**IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE**

**[2020] SGCA 71**

Criminal Appeal No 13 of 2019

Between

BSR

… *Appellant*

And

Public Prosecutor

… *Respondent*

Criminal Motion No 8 of 2020

Between

BSR

… *Applicant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Case No 59 of 2018

Between

Public Prosecutor

And

BSR

# *EX TEMPORE* JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Sexual assault by penetration of a person under 14 years of age]

[Criminal Procedure and Sentencing] — [Sentencing] — [Prevention of Human Trafficking Act]

[Criminal Procedure and Sentencing] — [Sentencing] — [Outrage of modesty of a person under 14 years of age]

# BSR
# v
# Public Prosecutor and another matter

**[2020] SGCA 71**

Court of Appeal — Criminal Appeal No 13 of 2019 and Criminal Motion No 8 of 2020
Judith Prakash JA, Tay Yong Kwang JA and Woo Bih Li J
16 July 2020

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**Judith Prakash JA (delivering the judgment of the court *ex tempore*):**

1 This appeal is against sentence only. The appellant pleaded guilty to and was convicted on four proceeded charges with four additional charges being taken into consideration for the purpose of sentencing. He received an overall sentence of 25.5 years' imprisonment, 24 strokes of the cane and a fine of $12,000. Three of the sentences were ordered to run consecutively as the charges they reflected related to separate transactions on different occasions involving three different victims.

2 The individual sentences are broken up as follows:

(a) First, a sentence of 14 years' imprisonment and 12 strokes of the cane for penetrating the mouth of his six-year-old daughter with his penis and forcing her to perform fellatio on him for a few minutes. This

was an offence under s 376(1)(*a*) of the Penal Code (Cap 224, 2008 Rev Ed) punishable under s 376(4)(*b*) of the same Code ("the first charge").

(b) Second, a sentence of six years' imprisonment, three strokes of the cane and a $6,000 fine for coercing his wife to prostitute herself through physical abuse and threatening further abuse if she refused. This was an offence under s 3(1) of the Prevention of Human Trafficking Act (No 45 of 2014) ("PHTA") punishable under s 4(1)(*a*) of the same Act ("the second charge").

(c) Third, a sentence of six years' imprisonment, three strokes of the cane and a $6,000 fine for receiving the sum of $10,930 from his wife's earnings as a prostitute. This was an offence under s 6(1) of the PHTA punishable under s 6(2) of the same Act ("the third charge").

(d) Fourth, a sentence of five and a half years' imprisonment and six strokes of the cane for pinning his 13-year-old niece to a bed, removing her clothes and molesting her which was an offence of aggravated outrage of modesty of a minor under s 354A(2)(*b*) of the Penal Code ("the fourth charge").

3 As regards the charges which were taken into consideration in the sentencing, these comprise two charges of voluntarily causing hurt to his wife under s 323 of the Penal Code and two charges of molesting his niece in a cinema which were offences of outrage of modesty of a minor under s 354(2) of the Penal Code.

4 In this appeal, the appellant submits that the individual sentences are excessive and should be reduced as follows:

(a) For the first charge, in relation to imprisonment, the sentence should be ten years' imprisonment instead of 14 years.

(b) For the second, third and fourth charges, the sentence for each should be four years' imprisonment with no caning.

The appellant accepts that three sentences have to run consecutively and therefore submits that the total sentence should be 18 years' imprisonment and 12 strokes of the cane.

5 The grounds of the appeal are that in coming to his sentencing decisions:

(a) The High Court Judge ("the Judge") was wrongly influenced by the "disgust factor";

(b) The Judge erred in law in determining the appropriate sentence for the first charge, given that there is no hierarchy of the severity of sexual sentences under s 376 of the Penal Code;

(c) The Judge wrongly analysed the offence-specific factors for the first charge;

(d) The Judge failed to consider that the PHTA was primarily intended by Parliament to address intentionally trafficked and/or minor victims for whom the existing provisions under the Women's Charter were insufficient; and

(e) The Judge erred in law when he determined the appropriate sentence for the fourth charge.

6 Having considered the written submissions of the appellant as well as the oral submissions made on his behalf today, we are satisfied that the

sentences imposed on the appellant by the Judge were not manifestly excessive and the appeal must be dismissed. The appellant's submissions cannot be accepted for the reasons we give hereafter.

**The first charge**

7 Most of the appellant's arguments were related to the sentence imposed for the first charge. The first of these arguments was that the Judge had erred by allowing the "disgust factor" towards the appellant's overall conduct to influence his judgment.

8 In this connection, the appellant referred to the case of *BPH v Public Prosecutor and another appeal* [2019] 2 SLR 764 ("*BPH*") where the Court of Appeal had pointed out that it is hard to differentiate among the various permutations of sexual offences involving penetration and decide whether one form of sexual penetration is worse than another. The court said that the "disgust factor" is too personal for the court to draw meaningful and acceptable distinctions between the permutations of the offence in s 376. The appellant argues that the Judge was influenced by disgust because he described the appellant's act as monstrous, observed that the appellant had sexually exploited and abused three females and had relied on an observation in an earlier case that penile-oral penetration is generally regarded as more severe than digital-vaginal penetration.

9 In our view, the appellant's criticisms of the Judge in this regard are unwarranted. The Judge's descriptions of the appellant's behaviour were reflective of general societal views on the responsibility of a father, husband and uncle towards his female relatives and were not exaggerated or extreme in any way. Indeed the appellant's misdeeds came to light because the appellant's

own mother was so shocked by what he did to his daughter that she reported him to the police.

10 At no point did the Judge express disgust for the appellant. The legal position as set out in *BPH* is that there is no hierarchy among the offences covered by s 376 of the Penal Code but this position had not been clearly enunciated at the time of the trial. It was therefore not wrong for the Judge to have referred to the previous decision which had expressed a different view regarding the ranking of various types of penetration. In any case, in calibrating the applicable sentence for the first charge, the Judge had regard to the framework in *Pram Nair v Public Prosecutor* [2017] 2 SLR 2015 ("*Pram Nair*") and applied that framework without drawing any comparison between one type of penetration offence and another type. He was concerned about factors such as the relationship between the appellant and the victim, the age of the victim, the force employed by the appellant and the latter's knowledge that he probably had a sexually transmitted disease at the time. It is clear from his Judgment that these highly relevant matters influenced the Judge in imposing the sentence rather than any theoretical ranking of one penetration offence against another.

11 The appellant's third point was that the Judge had wrongly analysed the factors that were specific to the offence under s 376 and that if he had analysed these factors correctly he would have imposed a lower sentence. The first argument was that it was wrong of the Judge to have found that the appellant had exploited an extremely vulnerable victim, his daughter, who was only six years old at the time and entirely defenceless against him during the course of the assault. The appellant argued that the victim was only harmed once by him and that other factors such as physical frailty or mental impairment or disorder which would have justified an uplift in the sentence were not present.

12 We cannot accept the submission. The very age of the appellant's daughter, six years, indicates that in comparison with the appellant, she was physically frail and very much less mentally developed. The appellant might have chosen in the appeal to say that he only harmed his daughter once but the statement of facts which he admitted without reserve recited that the appellant had forcibly inserted his penis into his daughter's mouth and demanded that she suck it. When she tried to refuse, he grabbed her hair and guided her head in an up and down motion to achieve his objective. Although the daughter tried to push the appellant away, she was unsuccessful and was thus forced to fellate him against her will. There were also multiple penetrations during the several minutes of the sexual assault. These facts speak for themselves and completely substantiate the Judge's analysis of this factor.

13 The second thing that the Judge took into account as an aggravating factor was that the appellant had committed an abuse of trust of the highest order since he is the biological father of the victim. The appellant argues again that he had only done this once in contrast with the accused in the *BPH* case who had abused his position as grandfather of the victim more than once. The Judge had therefore over-emphasised this factor. We reject this submission as well. The abuse of trust was grave because the victim was entitled to expect that her father would protect her from harm rather than inflict it himself. A child of six years is barely capable of looking after herself and has no choice but to rely on her parents to provide life's basic necessities and to look after her. Abuse of trust of a vulnerable person is qualitative, and even one instance is one too many and must be given due weight. In this case, the appellant added to the trauma of the incident by threatening his daughter that he would beat her up if she told anyone about it, a threat that she must have known he was fully capable of carrying out.

14 The third aggravating factor that the Judge took into account was that at the time of the offence, the appellant rightly suspected that he had a sexually transmitted disease ("STD"). On appeal, it was argued that too much weight was given to this factor as the risk of an exposure was minimised because the appellant had only penetrated the victim once. We disagree. Any risk of the daughter's exposure to an STD was a risk too far. In our view, it was entirely fortuitous that the victim did not contract any STD from the appellant and the Judge correctly weighed this factor in his analysis.

15 Overall, the Judge correctly identified the offence-specific aggravating factors and was correct in finding that, at the least, this was a case that fell within the highest end of Band 2 of the *Pram Nair* framework. We note that the appellant's counsel agreed in court with this placing. Under this framework, cases falling within Band 2 attract sentences of between ten and 15 years' imprisonment and at least eight strokes of the cane. The only mitigating factor was the appellant's plea of guilt and due weight was given to this since the appellant was sentenced to 14 years. The sentence of 12 strokes of the cane was the mandatory minimum prescribed for an offence involving a victim under the age of 14. We see no reason to interfere with the Judge's sentence for the first charge. In all the circumstances, it cannot be described as excessive much less manifestly excessive.

**The sentences for the second and third charges**

16 The appellant submitted that the Judge erred in law or in fact in his sentences imposed for the second and third charges because the statutory scheme embodied by the PHTA is directed more at offenders who engage in international trafficking of victims into Singapore rather than at purely local

cases such as the present. He referred to the Parliamentary Debates on the PHTA to support his submission on the intention behind the legislation. In this case, the Judge had been guided by the sentencing framework in the case of *Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892 which was a case brought under ss 140 and 146 of the Women's Charter (Cap 353, 2009 Rev Ed) and involved the trafficking of Thai women into Singapore for the purpose of prostitution. The appellant submitted that the Judge was wrong to adapt that framework to the present case since it was concerned with international trafficking which was far from the facts here.

17 We cannot accept the appellant's submissions in relation to the intention behind the PHTA. A piece of legislation may have more than one intention. Undoubtedly, one of the reasons that the PHTA was passed was to increase the penalties for international trafficking of human beings into Singapore in line with international standards. However, the legislation was not drafted so as to exclude domestic trafficking. Indeed, the provisions of the PHTA are widely drafted and capable of covering both international and domestic trafficking. As the Judge himself pointed out, these provisions demonstrate that the PHTA was intended to weed out *all* forms of human trafficking, however committed, and he cited remarks made by the Deputy Speaker in the Parliamentary Debates in that regard. He also noted that under s 4(2)(*g*) of the PHTA, it is an aggravating factor that the offender was the trafficked victim's spouse. The Judge noted that cases involving the trafficking of one's own spouse are likely to lack transnational characteristics. We entirely agree with the Judge. We cannot accept the submission that because the trafficking here contained only local elements, the Judge's sentence in relation to the second and third charges must *prima facie* be considered manifestly excessive.

18 The appellant also submitted that the sentence passed in respect of the second charge was manifestly excessive when compared to precedents. He cited the case of *Public Prosecutor v Bhattacharya Priyanka Rajesh and another* [2020] SGDC 124 ("*BPR*") where each of two accused persons was sentenced to an aggregate of five years and six months' imprisonment with total fines of $7,500 for three offences each under s 3(1)(*d*) of the PHTA. In that case, the accused persons had claimed trial whereas here the appellant had pleaded guilty. In that case, three victims from overseas were involved whereas here there was only one, local, victim. We do not accept this submission. The District Judge who passed sentence on the accused persons in *BPR* was at pains to distinguish that case from the present one by pointing out that while in *BPR* there was exploitation of three victims who were forced to provide sexual services for the financial benefit of the accused persons, the PHTA charges preferred in the appellant's case were trafficking in persons for the purpose of exploitation by means of "a threat or use of force, or any other form of coercion" whereas the PHTA charges in *BPR* were significantly different. The District Judge observed that this case was clearly more egregious than *BPR* itself and therefore the sentences he imposed in *BPR* had necessarily to be lower than that imposed on the appellant even after allowing for the fact that the appellant had pleaded guilty. In our view, the facts behind the second and third charges in the case before us are quite different from those in *BPR* and, on their own, merited the sentences meted out by the Judge.

19 The charges against the appellant carried maximum sentences of up to ten years' imprisonment, a fine of up to $100,000 and six strokes of the cane. The sentences of imprisonment imposed by the Judge were just 10% higher than the mid-point of the range, while the fines were calibrated to reflect the profit that the appellant had earned from prostituting his wife. The number of strokes

was half the maximum limit that could have been imposed for each charge. In all the circumstances of this case, we are unable to accept the appellant's argument that these sentences were manifestly excessive. There were a number of aggravating factors here which were not present in the authorities cited. First, under the statute itself, it is expressly provided in s 4(2)(*e*) and (*g*) that two of the features found in this case are aggravating factors. We refer to the actual or threatened use of a weapon to force a victim to carry out the aggressor's will and the fact that the victim is the spouse of the aggressor and thereby vulnerable.

20 The aggravating factors in this case were that the appellant persistently psychologically and physically abused his wife into providing sexual services. He not only punched her and kicked her but on at least one occasion hit her with a weapon, in point of fact, a dumbbell. Secondly, it was his wife whom he trafficked, a person whom he was morally bound to protect rather than to exploit. Thirdly, he forced her to service between three and five men every day for a period of two months and to hand over all the earnings to him. Fourthly, he increased the humiliation that his wife was undergoing by compelling her to video some of her activities for his later review. Fifthly, he even had the gall to hit her on some occasions because he was jealous after watching her adopt certain sexual positions with clients.

**The sentence for the fourth charge**

21 We turn to the fourth charge. The Judge adopted the following framework established in the case of *Public Prosecutor v BDA* [2018] SGHC 72 ("*BDA*") for cases of aggravated outrage of modesty under s 354A(1):

(a) Band 1: 2 – 4 years imprisonment, 3 strokes;

(b) Band 2: 4 – 7 years' imprisonment, 6 strokes;

(c) Band 3: 7 – 10 years' imprisonment, 12 strokes.

While *BDA* pertained to a charge under s 354A(1) which prescribes a sentence of between two and ten years' imprisonment and mandatory caning, this range is not much different from the range applicable to the fourth charge under s 354A(2)(*b*) which prescribes a sentence of between three and ten years' imprisonment and mandatory caning. This means that the minimum imprisonment term of three years for an offence under s 354A(2)(*b*) would at least fall within the middle of Band 1 of the *BDA* range. In determining whether a particular offence fell within Band 1, 2 or 3 of the framework, *BDA* followed the approach in *GBR v Public Prosecutor* [2017] 3 SLR 1048 ("*GBR*") which considered a number of offence-specific factors.

22 The appellant did not take issue with the Judge's approach to sentencing the appellant in respect of the fourth charge. His submission was that the Judge had placed insufficient weight on the mitigating factors. The appellant compared the facts of this case with the facts of the case of *Public Prosecutor v GCK* [2020] SGDC 57 ("*GCK*"). In that case, the accused was charged under s 354A(2)(*b*) with aggravated molest of his girlfriend's daughter who was then 12 years old. The accused molested her in her own bedroom and also slapped her twice when she tried to resist him. The accused was convicted after a trial and then sentenced to four years and six months' imprisonment with six strokes of the cane. The appeal against this decision has not been heard yet.

23 The appellant submitted that his sentence for the fourth charge was too harsh when compared with the sentence in *GCK*. He pointed out the victim in *GCK* was one year younger than the appellant's niece and *GCK* had claimed trial while the appellant has shown his remorse by pleading guilty. Further, the

appellant had no antecedents unlike *GCK*. We do not agree that the appellant's conduct was less egregious than that of *GCK*. The appellant may not have had any previous convictions but he consented to two charges of molest of the same niece being taken into consideration in sentencing. The fourth charge showed that the appellant's conduct towards the niece had escalated to aggravated molest. Further, there was premeditation and deception. He had forced his wife to bring the niece to his hotel room under false pretences. This was an aggravating factor. When he molested the niece, there was prolonged skin to skin contact and he used force to pin her to the bed and covered her face with a pillow in an attempt to muffle her screams. It was only when she fell unconscious that he desisted. Thus, quite apart from the exploitation of his relationship with his niece, a young girl of only 13, and her vulnerability to him, the aggravating factors in this case justified the sentence that was imposed. The fact that he pleaded guilty was the only factor in his favour. It was given weight by the Judge but he, rightly in our view, gave greater weight to the appellant's prior conduct in relation to the niece.

**Other matters**

24 The appellant criticised the Prosecution for its support of the sentences imposed by the Judge. He pointed out that before the Judge the Prosecution had submitted for sentences of imprisonment totalling 22 years and argued that it could not now resile from that position. This argument cannot be accepted. In the sentencing process, counsel for all parties assist the court by making their submissions as to the appropriate sentence in any particular case. However, as pointed out by Sundaresh Menon CJ in *Janardana Jayasankarr v Public Prosecutor* [2016] 4 SLR 1288, sentencing is ultimately a matter for the court to assess and determine what sentence would be just in the light of all the

circumstances before it. In this case, the Judge considered all the facts and determined that the various aggravating factors justified heavier punishment of the appellant. The Judge's reasons were cogent and before us the Prosecution is entitled to support the same.

25 The appellant also filed an application in Criminal Motion No 8 of 2020 for leave to adduce three medical reports on the appellant dated 30 July 2019, 31 December 2019 and 18 February 2020. These medical reports were prepared after the hearing in the High Court had concluded. The Prosecution did not object to these reports and they were therefore admitted by consent. However, before us and in the appellant's written submissions, there did not appear to be any reliance on these medical reports.

26 For the reasons we have given above, we see no merit in this appeal and dismiss it accordingly.

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| Judith Prakash JA<br>Judge of Appeal | Tay Yong Kwang JA<br>Judge of Appeal | Woo Bih Li<br>Judge |

Mohammed Shafiq bin Haja Maideen and Zamiq Azmeer bin Borhanudin (Abdul Rahman Law Corporation) for the appellant;
Winston Man and Sruthi Boppana (Attorney-General's Chambers) for the respondent.