Public Prosecutor v Yusry Shah bin Jamal
[2007] SGHC 188

Case Number : MA 82/2007

Decision Date : 31 October 2007

Tribunal/Court : High Court

Coram : V K Rajah JA

Counsel Name(s) : Janet Wang (Attorney-General's Chambers) for the appellant; Ismail Hamid (Ismail Hamid & Co) for the respondent

Parties : Public Prosecutor — Yusry Shah bin Jamal

Criminal Procedure and Sentencing – Sentencing – Appeals – Young offenders – Accused charged with robbery and theft in dwelling – Relevant sentencing considerations – Whether rehabilitation or deterrence dominant consideration given seriousness of offence, culpability of accused and commission of shoplifting while out on court bail – How court struck balance between giving effect to rehabilitative considerations and need for deterrence particularly where young offenders were concerned

31 October 2007

V K Rajah JA:

Introduction

1 This was an appeal by the Public Prosecutor ("the Prosecution") against the sentence imposed on the respondent by the district judge. The respondent was charged with robbery under s 392 read with s 34 of the Penal Code (Cap 224, 1985 Rev Ed) ("Penal Code"), together with four others. He was also charged with an offence of shoplifting pursuant to s 380 of the Penal Code. The respondent had pleaded guilty to both charges and accepted unreservedly the Statement of Facts. In the result, the district judge sentenced the respondent to a term of 30 months' probation entailing six months of intensive probation in a hostel and 24 months' supervised probation with six months of e-tagging, and the attendant conditions.

2 I heard this appeal together with *PP v Mohammad Al-Ansari bin Basri* [2007] SGHC 187 ("*Mohammad Al-Ansari bin Basri*") and allowed the Prosecution's appeal by substituting the probation order made by the district judge with a sentence of reformative training with immediate effect. As the applicable sentencing principles are largely identical with that discussed in my grounds of decision for *Mohammad Al-Ansari bin Basri*, it will be sufficient for the purposes of the present appeal if I were simply to state the facts and refer to *Mohammad Al-Ansari bin Basri* to explain the reasons for my decision here.

The facts

3 Like *Mohammad Al-Ansari bin Basri* ([2] *supra*), the facts in this appeal are uncomplicated and can be stated with economy. On 31 March 2006 at about 8.04pm, the respondent, then 17 years of age, was with his three accomplices, Mohamad Norhazri bin Mohd Faudzi ("Norhazri"), Khairul Zaman bin Mamon Basir ("Khairul") and Muhamad Dhiyauddin bin Ahmad ("Dhiyauddin") in a Malaysian registered vehicle ("the car") entering Singapore via the Woodlands checkpoint. Norhazri drove the car and met up with his cousin, Mohamed Fadzli bin Abdul Rahim ("Fadzli").The group then proceeded

to Bedok Reservoir Road to visit Norhazri's grandfather.

4 It transpired that because of a staring incident involving an unknown group of boys, the group, including the respondent, initially intended to confront their antagonists. This showdown was only averted because the other group dispersed. Subsequently, Norhazri and Dhiyauddin hatched a plan to obtain money by staging a robbery. The respondent and Khairul agreed to this scheme and the entire group, less Fadzli, then combed the vicinity for victims. After a futile 20 minutes, Fadzli rejoined them. On the way to Geylang, Norhazri, Fadzli and Dhiyauddin hatched a plan to rob sex workers. The respondent and Khairul agreed to participate in this plan of action. As there was no space left in the car to pick up sex workers, the group proceeded to Geylang Drive, where the respondent, Khairul and Dhiyauddin alighted, leaving Norhazri and Fadzli to prowl for sex workers.

5 Shortly thereafter, Norhazri and Fadzli met the victim, a foreign sex worker, and went through the motions of negotiating payment with her in return for her services. They lured the victim into the car and brought her to Geylang Drive where the rest of group had been awaiting their arrival. As planned, the respondent, Khairul and Dhiyauddin were alerted to the arrival of the victim in the car. Following a signal from Norhazri and Fadzli, some members of the group proceeded to attack the unsuspecting victim as she stepped out of the car. As this was going on, the respondent and Khairul acted as look-outs and stood near the victim. In the course of the attack, the victim was forcefully disrobed and sexually assaulted by the respondent's accomplices. Khairul also held the victim's shoulder and abdomen when the latter fell and told her to keep quiet. A medical report on the victim's injuries subsequently revealed that she sustained multiple bruises on her head, limbs and trunk. The victim's handbag and valuables were also wrenched from her. Subsequently, the group fled the scene, and the respondent and Khairul were handed their share of $60 from the spoils of the robbery. The respondent was 17 years old at the time of the offence.

6 After the respondent had been arrested for his role in the subject incident, he brazenly committed another offence while on court bail. On 28 January 2007, the respondent took two t-shirts and proceeded to the fitting room in a store in Causeway Point, a shopping centre in Woodlands. When he subsequently emerged from the fitting room with only one t-shirt in his hand, the manager of the store queried him about the other t-shirt he had brought into the fitting room. The respondent then pulled out the t-shirt from his bag and acknowledged that he had intended to steal it. The respondent was later arrested by the police and charged accordingly.

The district judge's decision

7 The hearing before the district judge took place over four days sometime between March and April 2007, and the district judge later issued her grounds of decision in *PP v Yusry Shah bin Jamal* [2007] SGDC 144 ("GD"). In the course of the hearing, the district judge called for probation and reformative training reports. The Prosecution strongly objected to probation, arguing that in view of the seriousness of the offence and the circumstances, it was not warranted. The Prosecution in turn submitted that the respondent should be sent for reformative training at the reformative training centre if the district judge was not minded to impose the sentence prescribed by ss 392 and 380 of the Penal Code.

8 In deciding whether probation could and should be granted, the district judge considered three factors (GD at [48]): (a) the seriousness of the offence; (b) the respondent's prospects of reform and rehabilitation; and (c) whether there were any other reasons militating against granting probation. She reached the same conclusion as she had in *PP v Mohammad Al-Ansari bin Basri* [2007] SGDC 145, concluding that the respondent did not have a high degree of involvement in the robbery as he was merely acting as a look-out and as such the possibility of rehabilitation through

probation could not be conclusively ruled out.

9 The district judge also considered the respondent's prospects of rehabilitation to be good, particularly because he had strong familial support. Weighing the seriousness of his first offence, the culpability of the respondent, as well as his rehabilitative prospects, the district judge concluded that the seriousness of the offence did not necessitate the imposition of a term of imprisonment. She concluded that any public interest in general deterrence would not be harmed by imposing a sentence other than the term of imprisonment and caning prescribed by s 392 read with s 34 of the Penal Code.

10 In dealing with the respondent's shoplifting offence when he was out on bail for his first offence (see [6] above), the district judge, after some initial diffidence, was convinced by the respondent's assertion that he had learnt his lesson. Furthermore, the district judge took into account the probation officer's finding that the respondent was an immature youth who was naïve in his thinking and that the shoplifting offence was not serious as it only involved a small amount (GD at [61]).

11 Ultimately, the district judge decided that probation was more suitable to meet the appropriate rehabilitative goals for the respondent due to his personal circumstances, especially the strong family support which could be afforded to him.

The decision of this court

12 For reasons which I have elaborated upon in *Mohammad Al-Ansari bin Basri* ([2] *supra*), which I briefly set out below, I was of the view that a sentence of reformative training more appropriately balanced the rehabilitation of the respondent with the need for deterrence, both specific and general.

Can rehabilitation be the dominant consideration here?

13 Adopting the general analytical framework I had set out in *Mohammad Al-Ansari bin Basri* ([2] *supra*) at [77], the starting point was whether rehabilitation can remain the predominant consideration notwithstanding the youth of the respondent. I accepted the district judge's conclusion that the respondent's prospects of rehabilitation to be good, particularly because he had strong familial support. Furthermore, as was the case in *Mohammad Al-Ansari bin Basri*, while the robbery offence committed was serious, it was certainly not so serious, or committed in such a wanton manner, for me to conclude that the respondent was without any realistic prospect of reform. Accordingly, rehabilitation could still be regarded as a dominant consideration in this case .I was therefore extremely reluctant to impose the statutorily prescribed mandatory punishment of at least three years imprisonment and 12 strokes of the cane (for the offence of robbery committed after 7.00pm and before 7.00am) on the respondent.

Reformative training better balanced rehabilitative aims with need for deterrence

14 However, as for the question of seeking the proper balance between giving effect to rehabilitation as a dominant consideration and the need for deterrence, I felt that the balance had been wrongly struck by the district judge.

Seriousness of the offence and culpability of the respondent

15 As a starting point, the principal offence committed in the present appeal was nothing short of reprehensible and must be unequivocally deplored through appropriate sentencing. In relation to the robbery, the respondent and his accomplices had targeted a lone and vulnerable female victim in the early hours of the morning, on the pretext of obtaining her sexual services, before viciously and

remorselessly turning on the unsuspecting victim in a deserted area. The gravity of the offence was compounded by the indignity and extent of the physical assault (and later, sexual assault) that was brought to bear on the victim in the course of the robbery.

16 Specifically, while the respondent may not have been the prime initiator or mover of the offending conduct, he was nevertheless a willing and conscious participant in these disturbing offences. In fact, the respondent was a look-out in the robbery. A look-out often plays a not unimportant role as he provides support and comfort that allows the other offenders to commit the crime unhindered. Often this permits the seriousness of an offence to be exacerbated. This is precisely what happened in this matter. The respondent acted as one of the look-outs as the robbery of the victim proceeded. Despite being physically present and witnessing the distress of the victim, the respondent not only did not call for help but persisted in his role that facilitated the commission of the offence. These factors alone made it obvious that the need for deterrence was high in this case. Accordingly, the rehabilitative principle could not be given effect to in this case without also taking into account the pressing need for deterrence.

Commission of shoplifting offence while on bail

17 Furthermore, the additional fact that the respondent committed a separate offence, while on court bail, showed further that probation was not appropriate. In *PP v Loqmanul Hakim bin Buang* [2007] SGHC 159, I had articulated the reason why an offence committed while on bail could be considered an aggravating feature (at [54]):

> [T]he granting of bail in every case involves a calculated assessment on the part of the courts (or the police, in the case of police bail), incorporating both a belief and trust that the alleged offender would not abuse his liberty to reoffend against society and/or disrupt the administration of justice. ***It appears to be now quite widely accepted that it is the blatant abuse of such a position of trust that constitutes the aggravating factor when a party commits an offence whilst on bail. Put another way, the accused's culpability for the offence is enhanced because he had exploited the trust that has been reposed in him by the State***. I should also point out that in England, by virtue of s 29 of the Criminal Justice Act 1991, "the court *shall treat* the fact [*ie*, offending on bail] as an aggravating factor" [emphasis in original]: see [Nigel Walker & Nicola Padfield*, Sentencing: Theory, Law and Practice*, (Butterworths, 2 Ed, 1996] at p 43–44. There was, however, no articulation of the rationale of this principle by the English Parliament; see Christopher Harding and Laurence Koffman, *Sentencing and the Penal System: Text and Materials* (Sweet & Maxwell, 2nd Ed, 1995) … at p 156. [emphasis added in bold italics]

At [61] of the same grounds of decision, I summarised the relationship between this reason and the principles in sentencing:

> To recapitulate, the commission of an offence whilst on bail is *aggravating* in nature because it is consistent with two of the key sentencing considerations, namely *retribution* and *deterrence*, though more so the latter than the former. Accordingly, where the primary sentencing consideration that is engaged represents one of these considerations, or both, the fact that the offence had been committed on bail assumes further significance meriting enhanced sanctions to reflect the abuse of trust and the manifested proclivity for offending behaviour. [emphasis added in original]

18 Applied to the present case, these principles undoubtedly made the respondent's subsequent commission of the shoplifting offence while he was on bail an aggravating feature. With respect, the district judge had not accorded sufficient (indeed, any) weight to this factor but instead, rather

surprisingly, chose to accept the professed regret of the respondent after he had been apprehended a second time by the police. In my view, any such purported regret must in the prevailing circumstances be viewed with a very large pinch of salt and accorded little weight; it is far more significant that the respondent had not shown any such regret *after* his first offence. The need for deterrence (both specific and general) assumed greater importance precisely because the respondent had committed the shoplifting offence while on bail after being charged with the commission of a serious offence. Where was the evidence of contriteness and acknowledgement of earlier wrongdoing when he nonchalantly committed the shoplifting offence?

The appropriate sentence in this case

19 As such, for the reasons which I have elaborated upon in *Mohammad Al-Ansari bin Basri* ([2] *supra*), I concluded that the district judge mistakenly tilted her decision in favour of the respondent in seeking to apply the general principle of sentencing young offenders with a lighter touch. A lighter touch which places an emphasis on rehabilitation does not and cannot mean that young offenders who commit serious offences are left largely untouched by the customary penal consequences. While I acknowledged the relevance and applicability of rehabilitative efforts to the respondent in the appeal before me, I concluded that the realisation of such an objective could not preclude the general necessity for deterrence as a serious offence had been committed, exacerbated by the fact that the respondent had committed a second offence while out on bail for the first offence. In the result, I set aside the district judge's decision and sentenced the respondent to reformative training with immediate effect.

20 On a related note, as I observed in *Mohammad Al-Ansari bin Basri* ([2] *supra*, at [95]), another High Court judge had recently affirmed the decision of the district court in *PP v Khairul Zaman bin Mamon Basir* [2007] SGDC 86 ("*Khairul Zaman bin Mamon Basir*"), where the district judge concerned had sentenced the accused to probation based on largely identical facts. In fact, the accused in *Khairul Zaman bin Mamon Basir* was involved in the same instance of robbery as the respondent in the present case and could be said to have had an even greater culpability in the commission of the offence. However, since no grounds of decision have been issued, I do not think that it is appropriate for me to speculate on the reasons for the judge's decision, save to reiterate the observations I made in *Mohammad Al-Ansari bin Basri* at [95]–[97].

Conclusion

21 For the reasons above, I allowed the Prosecution's appeal and sentenced the respondent to reformative training.