V Murugesan v Public Prosecutor
[2005] SGCA 54

Case Number : Cr App 7/2005

Decision Date : 01 December 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Choo Han Teck J; Yong Pung How CJ

Counsel Name(s) : The appellant in person; Lee Lit Cheng and Daphne Chang (Deputy Public Prosecutors) for the respondent

Parties : V Murugesan — Public Prosecutor

Criminal Law – Offences – Property – Rape – Whether grounds existing for court to set aside conviction on rape offence – Section 375 Penal Code (Cap 224, 1985 Rev Ed)

Criminal Procedure and Sentencing – Sentencing – Principles – Trial judge ordering sentences for offences of abduction and rape to run consecutively – Whether "one transaction rule" and "totality principle" applicable – Section 18 Criminal Procedure Code (Cap 68, 1985 Rev Ed), ss 375, 376 Penal Code (Cap 224, 1985 Rev Ed)

1 December 2005

Chao Hick Tin JA (delivering the judgment of the court):

1 This was an appeal against the appellant's conviction and sentence by the High Court for the offences of abduction and rape. At the same trial, the appellant was also convicted, on his admission of guilt, on two relatively minor offences of illegal entry and possession of an unlawful identity card ("IC offence") The sentences meted out by the trial judge on the four offences, were:

(a) abduction	:	seven years' imprisonment and seven strokes of caning.
(b) rape	:	14 years' imprisonment and 14 strokes of caning.
(c) illegal entry	:	ne month's imprisonment and three strokes of caning.
(d) IC offence	:	$3,000 fine (or one month's imprisonment in default).

2 The trial judge ordered that the imprisonment sentences for abduction and rape were to run consecutively while that for the illegal entry was to run concurrently with the first two. The net result was that the appellant would have to serve a total prison term of 21 years and 24 strokes of caning. Should the appellant not able to pay the fine of $3,000 for the IC offence, he would have to serve another one more month of imprisonment.

3 We heard the appeal on 24 October 2005 and found no merit in the appeal against the conviction for abduction and rape. However, we allowed the appeal against the sentences imposed

for these two offences on the ground that certain principles on sentencing appeared to have been overlooked. We now give our reasons.

The facts

4 The appellant is a 28-year-old Indian national. At about midnight on 4 March 2004, the victim was returning home by taxi after some drinks with friends. Having alighted from the taxi, she vomited on a grass patch at the foot of Block 715 Woodlands Drive 70. She was tipsy. At that moment, the appellant and a friend, Manikkam, were also returning to a block nearby after some drinks. Seeing the victim in that condition at the void deck of Block 715, they forcibly dragged her into the refuse area of the block, where the offence of rape was committed by the appellant. We should, at this juncture, add that before the trial, the accomplice, Manikkam, had pleaded guilty to charges of abduction, abetment of rape and attempted rape for which he was sentenced to serve a total of 14 years' imprisonment and ten strokes of caning.

5 According to the victim, one of the two men who approached her spoke in a foreign language and that person grabbed her by the waist and arms and dragged her into a dark room. As she was being dragged, she screamed and struggled. Inside the room while one man held her down the other was in front of her and she felt something being inserted into her vagina. Having previously experienced sexual intercourse, she knew that it was a penis which had entered her vagina.

6 As the victim was being dragged into the refuse room, her screams were heard by two residents, Latipah bte Isman ("Latipah") and Goh Kim Ean ("Goh"), who lived at the seventh and eighth floors respectively of Block 719 Woodlands Avenue 6, a block which is adjacent to Block 715. Both their flats face the refuse area of Block 715 and they could see clearly what was happening in the vicinity of the refuse area.

7 Latipah said that she saw two dark-skinned men dragging a woman from the void deck of Block 715 into the refuse room. The woman was struggling and screaming as she was being dragged. Latipah shouted at them saying "Oei, Police". As she was calling the Police emergency line, she saw one of the two men opening the door to the refuse room while the other man dragged the woman in. At all times the woman kept screaming as she was being dragged. After the woman was brought into the refuse room, the man who was holding the door open, closed it.

8 According to Goh, she saw a man who was wearing a light-coloured, round-necked, long-sleeved T-shirt dragging a woman into the refuse room and another man, who was wearing a round-necked T-shirt, holding open the door to the room. The door to the room was closed by the second man as soon as the woman was dragged into it.

9 Thereafter, Latipah went down near to the refuse area, waiting for the arrival of the Police. At that moment, a man, Lee Wai Lup ("Lee") walked by. Latipah related to Lee what she witnessed. Lee went up to the door of the refuse room where he heard the laughter of two men and the muffled screams of a woman inside. He kicked the door and shouted to them to come out. In a matter of a few seconds, two dark-skinned men rushed out, one behind the other, and fled. He gave chase but was unable to find them. He said that one of the two men was taller than the other.

10 Shortly after the incident, the victim was medically examined by Dr John Yam, an Associate Consultant attached to the Division of General Obstetrics and Gynaecology of the KK Women's and Children's Hospital, who found bruises on her upper lip as well as her knees. On that day, the victim was having her period. No semen was detected in her vagina. While Dr Yam did not find any fresh hymenal tears, he said that the absence of such tears could not exclude the possibility that the

victim could have had non-consensual sexual intercourse shortly before she was examined. This was because the elasticity of the victim's hymen had already been breached as she had had previous sexual intercourse experiences. Dr Yam added that he had previously encountered cases where there was sexual intercourse and yet there was no obvious physical evidence. However, there is one very significant thing we should add: a semen stain, that matched the DNA profile of the appellant, was found on the victim's underwear. The probability of another person selected at random from the Indian population and having the same DNA profile was estimated to be one in 970 trillion, an extremely remote possibility.

11 Finally, there was the evidence of Manikkam, who testified for the Prosecution. He said that on that evening, he was wearing a white long-sleeved shirt with black pants and the appellant, a green short-sleeved T-shirt with dark pants. They were returning after having had some drinks and had passed by Block 715 when they noticed the victim squatting and she seemed to be talking on the handphone. He himself was feeling a little tipsy. However, upon the appellant's suggestion, he went forward to talk to the victim, who ignored him. Instead, she walked to the void deck and sat down. At that point, the appellant showed Manikkam the refuse room and asked the latter to forcefully bring the victim to that place. Manikkam did as he was told, grabbing and dragging the victim to the refuse room. As the victim had put up a struggle, the appellant held her legs and helped Manikkam in dragging her. Upon reaching the refuse room, the appellant opened the door and held it while Manikkam dragged the victim in. The appellant told Manikkam to hold the victim down as he was going to have sex with her. Manikkam did as he was told by grabbing both hands of the victim and holding them over her mouth and at the same time pinning her down. Although Manikkam said that he did not see the appellant removing his pants or inserting his penis into the vagina of the victim, the room being dark, he had observed that the appellant was on top of the victim between her legs. After two to three minutes, the appellant stood up and started to put on his underwear and pants. Manikkam then asked the appellant to hold the victim so that he could have sex with her. The appellant did not do as he was told but carried on putting on his clothes. Manikkam clambered onto the victim in an attempt to have sexual intercourse with her. However, he could not do the act as he failed to maintain an erection. Just then, they heard banging on the door. The appellant pulled Manikkam by the collar and said that they had to leave. Manikkam frantically tried to put on his clothes but missed his underwear. The appellant dashed out, followed by Manikkam who was still trying to put on his pants. However, in rushing out, Manikkam managed to snatch the victim's handphone.

12 The appellant, in his defence, denied any part in the abduction and rape. On his evidence, the real culprit was Manikkam. According to him, he was talking on the handphone with a female friend while walking past Block 715. They saw a Chinese woman (the victim) vomiting. Manikkam attempted to talk to the woman. He told Manikkam not to disturb the woman but Manikkam ignored him and followed the woman. Suddenly, he heard a scream and saw Manikkam dragging the woman into the refuse room. He tried in vain to stop Manikkam from dragging the woman into the room. Once inside, Manikkam removed the woman's underwear and placed his hands on her private parts. The appellant refused to hold the woman's hand as requested by Manikkam and pleaded with Manikkam to let the woman go by tugging at Manikkam. He claimed that because of what he did, no rape of the woman took place.

13 His explanation for the presence of his semen stain on the underwear of the victim was as follows. He said that he gets sexually aroused easily. Thus, this occurred when he saw Manikkam touching the victim's private parts and he felt a wet sensation. He further postulated that he could also have been wet earlier when he was talking on the handphone with the female friend. Due to this uneasy feeling of wetness, he put his hand into his underwear which came into contact with his semen. When Manikkam tugged at him, he fell. It was possible that his semen-stained hand could have come into contact with either the victim or Manikkam.

14 The trial judge, having analysed the evidence of the prosecution witnesses and that of the appellant, rejected the appellant's defence that the villain was Manikkam, not him. The trial judge accepted that the victim and Manikkam told the truth as to what had occurred that day, that the appellant was the main culprit, and Manikkam the accomplice. He accordingly convicted the appellant on the charges of abduction and rape.

Issues on appeal

15 The appellant, who was not represented at the trial and the appeal, submitted a rather well-written representation (no doubt written with assistance) to the court. In it, he said that it was Manikkam who had tried to have intercourse with the victim. It was after Manikkam's attempt and when he tried to position himself on her that he had premature ejaculation. Because of that, he could not thereafter maintain an erection. He therefore did not have any sex with the victim. He repeated his claim that he had a history of premature ejaculation when aroused, for which condition he had sought medical treatment in India.

16 The appellant also emphasised the fact that the medical evidence did not substantiate positively that there was penetration of the victim that evening. There was no spermatozoa in the victim's vagina and no tenderness around the vagina area to suggest rape.

Our consideration

17 On the basis of the evidence before the court, and taking into account the arguments made in the appellant's written representation, it was clear to us that both the appellant and Manikkam had jointly abducted the victim at the void deck of Block 715 into the refuse room of the block. Essentially, what the appellant wanted this court to do was to review the evidence relating to the rape charge. His point was that the main perpetrator of the whole thing was Manikkam and that his role was secondary. He did not have any sexual intercourse with the victim. His penis never penetrated the vagina of the victim.

18 For there to be an offence of rape, there must be penetration. This is clearly spelt out in the Explanation to s 375 of the Penal Code (Cap 224, 1985 Rev Ed) ("PC"). What constitutes penetration is further clarified in *Ratanlal & Dhirajlal's Law of Crimes* (Bharat Law House, 25th Ed, 2002) vol 2 at p 1857:

> The only thing to be ascertained is whether the private parts of the accused did enter into the person of the woman. It is not necessary to decide how far they entered. It is not essential that the hymen should be ruptured, provided it is clearly proved that there was penetration even though partial. For the offence of rape to be committed, it is not necessary that there should be complete penetration.

19 The trial judge accepted the victim's testimony that she felt that a penis had entered her vagina. Although the victim was then tipsy, and could not identify the two dark-skinned persons who abducted her, the judge was satisfied that she was conscious enough to know of what had transpired as evidenced by the fact that she struggled and screamed while the two culprits were abducting her. In coming to that conclusion, he tested her evidence against that of the independent witnesses, namely, Latipah, Goh and Lee, as well as that of Manikkam. The judge was particularly cautious, as can be seen from his observations at [47] of his judgment ([2005] SGHC 160):

> [W]here there is no trace of physical evidence of an act of rape having been committed, a court must be particularly circumspect and astute in evaluating the evidence. The evidence of the

victim and the relevant circumstances must be compelling and unequivocal. The testimony of the victim and the established factual matrix in this matter satisfied that acid test.

20 Latipah said that when the victim came out of the refuse area, she looked very distraught. Lee further testified that when he asked the victim whether she had been raped, she replied in the affirmative. In those circumstances, there was no reason for the victim to lie. These testimonies were corroborative. In any event, whether one was to take the evidence of the appellant or Manikkam, what was clear was that one of them had been on top of the victim. The question that remained was: As between the appellant and Manikkam, who raped the victim? The evidence of these two persons pointed to the other being the culprit.

21 Illustration (*b*) to s 116 of the Evidence Act (Cap 97, 1997 Rev Ed) provides that the court *may* presume that an accomplice is unworthy of credit and that his evidence needs to be treated with caution. The presumption is not mandatory but discretionary, depending on all the circumstances. In *Chai Chien Wei Kelvin v PP* [1999] 1 SLR 25, this court said at [52]:

> Whether or not the court should believe the evidence of the accomplice would depend on all the circumstances of the case and the evidence must be tested against the objective facts as well as the inherent probabilities and improbabilities; but where the court did not discern any attempt by the accomplice materially to minimise his own involvement or exaggerate that of the accused and his evidence was found to be consistent as a whole and reliable on a review of the whole evidence, there was no reason why the evidence should be treated as unreliable.

22 The trial judge quite rightly approached Manikkam's evidence with "measured wariness". This was how he felt when he compared the evidence of Manikkam with that of the appellant (at [39]–[41]):

> The crux of Manikkam's evidence was in several material aspects confirmed by the evidence of the eyewitnesses and the victim, not to mention the physical evidence found at the scene. The forensic evidence also indirectly supported his version of the facts. His semen was not found at the scene. His own involvement in the incident had already been resolved in earlier proceedings before another court, and he had received a heavy aggregate sentence. I was satisfied that he was not testifying merely to pin responsibility on the accused. Manikkam's evidence was dependable and consistent.
>
> The DNA evidence in this matter was reliably tested and identified. The DNA profile of the semen stain on the victim's panty matched the DNA profile of the accused's blood. The DNA profile of the bloodstains on the same panty matched the DNA profile of the victim. There are no issues in these proceedings pertaining to improper testing procedures, DNA contamination or insufficient DNA sampling.
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> The accused's version of the facts is plainly and irreconcilably inconsistent with the evidence of Latipah and Goh. On the basis of their testimony alone, it is apparent that he was an active participant in the incident.

The judge also noted at [45] that the appellant "appears to be an intelligent and assertive person", while Manikkam "appears to have a more malleable and somewhat servile personality". The appellant was also bigger in build than Manikkam.

23 It seemed to us that the presence of the appellant's semen on the victim's panty was clearly significant. The appellant's explanation of premature ejaculation was dismissed by the judge as

something conjured up by him. The judge observed (at [44]):

> If he was so desperately intent on preventing or deterring Manikkam from effecting his criminal intentions, it is most implausible that he would also have been "sexually aroused". It was clear to me that the accused was desperately seeking to minimise his unhappy role in the incident. He attempted to pin the entire responsibility for the incident on Manikkam while portraying himself as the innocent, Good Samaritan who had done his utmost to prevent the abduction as well as the purported attempted rape by Manikkam. He of course had no explanation for the laughter emanating from the Refuse Area that Lee heard while approaching it.

We noted that these observations of the judge were entirely logical and reasonable.

24 Another vital piece of evidence which was at variance with the version given by the appellant was this. If it were true that Manikkam sexually abused the victim first, followed by the appellant, it simply did not gel with the fact that the appellant was properly clothed when he ran out of the refuse area, yet Manikkam had left his underwear behind. The latter fact was inconsistent with the version of events given by the appellant and, instead, more consonant with the sequence of events narrated by Manikkam.

25 There were also other material contradictions between the appellant's oral testimony in court and his police statement. The trial judge, in particular, highlighted two jarring inconsistencies in [43] of his judgment. It is wholly unnecessary for us to repeat them here. They again went to show the unreliability of the appellant.

26 It is settled law that an appellate court should not disturb findings of fact based on the credibility and veracity of the witnesses whom the trial judge had heard and seen unless those findings are plainly wrong or clearly reached against the weight of the evidence: see *Lim Ah Poh v PP* [1992] 1 SLR 713 and *PP v Hla Win* [1995] 2 SLR 424.

27 Accordingly, in our judgment, not only was there nothing to show that the findings of the trial judge were plainly wrong, or against the weight of the evidence, those findings were amply substantiated by the evidence tendered before the court. In the result, we upheld the conviction against the appellant recorded by the trial judge on the abduction and rape charges.

Sentence

28 We now turn to the question of sentence. In imposing the sentence of 14 years' imprisonment and 14 strokes of caning for the rape charge, the trial judge had considered the cases of *Chia Kim Heng Frederick v PP* [1992] 1 SLR 361 ("*Chia Frederick*"), *PP v Solaiyan Arumugam* [2001] SGHC 82 and *PP v Suresh Nair* Criminal Case No 39 of 2003 (unreported). In *Chia Frederick*, this court stated at 367, [20] that:

> [F]or a rape committed without any aggravating or mitigating factors, a figure of ten years' imprisonment should be taken as the starting point in a contested case, in addition to caning.

In *PP v Suresh Nair*, the accused was sentenced to 18 years' imprisonment and 16 strokes of caning for raping an air stewardess in a leading five-star hotel.

29 The trial judge in this case noted that the courts had severely dealt with rapists and similar offenders. He felt that, in the circumstances of this case, a deterrent sentence was called for.

30 As regards the offence of abduction, the court referred to the case of *PP v Victor Rajoo* [1995] 3 SLR 417 where for a similar offence of abduction, the court there imposed an imprisonment term of five years. Manikkam, who had earlier pleaded guilty before another court, was also sentenced to five years' imprisonment for abduction. The judge thus sentenced the appellant to a term of imprisonment of seven years and seven strokes of caning.

31 The one matter which gave us concern was the judge's order that the terms of imprisonment for the offences of abduction and rape were to run consecutively, which meant that the appellant would be required to serve a total of 21 years' imprisonment. It is established law that an appellate court will not disturb the sentence passed by a lower court unless it is satisfied that (a) the sentencing judge made the decision based on an erroneous factual basis; (b) the sentencing judge erred in appreciating the material placed before him; (c) the sentence was wrong in principle; or (d) the sentence imposed was manifestly excessive or inadequate: see *Tan Koon Swan v PP* [1986] SLR 126.

32 The maximum term of imprisonment which the law has imposed for rape is 20 years. Section 18 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC"), however, provides that where an accused is convicted of at least three distinct offences at one trial, at least two sentences shall run consecutively. In the present case, as the appellant was convicted of more than three distinct offences, the trial judge was required to order that the sentences for at least two of those offences should run consecutively. Of course, the judge would have the discretion to determine which two or more of the sentences should run consecutively.

33 It seemed to us that the trial judge in ordering that the sentences for the offences of abduction and rape should run consecutively had overlooked the "one transaction rule" and the "totality principle" as these matters were not addressed in his judgment. The "one transaction rule" was referred to by this court in *Kanagasuntharam v PP* [1992] 1 SLR 81 as follows (at 83, [5]–[6]):

> The rule may be stated shortly: where two or more offences are committed in the course of a *single transaction*, all sentences in respect of these offences should be concurrent rather than consecutive. The difficulty, of course, is with the question of what constitutes one transaction and this question is necessarily one of fact depending on all the circumstances of the case. …
>
> The general rule, however, is *not* an absolute rule. The English courts have recognized that there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished: see *R v Faulkner*, *R v Wheatley* and *R v Skinner*. The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence. It is stated in broad and general terms and although it may be criticized as vague, it is necessarily in such terms in order that the sentencer may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard.
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> [emphasis added]

34 Similarly, in *R v Kastercum* (1972) 56 Cr App R 298 at 299–300, the English Court of Appeal considered the principles for determining whether sentences for convictions of a substantive offence and of assault on a police officer should run concurrently or consecutively:

> [W]here several offences are tried together and arise out of the same transaction, it is a good working rule that the sentences imposed for those offences should be made concurrent. The reason for that is because if a man is charged with several serious offences arising out of the same situation and consecutive sentences are imposed, the total very often proves to be much

too great for the incident in question. That is only an ordinary working rule; it is perfectly open to a trial judge in a case such as the present to approach this in one of two ways. If he thinks that the assault on the police officer is really part and parcel of the original offence and is to be treated as an aggravation of the original offence, he can reflect it in the sentence for the original offence. If he does that, it is logical and right that any separate sentence for the assault should be made concurrent. On the other hand, and, as this Court thinks, a better course, in cases where an offender assaults the police in an effort to escape, the sentence for the principal offence can be fixed independently of the assault on the constable, and the assault on the constable can be dealt with by a separate and consecutive sentence.

35 We recognise that the "one transaction rule" is not a rigid rule and should be applied sensibly. While, in some cases, there could be difficulties in determining whether the various offences constitute one transaction, there can be no doubt that in relation to the offences of abduction and rape on which the appellant was convicted, they were clearly connected and were one transaction. The abduction was for the purposes of having illicit intercourse with the victim and it was really part and parcel of the rape. This was expressly spelt out in the charge for the offence of abduction. As stated by the English Court of Criminal Appeal in *R v Torr* [1966] 1 All ER 178 at 180:

> [A]s both charges arise out of precisely the same facts and involve, so to speak, exactly the same criminality on the part of the appellant, there was no possible reason for passing consecutive sentences.

36 As regards the totality principle, its scope and operation is explained by D A Thomas in *Principles of Sentencing* (Heinemann, 2nd Ed, 1979) in these terms (at pp 57–58):

> The many decisions of the Court in which the totality principle has been applied to explain the reduction of a cumulative sentence made up of correctly calculated individual parts suggest that the principle has two limbs. A cumulative sentence may offend the totality principle if the aggregate sentence is *substantially above the normal level of sentences for the most serious of the individual offences involved*, or if its effect is to impose on the offender 'a *crushing sentence*' not in keeping with his records and prospects. [emphasis added]

37 This passage in *Principles of Sentencing* was cited with approval by both the High Court in *Wong Kai Chuen Philip v PP* [1990] SLR 1011 at 1015, [20] and this court in *Kamagasuntharam v PP* ([33] *supra*) at 84–85, [13]. This court further held that the existence of s 18 of the CPC did not detract from the principle. The section did not remove the duty of the court to have regard to the one transaction rule and the totality principle. The essence of this principle is really that the aggregate sentence "should not be longer than the upper limit of the normal bracket of sentences for the category of cases in which the most serious offence committed by the offender would be placed": see *Principles of Sentencing* at p 59.

38 The maximum imprisonment term which Parliament has prescribed for abduction under s 366 of the PC is ten years and for rape under s 376(1) of the PC is 20 years. For both the offences under ss 366 and 376(1), the offender is liable to caning. These are serious offences and so the punishments prescribed by law are severe. By ordering that the sentences imposed on the appellant for abduction and rape should run consecutively, the court had imposed a total imprisonment term of 21 years, a term in excess of the maximum prescribed by either s 366 or s 376. Bearing in mind that the two offences of abduction and rape committed by the appellant were clearly one transaction and although we acknowledged that the acts of the appellant and Manikkam were obviously heinous and revolting, that *per se* was no reason to depart from the "one transaction rule". This was not a case where we were faced with a persistent offender or where the maximum sentence would be too short

to reflect the gravity of the appellant's total conduct if we treated the offences as a single transaction.

39 We noted, as did the trial judge, that the offences were committed by the appellant (and assisted by Manikkam) in the most brazen and audacious manner, right in the midst of the residential heartland. We agreed that a deterrent sentence should be imposed for the protection of the public. For Manikkam, who pleaded guilty, he was sentenced to five years' imprisonment for the offence of abduction and seven years' imprisonment and five strokes of the cane for each of the offences of abetment of rape and attempted rape, with the imprisonment term imposed for the latter two offences to run consecutively while that for abduction was to run concurrently. In all, Manikkam would have to serve 14 years' imprisonment and suffer ten strokes of caning.

40 Here, as the trial judge found, the appellant had played a more dominant role in this despicable episode. Indeed, he orchestrated the whole incident. A sufficiently severe punishment must be meted out. Thus, we enhanced his imprisonment term for rape under s 376 to that of 18 years, leaving intact the number of strokes of caning which he would be receiving. However, we ordered that the imprisonment term imposed for the offence of abduction should run concurrently with that for the offence of rape while the imprisonment term of one month imposed for the offence of illegal entry will run consecutively with that for the offence of rape. In addition, we made a minor alteration to the sentence imposed for the IC offence. It was clear to us that the appellant would not be able to pay the fine of $3,000 (in default one month's imprisonment) imposed by the trial judge. The effect of such an order would be that the appellant would have to serve one more month of imprisonment. Accordingly, we substituted one month's imprisonment for the $3,000 fine for the IC offence and ordered that this imprisonment term was to run concurrently with the imprisonment terms for the offences of rape and illegal entry. In total, the appellant would have to serve a prison term of 18 years and one month and suffer 24 strokes of caning. This would be an amply adequate punishment for all the offences the appellant had committed.