IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 182

Magistrate's Appeal No 9023 of 2016

Between

Public Prosecutor

… *Appellant*

And

Ong Jack Hong

… *Respondent*

EX TEMPORE JUDGMENT

[Criminal Law] — [Offences] — [Sexual penetration of a minor]

Public Prosecutor
v
Ong Jack Hong

[2016] SGHC 182

High Court — Magistrate's Appeal No 9023 of 2016
Sundaresh Menon CJ
12 July; 25 August 2016

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

1 This is an appeal brought by the Prosecution against the sentence of probation imposed by the learned district judge on the 18 year-old respondent, Ong Jack Hong ("the Respondent"), for an offence of sexual penetration of a minor under s 376A(1)(*a*) and punishable under s 376A(2) of the Penal Code (Cap 224, 2008 Rev Ed). The Prosecution argues that the sentence of probation is manifestly inadequate and that a term of reformative training is necessary in the light of the need for deterrence due to the seriousness of the offence and the fact that the Respondent has had brushes with the law, albeit for unrelated matters.

2 The sentencing of young offenders is an issue that has been considered by the court from time to time. In recent months, it is a matter that has been dealt with in several judgments that I have issued, including in *Public Prosecutor v Koh Wen Jie Boaz* [2016] 1 SLR 334 ("*Boaz Koh*"). In *Boaz*

Koh, I reviewed the relevant authorities and summarised the position in the following terms at [36]–[39]:

> 36 While it is clear that probation is conducive to rehabilitation, I emphasise that it is not the only sentencing option for a youthful offender where rehabilitation remains the dominant sentencing consideration. Reformative training too is geared towards the rehabilitation of the offender (*PP v Al-Ansari* at [47]). The rehabilitative goal of reformative training is apparent from the Parliamentary debates relating to the introduction of reformative training …
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> …
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> 38 Having said that, there is no gainsaying the fact that reformative training also incorporates a significant element of deterrence because there is a minimum incarceration period of 18 months that is not a feature of probation (see reg 3 of the Criminal Procedure Code (Reformative Training) Regulations 2010 (S 802/2010); PP v Adith s/o Sarvotham [2014] 3 SLR 649 ("PP v Adith") at [21]; PP v Al-Ansari at [57]–[58]). Prof Tan Yock Lin thus observed in Criminal Procedure vol 3 (LexisNexis, Looseleaf Ed, Issue 11, July 2004) at paras XVIII[2554]–[2555] that reformative training offers the court a middle ground between sending the offender to prison and the desire to rehabilitate a young offender. In other words, reformative training allows the courts to sentence the offender to a rehabilitative programme under a structured environment while avoiding the danger of exposing the young offender to the potentially unsettling influence of an adult prison environment. It presupposes that the offender in question is amenable to rehabilitation within a closed and structured environment such as the Reformative Training Centre.
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> 39 As I have noted above …, at the first stage of the inquiry, the court is concerned with whether there is a need to incorporate a sufficient element of deterrence within the overarching focus on the goal of rehabilitation. Because reformative training incorporates the elements I have noted in the previous paragraph, it will be the preferred sentencing option in cases where a degree of deterrence is desired.

That provides a workable framework for selecting the appropriate sentence as between probation and reformative training in cases such as the present, which involve young offenders.

3 With this framework in mind, I turn to the facts of the present case. The Respondent, who had just turned 17 years old at the time of the incident, committed the offence of penile-vaginal penetration of a minor ("the victim"), who was 14 years old at the material time. The Respondent met the victim at a bar for the first time on the date the offence took place. The victim was drinking beer by herself. The Statement of Facts recites that she was in a drunk and vulnerable state at the time of the offence. The Respondent approached her with some friends and they chatted a while. She left for the toilet and when she emerged again, she was approached by the Respondent, who started hugging and kissing her on the lips. After they kissed for a while, the Respondent carried the victim to a stairwell, closed the door, turned the victim to face the wall and then penetrated her while she was bending down. He did not wear a condom at the time. He stopped when he heard a noise, and the two of them dressed up before leaving the stairwell. The offence was reported two months later, after the victim revealed to a medical staff member at KK Women and Children's Hospital during a medical check-up for a bout of migraine that she had had sexual intercourse in the past with the Respondent and with her boyfriend.

4 The district judge sentenced the Respondent to a term of 24 months' split probation. The Prosecution has appealed against that sentence, arguing that a sentence of probation is manifestly inadequate and that at the very least, the district judge should have called for a reformative training suitability report before making his decision. At the last mention of the appeal on 12 July 2016, I was satisfied that the district judge had erred in not calling for a reformative training suitability report and I gave the following brief grounds:

> I am satisfied that this is a case where the district judge ought to have called for a pre-sentencing [reformative training] suitability report, and I allow the appeal on this ground and call for such a report now. I will give my grounds at a later

> stage when I come to a decision on sentence after considering the pre-sentencing [reformative training suitability] report.
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> What I wish to say for the moment is that I regard this as a case concerning a serious offence. The laws pertaining to sexual offences against minors exist to protect [a victim] whose vulnerability makes [him or her] prone to abuse and exploitation. The victim in this case was vulnerable on several counts which I have alluded to in the course of arguments. This, in my judgment, exacerbates the seriousness of the offence and also highlights the critical importance of general deterrence in such context. The [district] judge appeared to me not to have recognised such considerations and factors.
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> Having said this, I also call for an updated probation report in which the probation officer should have regard to the fact that he is now serving his National Service and also … his parental situation in order to allow me to assess whether that is a viable option in the present circumstances.
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> With benefit of both reports, I will then decide on the appropriate sentence and I will deliver my detailed grounds at that time.

5 I have since had the benefit of both reports. I am also grateful to the arguments that both counsel have put before me this morning. It is fair to state that the Respondent has been found to be fit for reformative training. At the same time, the updated probation report suggests that he remains suitable for probation, even though his situation with respect to parental support is less than optimal.

6 I begin with the observation that the offence of sexual penetration of a minor is a serious offence. The offence carries a maximum term of imprisonment of up to 10 years: s 376A(2) of the Penal Code. In the light of the youthfulness of the Respondent, the Prosecution has sought a sentence of reformative training rather than that of imprisonment in the present case.

7 The principal factors that are urged upon me as warranting the imposition of a term of probation rather than of reformative training are these:

(a) First, the Respondent is young and the prospects for his rehabilitation are thought to be good.

(b) Second, the circumstances showed that the offence was committed in an opportunistic rather than in a premeditated way.

(c) Third, the offence took place after the Respondent met the victim drinking in a bar and this may have induced him into over-estimating her age.

(d) Fourth, the prognosis reflected in the probation report, the updated probation report and the reformative training suitability report is that the risk of re-offending is low.

(e) Fifth, there is a prospect that imposing a sentence of reformative training at this stage may undo the progress that appears to have been made by the Respondent.

There is also some reliance on a suggestion that the sexual encounter was apparently consensual in nature though, in the final analysis, that seems to have been put forward not as a mitigating factor but as the exclusion of a potentially aggravating factor.

8 I make some preliminary points, which I consider to be of considerable importance. Taking first the question of consent, in my judgment, this is wholly extraneous to the sentencing inquiry in this case. First, the criminalisation of sex with a minor rests on the notion that minors, such as the victim in this case, are vulnerable to such a degree that they are taken to be incapable of consenting. But even aside from this, the seriousness of the offence must be assessed in the round having regard to the totality of the

context. The relevant context here is that the victim was not only vulnerable by reason of her age, but further, because she was drunk. The Statement of Facts explicitly states that she had wanted to go home but had not done so because her boyfriend, whom she had called, did not come to fetch her. As I mentioned above, the Statement of Facts also explicitly states that the incident took place at a time when she was "in a drunk and vulnerable state". In these circumstances, I cannot see how any purported consent on her part could have alleviated the gravity of the offence.

9 I make some ancillary observations on the issue of consent. It is true that in *Public Prosecutor v AOM* [2011] 2 SLR 1057, the High Court recognised that consent might be relevant to sentencing. But it must be noted that Steven Chong J couched his observations in the following terms (at [35]):

> 35 I add here, [parenthetically], that I do not discount the possibility of *exceptional* cases where consent *may* be regarded as a relevant mitigating factor for statutory rape or sexual penetration of a minor, especially where the victim and the offender was of the *same or similar age* at the time the offences were committed (even in such cases however, the court should look at the age gap between the offender and the victim; the greater the age gap, *the lesser the mitigating weight* that may possibly be accorded to the purported consent). … [emphasis in original]

It is clear from the manner in which the point was made that Chong J stressed that it would be *exceptional* for consent to bear weight as a relevant mitigating factor. In my judgment, consent would come into play primarily in circumstances where it can be shown that there has been a settled relationship of sorts between the parties, or where the victim was really not vulnerable in the circumstances, such as where he or she was close to the age of consent and went into the encounter knowing exactly what he or she was doing.

10 This is in line with the observations of Chao Hick Tin JA in *Public Prosecutor v Qiu Shuihua* [2015] 3 SLR 949 ("*Qiu Shuihua*") (at [21]) that it may be relevant to consider whether such an offence was committed on impulse or with planning. He elaborated on this in the very next paragraph, and said as follows:

> 22 In determining whether the offence was committed in a calculated, pre-meditated manner, all the circumstances must be considered – how did the offender and the victim first meet; was it the victim who sought out the offender; how long was the duration of their relationship before moves were made to advance their relationship to a more intimate level; and who initiated those moves and if it was the victim, what was the offender's response – these, and others too, will show whether the offence was calculated and planned and whether the offender sought out young girls to exploit their gullibility or precociousness. In this regard, the existence of a relationship over a period of time would be a relevant factor.

In my judgment, the present case is far removed from the sort of situation that was envisaged by Chao JA in *Qiu Shuihua*, or by Chong J in *AOM*.

11 Next, I think it is appropriate to remind ourselves that the imposition of reformative training remains within the range of sentencing options for young offenders where the focus is on rehabilitation. There has been a tendency from time to time for courts and counsel to proceed on the basis that reformative training is inappropriate where rehabilitation is the dominant sentencing consideration. The district judge in this case came close to suggesting that he did not have to consider reformative training because he felt rehabilitation was the primary sentencing consideration. To the extent that my understanding of the district judge's decision is correct, I wish to state that the decision and approach are wrong in principle. As I sought to emphasise in *Boaz Koh* – in the passages I quoted at [2] above – reformative training too is geared towards the rehabilitation of the offender and hence remains a viable option in such cases. That is why I allowed the appeal in the last mention and called for the

further reports. In the present case, the youthfulness of the offender is what points towards rehabilitation retaining its primacy as the primary sentencing consideration; and it is why the court is faced with a choice between probation and reformative training rather than a term of imprisonment. To simply repeat the observation that rehabilitation is the primary sentencing consideration does not help to resolve this choice between probation and reformative training.

12 I also wish to correct what I consider to be a misconception in relation to the approach that the court should take in deciding whether to impose reformative training as a sentencing option. In the course of her submissions, counsel for the Respondent, Ms Cheryl Ng ("Ms Ng"), examined a few precedents where a term of reformative training had been imposed, and suggested that reformative training should not be imposed in this case because the circumstances in those precedents are, in her view, more aggravated than those in the present case. This suggests that in choosing between probation and reformative training, the court should see the two as points along a continuum, with the choice of sentence depending solely on the seriousness of the offence and the presence or absence of aggravating circumstances.

13 With respect, in my judgment, such an approach is not correct. While there is no denying that reformative training is more onerous than probation, the choice between them is not governed solely or primarily by the presence or absence of aggravating circumstances. That is the approach that is typically adopted to determine a suitable length of imprisonment and/or an appropriate quantum of fine. But reformative training, juxtaposed with probation, attracts a different form of analysis. At the outset, it should be noted that reformative training is for a fixed minimum period of time, and the actual duration that the offender would have to undergo reformative training beyond the prescribed minimum is dependent on the offender's progress during the reformative

training. Hence, the actual period of time for which the young offender will have to undergo reformative training is not a matter that is within the control or purview of the court. It follows that when the court considers whether to impose a term of reformative training, what is relevant is the *type* of sentence that reformative training is, and the question the court must determine is whether such a sentence is called for in the circumstances.

14 As I have said in *Boaz Koh*, reformative training and probation are both rehabilitative sentencing options; the choice between reformative training and probation is governed primarily by whether there is in the circumstances a need for a degree of deterrence within an overarching focus and emphasis on rehabilitation. In my judgment, it would therefore be unhelpful to approach the issue of whether reformative training should be imposed in a given case from the vantage point of comparing the circumstances of the case before the court with other cases where reformative training has been imposed, and then submitting that reformative training should not be imposed in the case at hand because the circumstances are less aggravating. Simply put, reformative training should ordinarily be preferred over probation if the court considers that there is a need for deterrence.

15 Against the backdrop of those observations, I return to the present case. I have already touched on the youthfulness of the offender and his sound prospects of rehabilitation (see [5]–[6] above). As I have said, this does not exclude consideration of the imposition of reformative training. It is true that the court will take cognisance of the fact that the Respondent is a young offender and will not usually treat him in the same way as an older offender. But this does not take matters very far. Had the offender in this case been appreciably older, the sentence in question would be a term of imprisonment; and that term – in circumstances that are otherwise identical – would be

lengthy because there would be no consideration given to the immaturity of a young offender which might have inclined him to give in to the impulses of the moment. Moreover, there would be an inevitable finding that the offender in such a case was deliberately and cynically taking advantage of the youthfulness and drunken state of the victim. But discounting those factors, and accepting that this was a young offender more prone to impulse and arguably less focused on exploiting the vulnerability of the victim, the court remains focused on rehabilitative sentencing options instead of considering a substantial term of imprisonment.

16 As to the setting in which the offence occurred, in my judgment, little, if any, weight can be placed on the suggestion of the defence that the culpability of the Respondent is in some way mitigated because he found the victim in a bar and might have thought she was over the age of consent. For one thing, the offence is one of strict liability. Furthermore, the Respondent was himself drinking even though he was underage and there is even some suggestion, made on his behalf, that he might have been drunk. It is not evident how he could reasonably have formed any view of the age of the victim on the supposition that she would act in accordance with the law, when he himself was not doing so. In any case, there is no evidence that has been put before me to suggest that it would have been reasonable for him to conclude by looking at this victim, regardless of where she was, that she was over the age of 16.

17 Nor do I place relevance on the argument that the offence was committed opportunistically rather than in a premeditated way. Chao JA in *Qiu Shuihua* has already drawn out some of the differences between an offence that is committed in a premeditated way and one that is committed in the context of a relationship. But aside from that, if the Respondent had

committed the offence in a deliberate and premeditated way, that would have been a serious aggravating factor, which might well have displaced the focus on rehabilitation altogether in favour of other sentencing interests such as deterrence and retribution.

18 The recounting of the relevant events in the Statement of Facts suggests that the Respondent decided to approach the victim as she emerged from the restroom after an initial period of conversation, and he then hugged and kissed her before carrying her into the stairwell and closing the door. The Statement of Facts then reads: "[he] turned the victim, who was in a drunk and vulnerable state, around to face the wall. [He] then penetrated [her] … from behind … when she was bending down". In my judgment, the clear impression to be drawn from the above narrative – which is contained in the Statement of Facts that the Respondent had admitted to – is that the Respondent was in control of the situation over the victim, who was in a drunk and vulnerable state and who was carried to the scene and then turned around into position by the Respondent for him to do what he then proceeded to do. This, to my mind, is a factor that makes the offence graver because the Respondent was effectively in control throughout the entire episode. While I accept Ms Ng's submission that the victim was neither unconscious nor wholly without control of her faculties, this does not materially advance the Respondent's case because the fact that she was drunk and vulnerable is, by itself, sufficient to aggravate the offence.

19 As to the progress made by the Respondent as noted by the probation officer and his superiors in the army where he is now serving his national service, this is to be commended. But in the final analysis, it is in *his* interest that he continues to strive for improvement. The argument that the progress that an offender has achieved would be undone if he were to be sentenced to

reformative training is not helpful. The focus and purpose of reformative training is to reform and rehabilitate an offender within a rigorous and structured environment. Further, if the progress that an offender has achieved can be so easily undone or undermined by a sentence of reformative training, this raises the concern that such progress is unduly fragile and is perhaps not reflective of real change but is born of a desire to avoid a more onerous sentence (see my observations at [64] of *Boaz Koh* where I cautioned against being influenced by an offender's efforts at rehabilitation which might be geared towards seeking to persuade the court to impose a lighter sentence).

20 In my judgment, the arguments advanced on the Respondent's behalf fail to consider, to a sufficient extent, the seriousness of the offence, the harm done to the victim and, most importantly, the public interest in deterring such conduct. Again, I reiterate what I said in *Boaz Koh* at [39]:

> 39 … at the first stage of the inquiry, the court is concerned with whether there is a need to incorporate a sufficient element of deterrence within the overarching focus on the goal of rehabilitation. *Because reformative training incorporates the elements I have noted in the previous paragraph, it will be the preferred sentencing option in cases where a degree of deterrence is desired.* [emphasis added]

21 In my judgment, a degree of deterrence *is* called for in this case. I place emphasis on the interest of general deterrence because it is important that other like-minded youths who find themselves in a similar situation understand that the consequences of engaging in such conduct is likely to be a stint of reformative training, if not worse. I also consider that there is a need for specific deterrence. This is not the Respondent's first brush with the law. He had previously been sentenced to probation for the offence of mischief of fire in November 2012, and that stint of probation ended just seven months before the present offence took place. Prior to that, he had also been placed on

the Guidance Programme from November 2010 to May 2011 for stealing shoes from a corridor with a friend and setting a national flag on fire. I am aware and accept that those antecedents are of a different nature from the present offence. But this history strengthens my view that he will benefit from undergoing a stint in the structured environment of reformative training where he can undertake serious efforts at making a fresh start.

22 Before concluding, I briefly touch on two points raised by Ms Ng. First, Ms Ng drew attention to the fact that the Respondent's father is dying. Let me say in no uncertain terms that that is tragic; but in the final analysis it does not affect my decision. What is critical in cases such as the present is the need to focus on what is in the best interest of the young offender. He may well prefer not to spend the next period of his life in the structured environment of reformative training away from his father but, in my judgment, that is the best course for his reform and rehabilitation.

23 Second, Ms Ng referred to the fact that the victim has had sexual relations with her boyfriend. It was not clear to me just what the point was that was being made by this reference. Ms Ng suggested that all she was putting forward is that the victim had not been traumatised by the incident. I am not convinced first that that is a conclusion that can fairly be drawn in all the circumstances. It seems clear, at least to me, that there is no basis for comparing, much less equating, a 14-year-old's reaction to one or more sexual encounters with her boyfriend, with whom she appeared to be in a steady relationship, with an encounter that took place with a stranger shortly after she had met him for the first time and when she was drunk and vulnerable. But in the final analysis, even if it were true that she had not been traumatised, that would not be a mitigating factor; it would only mean that there was no such aggravating factor. I thus disregard it. It is not clear to me why it was thought

necessary for a point that appeared, in the final analysis, to be directed at the morality of the victim to be put forward. That is seldom helpful in the context of sexual offences. As officers of the court, counsel should always be mindful of the importance of ensuring the appropriateness and relevance of any submission that he or she is making, and this is especially so where such a submission impugns the character or integrity of a person who is not only *not* on trial but is in fact the victim of the crime in question.

24 Finally, I am satisfied that imposing a sentence of reformative training will not be disproportionate. A serious offence has been committed and as I observed at the last mention and reiterate today, the vulnerability of the victim on account not only of her age but of her state of drunkenness exacerbates the seriousness of the offence. I am encouraged by the Respondent's willingness to change and the progress he has made, but ultimately, in my judgment, reformative training remains the most appropriate sentence in this case. I urge the Respondent to continue with his efforts within the rehabilitation regime provided in the reformative training centre and to strive to be a valuable member of society when he has completed his sentence.

Sundaresh Menon
Chief Justice

Charlene Tay Chia and Amanda Chong Wei-Zhen (Attorney-General's Chambers) for the appellant;
Sadhana Rai and Cheryl Ng (Criminal Legal Aid Scheme, The Law Society of Singapore) for the respondent.