IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 22

Criminal Motion No 33 of 2020

Between

Isham bin Kayubi

… *Applicant*

And

Public Prosecutor

… *Respondent*

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing] — [Appeal] — [Out of time]
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Andrew Phang Boon Leong JCA (delivering the judgment of the court *ex tempore*):

Introduction

1 This is the applicant's motion for an extension of time to file an appeal against the trial judge's sentencing decision imposing on the applicant an additional term of 12 months' imprisonment in lieu of caning. Convicted after trial on four charges of rape under s 375(1)(*a*) of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") and two charges of sexual assault by penetration ("SAP") under s 376(1)(*a*) of the Penal Code, the applicant was initially sentenced to a total of 32 years' imprisonment and 24 strokes of the cane (see *Public Prosecutor v Isham bin Kayubi* [2020] SGHC 44 ("GD") at [94] and [111]). However, the applicant was subsequently certified to be medically unfit for caning due to age-related spinal degeneration and, accordingly, that part of the sentencing decision in respect of caning could not carried out. Subsequently,

on 20 July 2020, the trial judge ("the Judge") sentenced the applicant to an additional term of 12 months' imprisonment in lieu of caning. Pursuant to s 377(2)(*b*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"), the applicant was required, if he was so inclined, to file within 14 days of the Judge's decision (*ie*, by 3 August 2020) a notice of appeal against the Judge's sentencing decision. On 6 November 2020, the applicant filed the present criminal motion for leave to file an appeal out of time.

Facts

Trial proceedings

2 As stated above, the applicant was convicted, after a trial, on four charges of rape and two charges of SAP. These acts were committed against two 14-year-old girls (see the GD at [1]). The applicant employed the same *modus operandi* on both victims. He lured the victims to his flat on the pretext of offering them a job and thereafter raped and forced the victims to fellate him under threat of harm (see the GD at [26], [28], [31] and [41]). The applicant also recorded videos of these sexual acts (see the GD at [26], [37] and [44]). By threatening to circulate the said videos, he coerced and raped one of the victims for a second time (see the GD at [31]). The trial was scheduled to commence in August 2019 before the Judge. However, the applicant's bizarre and blatant conduct during the trial had the effect of delaying proceedings.

3 At the close of the trial on 5 February 2020, the Judge convicted the applicant on all six proceeded charges. The Judge found that there was overwhelming objective evidence – such as videos of the assault recorded by the applicant himself – that the applicant had performed the relevant sexual acts on the two victims (see the GD at [59] and [85]). Additionally, the Judge found that both victims were credible and reliable witnesses whose evidence was

generally consistent (see the GD at [71]–[72] and [93]). He therefore accepted their testimony that they had been coerced into performing the sexual acts with the applicant. The Judge also ascertained from the applicant's cross-examination of the first victim and his written closing submissions that the applicant's defence was essentially that: (a) both victims had consented to the sexual acts (see the GD at [52]); and (b) he was a victim of a conspiracy by the first victim and her friends as well as a fabrication by the second victim (see the GD at [53]). After considering the evidence, the Judge rejected both aspects of the applicant's defence. On sentencing, the Judge imposed a global sentence of 32 years' imprisonment and 24 strokes of the cane (see the GD at [111]).

4 The Judge held that the offences fell within Band 2 of the sentencing frameworks for rape and SAP as set out in the Court of Appeal decisions in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [73] and *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 at [119] and [159] respectively, having regard to the offence-specific aggravating factors such as: (a) the victims' vulnerability; (b) the presence of premeditation; (c) the use of threats; (d) the recording of the sexual assaults; and (e) the failure to use a condom (see the GD at [103]–[104]). The Judge also regarded the applicant's prior convictions for similar sexual offences as an important offender-specific aggravating factor (see the GD at [105]). Significantly, the applicant had been convicted in 2008 for multiple sexual offences of a similar nature that were committed against four victims, three of whom were under the age of 16 at the material time (see the GD at [98]). The applicant had similarly targeted and lured those victims to different locations before sexually assaulting them and recording the sexual acts on his mobile phone. Such similarities between the applicant's antecedents and the present case underscored the need for a deterrent sentence.

Appeal proceedings

5 On 10 February 2020, the applicant filed an appeal against his conviction and sentence on the basis that the conviction was unreasonable and that his sentence was manifestly excessive. The applicant maintained his defence that the victims had consented to the sexual acts (see this court's decision in *Isham bin Kayubi v Public Prosecutor* [2020] SGCA 42 ("the Judgment") at [10]). He argued that his sentence was excessive because he did not physically harm the victims. In addition, the applicant urged us to grant him a retrial so that he might be represented by counsel (see the Judgment at [10]). At the hearing before us on 27 April 2020, the applicant sought an adjournment for him to engage counsel for the purposes of the appeal. We found no basis to grant any further adjournments and proceeded to hear the appeal. After hearing the parties, we dismissed the applicant's appeal in its entirety (see the Judgment at [23]). We affirmed the Judge's findings of fact and were fully satisfied that the victims did not consent to the relevant sexual acts (see the Judgment at [18]). We also upheld the global sentence of 32 years' imprisonment and 24 strokes of the cane as this was just and proportionate and in no way manifestly excessive (see the Judgment at [22]).

Imprisonment term imposed in lieu of caning.

6 Following our dismissal of the applicant's appeal, the applicant was certified to be medically unfit for caning due to age-related degenerative changes in his spine. Pursuant to s 331 of the CPC, the applicant's sentence of caning could not be carried out. On 20 July 2020, the Judge convened a hearing to decide whether to impose an additional sentence of imprisonment in lieu of the 24 strokes of the cane under s 332(2)(*b*) of the CPC. The applicant naturally urged the court not to impose any additional imprisonment term in lieu of caning. He pleaded for leniency and highlighted that his exemption from caning

was through no fault of his own and that he was already facing a sufficiently long custodial sentence. While the Judge acknowledged that the accused was exempted on medical grounds and could not have known that he would be exempted from caning, he was equally of the view that an additional sentence of 12 months' imprisonment would serve to compensate for the lost deterrent and retributive effect of caning, especially given the numerous aggravating factors and the applicant's similarly grave antecedents. Accordingly, the Judge imposed on the applicant an additional 12 months' imprisonment in lieu of the 24 strokes of the cane.

7 As noted at [1] above, the last day for the applicant to file a notice of appeal against the Judge's decision to impose the additional custodial term in lieu of caning, pursuant to s 377(2)(*b*) of the CPC, was 14 days after the Judge's sentence. Since the Judge sentenced the accused to 12 months' imprisonment in lieu of caning on 20 July 2020, the applicant had until 3 August 2020 to file an appeal. He did not do so. On 6 November 2020, however, the applicant filed the present criminal motion for an extension of time to file an appeal against the Judge's sentencing decision.

The applicant's submissions

8 The applicant's submissions focus on the prospects of the substantive appeal and, in this regard, he makes five arguments.

9 First, he relies on *Amin bin Abdullah v Public Prosecutor* [2017] 5 SLR 904 ("*Amin*") at [67] where the High Court stated that "an offender who was exempted from caning on medical grounds is less likely to have known that he would not be caned" and "[t]herefore, it would generally not be necessary to enhance the sentences of such offenders". The applicant contends that there is no deterrent effect in such an enhancement in sentence.

10 Second, the applicant argues that, when deciding to impose the additional custodial sentence in lieu of caning, the Judge omitted to take into account the overall length of the sentence when considering the sentencing principle of retribution. The High Court in *Amin* at [70] stated that "the weight of this factor [of retribution] should be considered with reference to the length of the existing sentence". The applicant asserts that the Judge did not do so.

11 Third, the applicant argues that the presence of aggravating factors cannot be relevant to the question of whether a custodial sentence in lieu of caning should be imposed. The applicant had already reached the specified limit of 24 strokes of the cane under s 328(1) of the CPC because: (a) the applicant was to be punished with a minimum sentence of 12 strokes of the cane for each charge (s 376(4) and s 375(3) of the Penal Code); and (b) at least two sentences of 12 strokes of the cane had to run consecutively given that the court had convicted him of at least three distinct offences (s 307 of the CPC). In those circumstances, the presence of aggravating factors would not affect the aggregate sentence of 24 strokes of the cane and could therefore only be relevant for the purpose of ascertaining the *variable* component of a sentence, *ie*, that part of the sentence pertaining to the custodial term. The aggravating factors, the applicant argues, had already been taken into account in the Judge's imposition of the 32-year custodial sentence.

12 Fourth, the applicant asserts that the length of the existing sentence, which is a relevant factor for the purpose of ascertaining whether an enhancement is warranted (*Amin* at [69]), had not been taken into account. In this regard, the applicant distinguishes two cases cited by the respondent in the sentencing proceedings below where a custodial sentence had been imposed in lieu of caning notwithstanding that the accused persons there were certified to be medically unfit for caning. One, in *Public Prosecutor v Chew Teng Wee*

(CC 72/2018, unreported), the base sentence was 14 years' imprisonment and 24 strokes of the cane, and the court imposed an enhanced sentence of 9 months' imprisonment in lieu of caning. Two, in *Public Prosecutor v BWR* (CC 6/2020, unreported), the base sentence was 12 years' imprisonment and 13 strokes of the cane, and the court imposed an enhanced sentence of 6 months' imprisonment in lieu of caning. The applicant contends that both cases are different from the present one because the former did not involve high base sentences of 32 years' imprisonment, in contrast to the case here.

13 Fifth, the applicant contends that the Judge did not consider his old age and spinal condition, which are relevant considerations (*Amin* at [77]–[80]). As he is currently 50 years old, the applicant says that, even taking into account the remission of one third of the length of his aggregate sentence, he would be in his 70s at the time of his release.

The respondent's submissions

14 The respondent argues that leave should not be granted to the applicant to file a notice of appeal out of time for three reasons. First, there was a substantial delay of more than three months. Second, no reasons were put forward for the delay. Third, the applicant's substantive appeal is unlikely to succeed. In respect of the prospects of the substantive appeal, the respondent argues that the Judge's decision to impose an additional 12 months' imprisonment in lieu of caning was justified on the facts of the case because the Judge had applied his mind to the decision in *Amin* and expressly noted that: (a) the applicant was exempted from caning on medical grounds and would not have known that he would be exempted from caning; and (b) the foregoing had to be balanced against and could not displace the need for an adequately

deterrent and retributive sentence that caning represents. The respondent makes four points in this regard.

15 First, the respondent submits that retribution is, in this case, a principal sentencing consideration because the offences were heinous, represented grievous intrusions into the victims' bodily integrity, and caused significant distress and psychological damage. In particular, the applicant had: (a) committed the offences against two young girls by luring them into his house on false pretences; (b) had penile-vaginal intercourse with them against their will; and (c) degraded them by forcing them to fellate him.

16 Second, the numerous aggravating factors present underscored the need for a high level of deterrence. These factors were: (a) the young age and vulnerability of the victims; (b) the high level of premeditation demonstrated in the commission of the offences; (c) the use of threats of harm against both victims; (d) the recording of the sexual assaults on the applicant's mobile phone; and (e) his failure to use a condom when engaging in penile-vaginal intercourse with both victims. Furthermore, specific deterrence was a significant consideration in this case because, apart from the aforementioned factors, the applicant's prior convictions were for sexual offences of a disturbingly similar nature. He had demonstrated a proclivity to target young girls and sexually exploit them. As the suspension of caning reduced both the retributive and deterrent effects of the overall punishment, these aspects had to be compensated for with an appropriate custodial sentence.

17 Third, the applicant's assertion – that an additional term of imprisonment should not be imposed in lieu of caning where lengthy imprisonment terms have already been imposed – was misguided. Additional

imprisonment terms in lieu of caning have been imposed in serious cases even where the offender faced a substantial term of imprisonment.

18 Fourth, the fact that the applicant is 50 years old and has age-related degenerative changes of the spine does not necessarily prevent him from being given an additional imprisonment term. He is currently not of old age. And, as the High Court stated in *Amin* at [78], the fact that an offender has a medical condition that caused him to be exempted from caning is not in and of itself a factor against the enhancement of sentence unless the considerations in *Chew Soo Chun v Public Prosecutor* [2016] 2 SLR 78 ("*Chew Soo Chun*") apply. These considerations did not apply here.

Whether leave should be granted for the applicant to file a notice of appeal out of time

19 It is clear and undisputed that the court has the discretion to grant an extension of time for the filing of a notice of appeal under s 380 of the CPC. Section 380(1) of the CPC states:

> **380.**—(1) The appellate court may, on the application of any person debarred from appealing for non-compliance with any provision of this Code, permit him to appeal against any judgment, sentence or order if it considers it to be in the interests of justice, subject to such terms and conditions as the court thinks fit.

20 In considering s 380 of the CPC in its present form, the High Court in *Public Prosecutor v Tan Peng Khoon* [2016] 1 SLR 713 at [40]–[42] endorsed the framework set out in *Lim Hong Kheng v Public Prosecutor* [2006] 3 SLR(R) 358 ("*Lim Hong Kheng*") and reiterated that the touchstone in deciding such applications is the "interests of justice" in the particular case. Moreover, the party that seeks the court's indulgence has to put forward sufficient material justifying why the court should exercise its discretion in his favour and, in this

regard, there is no automatic entitlement to an extension of time (see *Lim Hong Kheng at* [27]). A breach of the statutory timelines would only be excused in deserving cases where it is necessary to enable substantial justice to be done (at [37(e)]). In determining whether to exercise such a discretion, the court considers three factors (at [27]): (a) the length of the delay; (b) the explanation put forward for the delay; and (c) the prospects of the appeal.

21 Having heard the parties, we are satisfied that all three factors operate against the applicant and that he is accordingly denied leave to file an appeal out of time.

22 First, the motion was filed by the applicant more than three months after the statutory period of 14 days provided for filing a notice of appeal. This is not insubstantial. Nowhere in his affidavit or written submissions did the applicant even acknowledge the delay.

23 Second, the applicant has not provided any explanation to show why he merits the court's indulgence. The onus was on the applicant to furnish an explanation for the delay and he did not do so either in his affidavit or in his written submissions. We see no basis to excuse the applicant's breach of the statutory timelines.

24 Third, the applicant is unlikely to succeed in his substantive appeal. In fairness to the applicant, we think it appropriate to offer our views on the Judge's decision to impose an additional 12 months' imprisonment in lieu of caning:

(a) One, the Judge had given his reasons for imposing an additional 12 months' imprisonment in lieu of caning. We agree with the Judge that the need to compensate for both the deterrent and retributive effects

of caning (that would otherwise be lost) outweighs, in this case, the fact that the applicant did not know in advance that he would be exempted from caning. This is a case sordid to its core. The applicant had raped and sexually penetrated two young girls under the threat of force. We need not repeat the aggravating factors here, save to highlight one significant aspect, which is the fact that the applicant had been convicted of similar offences in 2008; three of those victims were similarly young. The suspension of the sentence in respect of 24 strokes of the cane diminished the deterrent and retributive effects of the overall punishment, and we agree with the Judge that such effects ought to be compensated for given the particularly egregious circumstances surrounding the applicant's offences.

(b) Two, while we agree with the applicant that it may not generally be necessary to enhance the sentences of offenders exempted from caning on medical grounds (*Amin* at [67]), the High Court in *Amin* was not prescribing a categorical rule. Each case must be decided based on a proper consideration of all the relevant circumstances.

(c) Three, the applicant's suggestion that the Judge did not consider the overall length of the base sentence (a point which he reiterated during the oral hearing before us) is unfounded. The Judge arrived at his conclusion after a careful perusal of all the relevant circumstances.

(d) Four, the applicant's assertion – that aggravating factors are not relevant to a sentencing decision under s 332 of the CPC – is not entirely correct. In our view, the aggravating factors are relevant in so far as they highlight the key aspects of the underlying factual matrix and shed light on the gravity of and the harm caused by the offence(s). This, in turn,

may be relied upon in identifying the principal or dominant sentencing consideration(s) in any given case.

(e) Five, as the respondent notes, additional imprisonment terms in lieu of caning have been imposed in serious cases even where the offender faced a substantial term of imprisonment. For example, in *Public Prosecutor v BRH* (CC 26/2019, unreported), a 41-year-old male offender pleaded guilty to a charge of aggravated statutory rape (s 375(1)(*b*) p/u s 375(3)(*b*) of the Penal Code) and two charges of aggravated SAP (s 376(1)(*a*) p/u s 376(4)(*b*) of the Penal Code), which were committed against his young step-daughter. He also consented for 12 other related charges to be taken into consideration. He was sentenced to 15 years' imprisonment and 12 strokes of the cane for the aggravated statutory rape charge and 13 years' imprisonment and 12 strokes of the cane for each aggravated SAP charge, making for a global sentence of 28 years' imprisonment and 24 strokes of the cane. After he was found to be unfit for caning due to a spinal condition, his sentence was enhanced by 12 months' imprisonment in lieu of the 24 strokes of the cane. Seen in this light, the Judge's decision in the present case to impose an additional 12-months' of imprisonment is in line with the way other cases of this type have been dealt with.

(f) Six, the applicant's age (*ie*, 50 years old) and age-related spine condition do not take his case very far. He is not especially old. And, his spinal condition, without more, is not sufficient to operate as a "factor against the enhancement of his sentence, *unless* the considerations outlined in *Chew Soo Chun* are engaged" (see *Amin* at [78]). In *Chew Soo Chun* at [38], the High Court established two ways in which ill-health would be relevant to sentencing: (a) first, as a ground for the

exercise of judicial mercy; and (b) second, as a mitigating factor in exceptional circumstances. Neither of these grounds has been proved here.

Conclusion

25 Having regard to the substantial period of delay, the lack of any explanation put forward for the delay, and the unlikely prospects of the substantive appeal, we are of the view that it would better serve the interests of justice to maintain the strictures of the statutory timeline in this case. There is no doubt in our minds that the sentencing considerations of retribution and deterrence come to the fore in this case, and that there arises a concomitant need to recompense the lost effects of these sentencing considerations that are inherent in the punishment of caning. The severity and the gravity of the applicant's crimes match the penalty of his transgression. All of the foregoing – as well as the need for due administration of criminal justice – lead us to the view that it would better serve the interests of justice to dismiss the applicant's criminal motion for an extension of time. The application is therefore dismissed.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Quentin Loh
Judge of the Appellate Division

The applicant in person;
James Chew, Jane Lim and Angela Ang (Attorney-General's Chambers) for the respondent.
