offender's conviction to be set aside post-sentence, whether he "seeks to achieve this by challenging the regularity of the plead guilty procedure or by asserting facts inconsistent with the elements of the offence and maintaining his innocence". The court has to safeguard the integrity of the conviction and sentence in these cases, and the principle of finality would generally be observed. A retraction of plea would only be allowed in "exceptional cases, such as where the court was satisfied on the evidence that the accused person did not have the genuine freedom to plead guilty" (see *Dinesh* at [49]–[51]). On the facts of this case, the appellant's attempt to retract his plea of guilt should clearly be rejected.

25 As the Prosecution rightly pointed out, the appellant has had multiple opportunities to decide whether to plead guilty or to claim trial. The appellant indicated his intention to plead guilty on the first day of trial on 26 January 2021. At that hearing, the Prosecution invited the appellant to review the SOF, whereupon his counsel confirmed the appellant's intention to plead guilty and that he accepted the SOF. The plead guilty hearing was then fixed before the Judge on 19 March 2021.

26 During the plead guilty hearing, the appellant confirmed that he wished to plead guilty to the charges. He admitted to the SOF without qualification. The same was stated in his mitigation plea (at paras 1 and 3). The Notice of Appeal dated 1 April 2021 indicated the appellant's intention to appeal *solely* against

his sentence. There is no evidence to suggest that the appellant did not have the genuine freedom to plead guilty.

27 On appeal, the appellant sought to dispute the accuracy of various facts in the SOF and also asserted that certain facts had not been proven. However, none of these factual disputes had been raised by him or his counsel at the hearing below, whether in the written mitigation plea or during oral submissions. The appellant's contention that there was "insufficient factual basis" on which the court could convict him also cannot stand as the SOF provided sufficient basis to convict him on the charges in question. It is the very function of a plead guilty procedure that an accused waives his right to a trial and the Prosecution need not adduce evidence to prove his guilt. As stated in the High Court decision of *Koh Bak Kiang v Public Prosecutor* [2016] 2 SLR 574 at [41], the plead guilty procedure is an abbreviated proceeding, and a plea of guilt carries grave implications:

> …By it, the accused waives his right to be convicted *only* after a full trial. In such abbreviated proceedings, the Prosecution no longer needs to adduce evidence to prove the accused person's guilt and the court may pass sentence on the accused without hearing a further word of testimony. The accused is also precluded from appealing against his conviction even if he subsequently comes to regret the plea, so long as the plea is not set aside. [emphasis in original]

28 As for the appellant's attempt to rely on Dr Lim's Report as well as the HSA results, this information was available to the appellant at the hearing below, when he had elected to plead guilty. It is undisputed that Dr Lim's Report was annexed to the SOF and the HSA results were stated in the SOF itself. In any event, these pieces of evidence taken alone would not be sufficient to cast doubt on or overturn the appellant's conviction. The power to set aside a conviction should be exercised only "sparingly" and in "circumstances where a failure to do so would result in serious injustice or a miscarriage of justice",

including where there existed "real doubts as to the offender's guilt" (see the High Court decision of *Sukla Lalatendu v Public Prosecutor and another matter* [2018] 5 SLR 1183 at [35(b)–(c)]). On the facts, there is no evidence to suggest that the appellant's guilty plea was impugned or that his conviction was in any way unsafe.

29 As such, the appellant's application to retract his plea must be rejected.

Appeal against sentence

Impact of the appellant's low intelligence and anti-social personality disorder

30 We turn to address the appellant's arguments in relation to his appeal against sentence. The appellant argued that he was of low intelligence and that he had been diagnosed with an anti-social personality disorder. The Judge had considered this submission and found that the appellant clearly knew the consequences of his actions. As the Judge pointed out, the appellant was found to have good adaptive functioning (see the IMH Report at para 22(c)). Pertinently, the Judge rightly noted that the appellant had changed into a different set of clothes to evade detection, threatened the Victim and her grandmother to intimidate them from implicating him, and came up with different versions of events in an attempt to explain away his alleged involvement (see the GD at [34]–[35]).

31 The appellant further asked the court to take cognisance of his low intelligence which resulted in him facing difficulty in deciding whether to plead guilty or to claim trial. In so far as the appellant appears to be relying on this to retract his plea, as we stated earlier, the appellant had been given multiple opportunities to elect whether to plead guilty. Further, Dr Tan stated in

the IMH Report that the appellant was "familiar with the court proceedings … [knew] how to instruct counsel, plead to the indictment (guilty vs not-guilty), [understood] the evidence [and could] give evidence". As for the implications on his sentence, the Judge had already reduced his sentence on account of the fact that he did eventually plead guilty, despite his late plea of guilt. The appellant therefore has no grounds for complaint.

Totality principle

32 We turn to address the issue of the totality principle. The law in relation to this principle is well-settled and set out in the High Court decision of *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998. The first limb of the principle considers whether the aggregate sentence is substantially above the normal level of sentences imposed for the most serious of the individual offences committed (at [54]). The second limb considers whether the effect of the sentence on the offender is crushing and not in keeping with his past record and his future prospects (at [57]). The totality principle is applied at the end of the sentencing process and requires the court to take a "last look" at all the facts and circumstances to determine whether the sentence imposed is appropriate (at [58]).

33 Mr Hiew was of the view that the aggregate sentence imposed in this case was not consistent with the first limb of the totality principle. Whilst the first limb of the principle may be attenuated in appropriate cases, there was no need to do so in this case as the appellant's conduct and the danger he may pose to the wider society had already been taken into account at the stage of calibrating the individual sentences. As the offence-specific and offender-specific factors had been considered at that earlier stage, these factors should not feature again in the overall assessment of whether the appellant's aggregate

sentence was proportionate. Doing so would give rise to double counting. Further, comparing the facts of the present case to that in the High Court decisions of *Public Prosecutor v Koh Rong Guang* [2018] SGHC 117 ("*Koh Rong Guang*") and *Public Prosecutor v Yue Roger Jr* [2019] 3 SLR 749 ("*Yue Roger Jr*"), Mr Hiew was of the view that the appropriate sentence in the present case should have been 24 to 26 years' imprisonment and 24 strokes of the cane.

34 In our judgment, the totality principle does apply in this case. As noted by the High Court in *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [84], the totality principle is a "manifestation of the requirement of proportionality that runs through the gamut of sentencing decisions". In the present case, the aggregate sentence was significantly longer than the sentence imposed for the most serious individual offence committed by the appellant, *ie*, that of rape. The court should give due consideration to whether the aggregate sentence imposed was proportionate to the seriousness of the offences and the appellant's culpability.

35 However, the sentence should not be *further* reduced in this case, as the Judge had already taken the totality principle into account in the calibration of sentence. As summarised above, the Judge had considered the numerous offender-specific factors at [25] to [29] of the GD. However, he did not increase the individual sentences of the appellant despite noting these aggravating factors. This suggested that the Judge had considered these factors, *in conjunction with* the totality principle, in deriving the aggregate sentence imposed on the appellant. It is clear from the reasoning of the Judge that there could not have been any double-counting of the offender-specific aggravating factors at more than one stage of sentencing.

36 In any event, the sentence imposed in this case was proportionate to the egregiousness of the offences committed by the appellant. In this regard, we consider the precedent cases cited by Mr Hiew. In *Koh Rong Guang*, the offender was convicted after trial of three charges for aggravated rape under s 375(1)(*b*) punishable under s 375(3)(*b*) of the Penal Code, one for aggravated SAP under s 376(1)(*a*) punishable under s 376(4)(*b*) of the Penal Code, and seven other charges for relatively less egregious offences (three charges for criminal intimidation, two charges for sexual exploitation of a child, one charge for voluntarily causing hurt and one charge for circulating an obscene object to a young person). The charges pertained to incidents which occurred over five separate occasions. Seven other charges were taken into consideration for sentencing. A global sentence of 28 years' imprisonment and 24 strokes of the cane was imposed on him.

37 Mr Hiew submitted that the global sentence imposed on the appellant should have been lower than that imposed on the offender in *Koh Rong Guang*, as the latter was convicted of more charges than the appellant. However, as the Prosecution rightly pointed out, the appellant was convicted of significantly fewer charges because he had pleaded guilty. The court has also to take into account the totality of the appellant's offending in sentencing; in particular, there were four charges taken into consideration for sentencing which relate to sexual assault on the same victim. These charges were that of aggravated rape, aggravated SAP and aggravated outrage of modesty. In addition, the offender in *Koh Rong Guang* had no related antecedents, whereas the appellant was traced for a recent antecedent for sexual assault. The appellant's present offence also revealed an escalation in offending. As such, *Koh Rong Guang* did not assist the appellant.

38 In *Yue Roger Jr*, the offender was charged with 48 offences, of which five charges for sexual penetration of a minor under 14 years of age under s 376A(1)(*a*)/(*b*) punishable under s 376A(3) of the Penal Code and two charges for rape of a minor under s 375(1)(*b*) punishable under s 375(2) of the Penal Code were proceeded with at trial. The offender carried out a series of sexual offences against the victim over the course of several years while he was her coach. He was sentenced to a global sentence of 25 years' imprisonment. Mr Hiew was of the view that the sentence imposed on the appellant should be in the ballpark of the imprisonment term imposed on the offender in *Yue Roger Jr*, as the overall criminality of both offenders was similar even though the specific charges faced by them were different.

39 On the facts, there is sufficient justification for the appellant to have been given a higher sentence than the offender in *Yue Roger Jr*. While the offences in the present case took place over a shorter time period, the appellant's conduct was egregious and disclosed numerous offence-specific aggravating factors. As the Judge rightly recognised, the Victim was "subjected to a harrowing two-hour ordeal of violent and repeated sexual assault" by the appellant (see the GD at [12]). In *Yue Roger Jr*, the High Court considered that the offence-specific aggravating factors present were that of abuse of position, premeditation (including sexual grooming), rape/ sexual assault of a vulnerable victim, and the non-use of a condom. In the present case, the Victim suffered serious harm as the appellant had used significant violence against her in the course of the assaults. The appellant's violent acts are set out clearly in the SOF as summarised earlier in this judgment. Dr Lim's Report showed that the Victim suffered various physical injuries, and the Victim also exhibited clear symptoms of trauma following the offences and required regular treatment in order to cope (see the GD at [14]–[16]). In addition, the appellant exhibited significant

opportunism, took deliberate steps to conceal his offences and did not use a condom. The offence-specific aggravating factors that are present in this case, in particular the repeated use of violence during the assaults, justified the length of the custodial sentence imposed. Further, the offender in *Yue Roger Jr* had no prior antecedents in contrast to the appellant in this case.

40 We therefore find that the Judge had adequately considered the totality principle in calibrating the aggregate sentence imposed on the appellant, and that the sentence was proportionate to the appellant's offending conduct.

Conclusion

41 For the reasons set out above, we dismiss the appeal. We also record our appreciation to Mr Hiew for his helpful submissions.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

The appellant in person;
David Khoo, Chong Kee En, Samyata Ravindran and Nikhil Coomaraswamy (Attorney-General's Chambers) for the respondent;
Hiew E-Wen Joshua (Allen & Gledhill LLP) as young *amicus curiae*.
