IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 170

Criminal Case No 28 of 2019

Between

Public Prosecutor

And

BSY

GROUNDS OF DECISION

[Criminal Law] — [Offences] — [Rape]
[Criminal Procedure and Sentencing] — [Sentencing] — [Principles]

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v
BSY

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Hoo Sheau Peng J:

Introduction

1 The accused pleaded guilty to and was convicted of three charges of raping his stepdaughter ("victim") between January and 17 July 2013. These were offences under s 375(1)(*b*) of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") and punishable under s 375(2) of the same.

2 The accused consented for six other charges to be taken into consideration for the purposes of sentencing. In respect of each of the rape charges proceeded with, I imposed a sentence of 12½ years' imprisonment. The sentences for the first two of these charges were ordered to run consecutively, with the sentence for the remaining charge to run concurrently. As the accused was above 50 years of age at the time of sentencing, he was not liable for caning. In lieu of caning, I imposed an additional 12 months' imprisonment under s

325(2) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"). The total sentence thus imposed was 26 years' imprisonment with effect from 25 May 2018, the date of the accused's remand.

3 The accused has appealed against his sentence. I now give my reasons for the decision.

Statement of Facts

4 The material portions of the Statement of Facts are as follows.

5 At the time of the hearing, the accused was 53 years old and the victim was 20 years old. I should add that the Statement of Facts erroneously stated that the accused was 52 years old, but that the charges correctly reflected his age. In any event, nothing turned on this.

6 In 2007, the accused married the victim's mother. It was the second marriage for both. During the period of the commission of the offences in the three charges which were proceeded with, *ie,* between January and 17 July 2013, the accused was 46 years old and the victim was 13 years old. At that time, the accused was working as a cleaner and the victim was a secondary one student.

7 The accused and the victim shared a close relationship akin to that between a father and daughter.

The first charge proceeded with ("the first charge")

8 Sometime between January and 17 July 2013, after the victim had returned home from school in the afternoon, she was alone with the accused. She shared with the accused the discussions she had with her classmates regarding sexual intercourse. The accused told her that she had to engage in

sexual intercourse to understand what it was about. Subsequently, the accused asked the victim if she wanted to have sex. Rejecting the accused, the victim stated that she was a child and that sex could lead to pregnancy. The accused assured her that to protect her from pregnancy, he would use a condom.

9 Thereafter, the accused brought the victim to an empty flat within a block of flats that was about to be demolished to have sex. This block of flats was near their home ("the first block of flats"). The accused asked the victim to lie down on the floor. He sat beside her, lifted her skirt and rubbed her thighs. He hugged and kissed her. Then, the accused took off the victim's panties and pulled down his own shorts and underwear. He put a condom over his erect penis and penetrated the victim's vagina with his penis. The victim felt pain. The accused continued to penetrate her for ten minutes and thereafter ejaculated into the condom. This was the victim's first experience of sexual intercourse and constituted the facts of the first charge proceeded with ("the first charge").

The second charge proceeded with ("the second charge")

10 Sometime after the events relating to the first charge above, the accused said that the victim should give him a "blowjob" *ie*, to fellate him. He said it was boring to engage only in penile-vaginal intercourse. When the victim asked him what a "blowjob" was, the accused told her she needed to learn. Then, he directed her to search for pornographic videos online. She followed his instructions, and she found online pornographic videos containing acts of fellatio.

11 On another occasion, the accused brought the victim to a staircase landing of another block of flats in the vicinity of the first block of flats ("the second block of flats"). The accused told the victim that he did not want to have

sex at the staircase landing of the first block of flats as they would be visible to persons who walked along the corridor. To avoid detection, the accused brought the victim to the highest floor of the second block of flats.

12 At the staircase landing, they sat down and the accused rubbed the victim's thighs. He stood up and exposed his penis to the victim. The accused told the victim to "come try this ice cream. You will know how it tastes and feels like". Despite her fear and disgust, the victim fellated the accused and the accused used his penis to penetrate the victim's mouth for approximately two minutes. The accused then asked the victim to rub his semen on her face, telling her it would be good for her skin. This would be repeated in subsequent occasions whenever the victim performed fellatio on the accused.

13 Then, the accused asked the victim to lean against the wall. After putting a condom on his erect penis, he pulled down her shorts and panties and penetrated her vagina with his penis for four to five minutes. The accused ejaculated into the condom while his penis was in her vagina. He then threw the condom down the second block of flats. This episode formed the facts of the second charge proceeded with ("the second charge").

14 Following these events, the accused began to use his handphone to take photographs and videos of both their private parts and him penetrating the victim's mouth and vagina. While the victim performed fellatio on the accused, he would ensure that he captured the victim's face on both the photographs and the videos. The accused removed the storage card from his handphone after each occasion to avoid detection by the victim's mother. Thereafter, the accused would commonly initiate sexual intercourse with the victim and the victim would not resist.

The third charge proceeded with ("the sixth charge")

15 On a separate occasion, the accused brought the victim to a staircase landing of yet another block of flats ("the third block of flats"). He chose this location in preference to another staircase landing that was situated next to the lifts of the block of flats their home was situated in, as persons using the lifts would be able to spot them. At this staircase landing of the third block of flats, they sat down and the accused rubbed the victim's thighs. The accused stood up, faced the victim and exposed his penis. The victim fellated the accused and the accused used his penis to penetrate her mouth. The accused asked the victim to lean against the wall. Standing in front of her, the accused pulled down her shorts and panties. The accused penetrated the victim's vagina with his penis for four to five minutes. The accused ejaculated outside the victim's vagina onto the staircase landing. This formed the basis of the third charge proceeded with (but which was the sixth charge in the series of nine charges against the accused) ("the sixth charge"). On this occasion, and on subsequent occasions, the accused did not use a condom.

Subsequent events

16 Sometime in July 2013, the victim began a relationship with another man. In August 2013, the accused asked her about her relationship status. When the victim said she had a boyfriend, the accused asked her whether they had sex. She replied that they had sex on one occasion. Then, the accused told her he no longer wanted to have sex with her as he felt she was "dirty".

17 Sometime after that, the victim developed symptoms akin to morning sickness. She informed the accused of her suspicion that she might be pregnant. After using a pregnancy test kit she received from the accused, the victim discovered that she was indeed pregnant. The victim informed the accused of

the result. On the same day, he told her to remain silent about their sexual activities. With the intention of inducing a miscarriage, the accused bought pineapple juice and fermented rice for the victim to consume. The accused did so for three successive days.

18 The victim then told her mother about the pregnancy and said that it was her boyfriend's child. In April 2014, the victim, who was only 14 years old at the time, gave birth to a boy ("the first child"). As the victim was a minor, the police commenced investigations into the matter. The victim did not disclose that she had sexual intercourse with the accused. She was afraid that the accused might show to other people the videos and photographs that he had captured of her engaging in intercourse and performing fellatio (see [14] above). Also, she wanted to protect the accused, and she was afraid he would get into trouble if she were to reveal the truth. Further, she did not want to ruin the relationship between her mother and the accused. Thus, she informed the police that she had sex with her boyfriend.

19 In 2016, the victim gave birth to another boy, whose father was another boyfriend. In early 2017, when the victim's mother confronted her about her sexual activities, the victim revealed that it was the accused who had "made her like this". The victim's mother agreed to let the matter rest when the accused and the victim said they did not have sex after the victim became pregnant with the first child, and they promised her not to have sex anymore.

20 In February 2018, the victim gave birth to a daughter. In May 2018, the victim brought her daughter to the hospital for a medical check-up. The victim's Child Protection Officer ("the CPO") from the Ministry of Social and Family Development approached them and asked about the first child's paternity. The victim disclosed that she had sex with the accused in 2013. Although the CPO

advised the victim and her mother to make a police report, they were unwilling to do so immediately.

21 On 22 May 2018, the CPO approached the victim at the void deck of her home and urged her to report the matter without delay as the CPO was concerned about the safety of the victim's daughter. The victim proceeded to make the police report on 23 May 2018. Even then, she still evinced an intention to protect the accused.

22 Following further investigations, blood samples belonging to the accused, the victim and the child were sent to the Health Sciences Authority ("HSA") for analysis. Based on the DNA profiles, the HSA analysis shows that the probability of the accused's paternity of the child was 99.9999%.

Decision on conviction

23 The accused admitted to the facts set out in the Statement of Facts without qualification. As all the elements of the three charges against him had been established beyond a reasonable doubt, I convicted him of the three charges.

Sentencing

Charges taken into consideration

24 The accused admitted to having committed six further offences against the victim. Both the Prosecution and the accused consented to these being taken into consideration for the purposes of sentencing. These were as follows:

(a) Third charge of sexual penetration of a minor under 14 by penetrating the victim's mouth with his penis sometime between

January and 17 July 2013, an offence under s 376A(1)(*a*) of the Penal Code, punishable under s 376A(3) of the same. This offence of fellatio took place on the occasion of rape as contained in the proceeded second charge (see [12] above);

(b) Fourth charge of rape under s 375(1)(*b*) of the Penal Code committed sometime between January and 17 July 2013, punishable under s 375(2) of the same. This offence took place during the third sexual encounter between the accused and the victim and occurred on the same occasion as the fellatio offence set out in the fifth charge below;

(c) Fifth charge of sexual penetration of a minor under 14 by penetrating the victim's mouth with his penis sometime between January and 17 July 2013, an offence under s 376A(1)(*a*) of the Penal Code, punishable under s 376A(3) of the same;

(d) Seventh charge of sexual penetration of a minor under 14 by penetrating the victim's mouth with his penis sometime between January and 17 July 2013, an offence under s 376A(1)(*a*) of the Penal Code, punishable under section 376A(3) of the same. This offence of fellatio took place on the occasion of rape as contained in the proceeded sixth charge (see [15] above);

(e) Eighth charge of sexual penetration of a minor under 16 by penetrating the victim's mouth with his penis sometime between 18 July 2013 and August 2013, an offence under s 376A(1)(*a*) of the Penal Code, punishable under section 376A(2) of the same; and

(f) Ninth charge of sexual penetration of a minor under 16 by penetrating the victim's vagina with his penis sometime between 18 July

2013 and August 2013, an offence under s 376A(1)(*a*) of the Penal Code, punishable under section 376A(2) of the same.

Antecedents

25 The accused admitted to all his antecedents. In summary, the accused had been convicted of drug offences or had been ordered to complete drug rehabilitation on five occasions between 1 August 1997 and 17 March 2006. Additionally, the accused was convicted on 29 November 1983 for a property-related offence.

The Prosecution's submissions

26 The Prosecution argued that the present case fell within Band 2 of the two-step sentencing framework for rape offences as set out by the Court of Appeal in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Terence Ng*"), which warrants consideration of a sentence of 13–17 years' imprisonment and 12 strokes of the cane.

27 At step one of the framework, the Prosecution highlighted the presence of the following offence-specific factors identified in *Terence Ng*: (a) abuse of position and breach of trust (at [44(b)]); (b) rape of a vulnerable victim (at [44(e)]); (c) premeditation and planning (at [44(c)]); (d) severe harm to the victim (at [44(h)]); and (e) deliberate infliction of special trauma (at [44(i)]). Based on the existence of more than two offence-specific factors, the Prosecution submitted that the starting point should be at the mid to higher end of Band 2 (*ie*, 15–17 years' imprisonment).

28 At step two of the framework, the Prosecution sought to calibrate the appropriate sentence, having regard to the offender-specific factors *ie,* the six

charges taken into consideration and the plea of guilt entered by the accused. The Prosecution argued for the following sentences: (a) at least 11 years' imprisonment for the first charge; (b) at least 12 years' imprisonment for the second charge; and (c) at least 14 years' imprisonment for the sixth charge. Therefore, the aggregate sentence submitted for was at least 25 years' imprisonment.

29 Additionally, the Prosecution sought an additional 12 months' imprisonment in lieu of caning on the premise that the accused would have been subjected to the maximum of 24 strokes of the cane had he not been above 50 years of age.

The mitigation plea

30 In the mitigation plea, Defence Counsel set out the accused's personal and family circumstances, citing the accused's low intelligence, lack of education and poor economic background as matters for consideration by the court in determining the appropriate sentence.

31 Defence Counsel accepted that the present case fell within Band 2 of the sentencing framework in *Terence Ng*. However, Defence Counsel submitted that there were three and not five offence-specific factors. I shall expand on this below. Defence Counsel submitted that the indicative starting sentence for each rape charge should be 12–13 years' imprisonment.

32 At the second stage, Defence Counsel relied on the accused's early plea of guilt and genuine remorse. Further, Defence Counsel submitted that the accused's admitted antecedents were dissimilar. Minimal weight should be given to the six charges taken into consideration because some of the offences disclosed therein were committed together with the proceeded charges as part

of the same transaction. Defence Counsel submitted that the appropriate sentence would be 11 years' imprisonment for each charge.

33 In total, Defence Counsel submitted for a global imprisonment term of 22 years' imprisonment with no additional imprisonment term in lieu of caning.

My decision

34 Pursuant to s 375(2) of the Penal Code, the prescribed punishment for an offence of rape is imprisonment for a term which may extend to 20 years and liability to fine or caning.

35 It was common ground that *Terence Ng* (at [39]) sets out the appropriate sentencing framework for rape offences. Under the framework, the court undertakes a two-step enquiry. First, the court identifies which band (out of three bands) the offence in question falls within, based on "the factors which relate to the manner and mode by which the offence was committed as well as the harm caused to the victim" (at [39(a)]). Then, the court obtains an "indicative starting point" within the appropriate band which correlates to the intrinsic seriousness of the offending act. Second, the court takes into account "the aggravating and mitigating factors which are *personal to the offender* to calibrate the appropriate sentence" [emphasis in original] (at [39(b)]).

Step 1: Offence-specific factors

36 Turning to the first step of the inquiry, I agreed with the Prosecution that the case involved five offence-specific factors in total. However, only four factors were engaged for the first charge, and not all the factors were present to the same degree or extent in the three proceeded charges.

37 First, there was an abuse of position and a breach of trust. The accused was the victim's stepfather. The victim was around eight years old when the accused married the victim's mother. Clearly, he was in a position of responsibility towards the victim. Furthermore, the victim and the accused shared a close relationship. This was evidenced by the fact that the victim trusted the accused enough to ask him about sexual intercourse. Instead of guiding the victim, the accused abused his position and violated the trust reposed in him.

38 Second, the victim was a vulnerable victim. She was only 13 years old at the time of the offences in the charges proceeded with. Furthermore, prior to the offence in the first charge, she was a virgin without any sexual experience. Initially, she had rejected the accused's sexual advances on the basis that she was a child and that she did not want to become pregnant. Nevertheless, the accused disregarded her concerns and took advantage of her vulnerability.

39 Third, the harm caused to the victim was severe. In particular, pregnancy occasioned from rape comprised one "especially serious physical or mental effect" on the victim (see *Terence Ng* at [44(h)]). Eventually, the victim gave birth to the first child when she was only 14 years old. I note that this aspect was especially relevant to the sixth charge – as the accused stopped using a condom only from that occasion onwards. I should add that the accused had, after learning of the victim's possible pregnancy, attempted to induce a miscarriage. He had scant regard for her well-being. In respect of the second and sixth charges, the accused further put the victim in fear of the photos and videos of their sexual activities being exposed. In relation to all three charges, a key aspect is the untold emotional and psychological harm inflicted on the victim. As set out above, from July 2013 onwards, the victim engaged in sexual

activities with boyfriends. In her words to her mother, the accused "made her like this". Apart from the first child, she now has two other children.

40 Fourth, contrary to the Defence Counsel's submission, I accepted that the accused planned and premeditated the offences. This "evinces a considered commitment towards law-breaking and therefore reflects greater criminality" (see [44(c)] of *Terence Ng*). Here, the accused isolated the victim by specifically choosing abandoned venues (*eg*, a flat awaiting demolishment at the first block of flats) or locations with minimal human-traffic (*eg,* unfrequented staircase landings at the second and third block of flats) to commit the offences. Also relevant to the second and sixth charges was the fact that the accused groomed the victim by asking her to view pornographic videos of fellatio so that she would know how to perform the act on him during their sexual encounters.

41 Fifth, while Defence Counsel argued to the contrary, I found that the accused deliberately inflicted special trauma on the victim. Specifically, the accused subjected the victim to "further degradation" (see [44(i)]) by asking the victim to smear his semen over her face as it would be good for her skin. This was demeaning and humiliating to the victim. I noted though that this factor applied only to the second and sixth charges, but not to the first charge

42 Having regard to the offence-specific factors, I agreed with the Prosecution that each proceeded charge clearly fell within the mid to high end of Band 2 of the framework in *Terence Ng.* As the sentencing range of Band 2 is 13–17 years' imprisonment, the mid to high end would mean 15–17 years' imprisonment. More specifically, I determined 16 years' imprisonment to be the indicative starting point. In this connection, I did not agree with Defence Counsel that the low end of Band 2 would be applicable *ie*, 12-13 years'

imprisonment. In fact, I noted that 12 years' imprisonment was below the range for Band 2.

Step 2: Calibration of the sentence

43 At the second stage of the *Terence Ng* framework, I assessed the offender-specific factors in order to calibrate the appropriate individual sentences.

44 In terms of aggravating factors, six offences were taken into consideration for the purpose of sentencing. However, a court is not bound to increase a sentence merely because there are such offences (see *Terence Ng* at [64(a)]). In this regard, I noted that the offences of fellatio in the third and seventh charges were committed on the same occasions as the second and sixth charges (which were proceeded with). Additionally, the offences in the fourth and fifth charges were committed on same occasion. While it is not entirely clear, Defence Counsel submitted that the offences in the eighth and ninth charges were committed on the same occasion. This was not disputed by the Prosecution. In view of such considerations of overlap, I did not consider it necessary to give a substantial uplift to the indicative starting point due to this factor.

45 Similarly, as submitted by Defence Counsel, the antecedents did not involve sexual offences. As these were not relevant antecedents, they did not warrant any substantial uplift to the indicative starting point.

46 Turning to the mitigating factors, I found the early plea of guilt to be one clear consideration operating in favour of the accused. As observed in *Terence Ng* at [68], "even in cases when the evidence … is compelling, [offenders who plead guilty to sexual offences] ought ordinarily to be given at least some credit

for having spared the victim additional suffering". Here, I am mindful that the victim was very reluctant to get the accused into trouble. Even at the point of making the police report, she wanted to protect the accused. By pleading guilty, the accused spared the victim the pain and trauma of court proceedings. The Prosecution accepted as much, and I am inclined to give this factor substantial weight.

47 However, I disagreed with the Defence Counsel that the accused's personal and family circumstances (particularly his lack of education and poor economic situation) should be given any weight at all in mitigation. While the accused was assessed by the Institute of Mental Health to have an extremely low to low average IQ, its report similarly made clear that the accused had adequate adaptive function and was not mentally ill or intellectually disabled. The accused *knew* that what he was doing was wrong. He should therefore take full responsibility for his actions.

48 Balancing the factors above, I was prepared to reduce two years' imprisonment from the indicative starting point. Thus, from 16 years' imprisonment, I arrived at individual sentences of 14 years' imprisonment for each proceeded charge. For completeness, I should state that the Prosecution did not clearly explain its submission that the individual imprisonment sentences for the three proceeded charges should be adjusted to at least 11 years, 12 years and 14 years respectively, given that the Prosecution did not argue for different indicative starting points to apply. As pointed out above, in my view, the facts of the three proceeded charges were slightly different, and each featured the aggravating factors to different degrees. It seemed to me that the offences were comparable in severity. For instance, although the accused used a condom on the first and second occasions unlike the occasion in the sixth charge, he also robbed the victim of her virginity in the first charge. Therefore,

I did not think it necessary to draw fine distinctions to arrive at different indicative starting points for the three charges. As the same offender-specific factors applied for the three charges, I did not consider different adjustments to the indicative starting point of 16 years to be appropriate.

The global sentence

49 Pursuant to s 307(1) of the CPC, at least two of the sentences imposed for the charges must be ordered to run consecutively. In doing so, the court must have regard to principles including the one-transaction rule and the totality principle.

50 As stated in *Public Prosecutor v Raveen Balakrishnan* [2018] 5 SLR 799 ("*Raveen*") at [73], the sentencing court should "take a 'last look' at all the facts and circumstances and be satisfied that the aggregate sentence is sufficient and proportionate to the offender's overall criminality". The totality principle requires the court to consider two limbs:

> … first, to examine whether the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences committed, and second, to examine whether the effect of the aggregate sentence on the offender is crushing and not in keeping with his past record and future prospects …. If an aggregate sentence is considered excessive, the sentencing judge may opt for a different combination of sentences to run consecutively or adjust the individual sentences (*Shouffee* at [59]; *Seng Foo* at [75]).

51 First, considering the individual sentence of 14 years' imprisonment per proceeded charge, I found that an aggregate sentence of 28 years' imprisonment would have been substantially above the normal level of sentences for the most serious of the individual offences committed. Second, I took the view that the effect of an aggregate sentence of 28 years' imprisonment would have been excessive.

52 In this regard, I found *Public Prosecutor v BND* [2019] SGHC 49 ("*BND*"), as cited by the Prosecution, to be of some guidance. There, a 35-year-old offender was charged with two counts of raping his 14-year-old daughter. The offender was convicted after trial. At the sentencing stage, the High Court held that the case fell within Band 2 of the *Terence Ng* (*supra* [26]) framework. Although the High Court noted that the offence-specific factors would have placed the case at the higher end of Band 2, the court took the view that a downward adjustment of the individual sentence running consecutively was appropriate owing to the totality principle (at [96]). As such, the court imposed a sentence of 13 years' imprisonment and 12 strokes of the cane for each charge of rape, with both sentences running consecutively. The offender was thus sentenced to a global sentence of 26 years' imprisonment and 24 strokes of the cane.

53 Therefore, I broadly agreed with the Prosecution's submission that 25 years' imprisonment would be appropriate. While the accused here pleaded guilty whereas the offender in *BND* claimed trial, the accused's conduct was more egregious than that of the latter. Therefore, a comparable total sentence was appropriate. For the foregoing reasons, I recalibrated the individual sentences from 14 years' to 12½ years' imprisonment for each proceeded charge, with the first and second charges to run consecutively and the sixth charge to run concurrently with the sentence for the first charge. In this connection, it was not disputed that the sentencing court may recalibrate the individual sentences imposed for the offences to reach the appropriate global sentence. In light of all of the above, and considering the principles of deterrence and retribution, I was of the view that the sentence of 25 years' imprisonment was appropriate. I did not think this was a crushing sentence for the 53-year-old accused.

Imprisonment in lieu of caning

54 The accused was not liable for caning as he was above 50 years of age. The offences were committed when the accused was 46 years old, and he managed to avoid facing up to the consequences of his conduct for almost five years because the victim did not wish to report him. Indeed, in 2016, he was able to convince not just the victim but also the victim's mother not to report him. As such, by the time the police report was lodged in 2018, the accused was above 50 years of age. I was of the view that the accused's sentence should be enhanced to "compensate for the deterrent and/or retributive effect of caning that is lost by reason of the exemption": *Amin Bin Abdullah v Public Prosecutor* [2017] 5 SLR 904 ("*Amin*") at [87]. I also did not consider there to be any factors which militated against enhancing the sentence. In particular, the accused was but 53 years old, and this was not a reason not to impose additional imprisonment.

55 Under Band 2 of the *Terence Ng* framework, the accused would have been liable for up to 12 strokes of the cane for each proceeded charge. As the accused faced three charges, he would have been liable for a maximum of 24 strokes of the cane. Taking reference from the guidelines set out in *Amin* at [90(d)], I imposed a sentence of 12 months' imprisonment in lieu of caning pursuant to s 325(2) of the CPC.

Conclusion

56 For the reasons above, I imposed the individual sentences of 12½ years' imprisonment for each charge (with two sentences to run consecutively). This led to a global sentence of 26 years' imprisonment (including an additional 12 months' imprisonment in lieu of caning) backdated to 25 May 2018.

Hoo Sheau Peng
Judge

Joshua Lim and Amanda Han (Attorney-General's Chambers) for the Prosecution;
Ashwin Ganapathy and Ameera Binte Mohamed Nagib Bajrai (IRB Law LLP) for the accused.