Public Prosecutor v Soh Song Soon
[2009] SGHC 249

Case Number : CC 25/2009

Decision Date : 03 November 2009

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Shahla Iqbal and Wynn Wong (Deputy Public Prosecutors) for the prosecution; Simon Tan Hiang Teck (Attorneys Inc LLC) for the accused

Parties : Public Prosecutor — Soh Song Soon

Criminal Procedure and Sentencing – Mitigation

3 November 2009 Judgment reserved.

Choo Han Teck J:

1 The accused pleaded guilty to four charges of sexual assault on a 12-year old boy. Two charges were under s 376A(1)(a) and the other two were under s 376A(1)(c) of the Penal Code (Cap 224, 2008 Rev Ed). He was 68 years old at the time of the offence. In two of the charges he committed fellatio on the boy and in the other two he made the boy commit fellatio on him. 11 other similar charges, all concerning the same boy and committed during the same period of time, namely, July to August 2008, were taken into account for the purposes of sentencing. The offences fall into two categories. The learned Deputy Public Prosecutor ("DPP") did not, and was not, obliged to explain why the prosecution proceeded with four and not two charges in such circumstances. The information leading to the arrest was given by a neighbour who lived in the flat opposite the accused's flat. She saw him walking naked in his flat and called the police. The police found the boy in his flat when they investigated the complaint. The accused first met the boy in August 2007 at a carnival where the accused was performing as a magician. The boy wanted to learn the art of a magician from the accused and was given permission by his father to do so. The boy would go to the accused's flat on Saturdays and Sundays and would sometimes stay overnight at the accused's flat over the weekend. The boy grew close to the accused and addressed him as "godfather".

2 In mitigation, Mr Simon Tan, counsel for the accused adduced evidence by way of a medical report from Dr Paul Ngui ("Dr Ngui"), a consultant psychiatrist, which stated that the accused suffered from a Stress Disorder prior to his arrest. In response, the DPP applied for a Newton hearing. Dr Lim Boon Leng ("Dr Lim"), the psychiatrist called by the prosecution, was a professional witness but not an expert witness. He told the court that he became a qualified psychiatrist in 2006. Dr Ngui was also not called as an expert witness in this case although he seemed qualified to be one. Dr Lim testified that having examined the accused on two occasions after his arrest and having reviewed the nursing notes, he was of the opinion that the accused did not suffer from any mental illness. His report dated 9 September 2008 was prepared to indicate that the accused was fit to plead; it was not specifically prepared in rebuttal of Dr Ngui's report, which was dated 28 November 2008. The Newton hearing in this case could have been averted. The point that Mr Tan wanted to make was that the accused was going through a period of emotional stress because his son had informed him that he (the son) was emigrating to Canada. The accused had been very close to his son, and feared that when his son left, he might be forced to live in a home for the aged. In support of this, counsel adduced Dr Ngui's medical report of 28 November 2008 (exhibit D1) which stated that the accused was suffering from a Stress Disorder. The relevant passage stated that the accused person's "pre-existing Stress Disorder is a strong contributory factor to his reduced impulse-control when he committed his offence." I think that the defence adduced Dr Ngui's medical opinion in abundance of

caution and, perhaps, consequently presented a mitigation that the DPP perceived as possibly carrying undue weight. That led to the DPP's application for the Newton hearing.

3 A Newton hearing takes its name from the case of *R v Robert John Newton* (1982) 4 Cr App R(S) 388 ("*Newton*"). The appellant in *Newton* pleaded guilty to sodomising his wife. In mitigation his counsel stated that the wife had consented to the act, which, if true, would have resulted in a much lower sentence. The prosecution did not accept that the wife had consented. The sentencing court after hearing submissions from both sides, sentenced the appellant to eight years' imprisonment. The Lord Chief Justice Lane (delivering the judgment of the appeal court) held that a sentencing court has three options when dealing with a divergence of facts between the mitigation and the prosecution's case. The first option is not relevant in non-jury trials - so I shall only refer to the other two. The second option was that the court may hear evidence from both sides and decide the fact for himself (this was to become known as a "Newton hearing") and thirdly, he could just hear submissions of counsel and come to a conclusion. The third option had been the conventional and predominant procedure prior to sentencing. It will be appreciated that a Newton hearing should be the exception and not the rule. In the case of sentencing after trial, there would usually be little dispute of fact, so a Newton hearing would, if required, arise in cases where the accused has pleaded guilty. The courts traditionally grant indulgence to the accused, and if the accused is represented, his counsel, to make a speech in mitigation of the offence. All sorts of claims are made by or on behalf of the accused in mitigation. Some would be obviously unmeritorious whilst some may be relevant. The court would normally have little difficulty deciding how much weight if any it would give to the mitigation. Sometimes, a court might take the view that a particular divergence on facts might be crucial to the sentence and in such cases, a Newton hearing might be ordered. The Newton hearing is a misnomer. In *Newton* itself, the court below actually adopted the conventional approach and heard submissions without calling for evidence. However, on appeal, the appeal court held that when this method is adopted, and "where there is a substantial conflict between the two sides, he must come down on the side of the defendant." The appeal court in *Newton* found that the judge had not done so, and, on the contrary, from the court's grounds (set out in Lord Lane CJ's judgment) it appeared that the judge below had accepted the prosecution's version. Lord Lane CJ applied the principle enunciated, and reduced the sentence of eight years' imprisonment to "such sentence as will result in his release today" *Newton*, p 391. The accused had already served ten months in prison. It might be that by a combination of factors, owing perhaps to an excess of cautions, medical certificates concerning the mental health of accused persons became items of necessity in cases where mental distress on the part of the accused was advanced in mitigation. This, in turn, led cautious prosecutors to ask for Newton hearings as they feared that the court might otherwise "come down on the side of the defendant."

4 The circumstances in the present case did not require a contest of psychiatric evidence because this was not a case in which a psychiatric condition was relied upon as a defence to the offences charged. Neither was a psychiatric condition being relied upon as a substantial factor that led to the commission of the offences. Were the stress disorder a crucial fact, that fact should have been proved with expert evidence. The stress that the accused went through that might have accounted for a part of the factors that contributed to his commission of the offences could have sufficiently been submitted to the court by way of a mitigation plea without oral evidence. In this case opposing psychiatric evidence were adduced from two professional witnesses, that is to say, the witnesses were qualified psychiatrists but had not been called to testify as expert psychiatrists. A Newton hearing should not be convened unless the court is satisfied that it would be helpful in resolving a difficult question of divergent facts which would be crucial in the court's determination of sentence. In the present case, both prosecution and defence seemed to think that the Newton hearing would have greatly assisted me. For the reasons above, after hearing the evidence and considering the circumstances, I formed the view that the psychiatric evidence was not necessary.

Consequently, the Newton hearing ought not to have proceeded. I hasten to add that no criticism is made in this case against either Mr Tan or the DPP. In my view, they conducted their cases admirably.

5 *Newton* must not be read in isolation from the noble traditions of the criminal law. In that tradition, the prosecutor, having done its public duty of properly obtaining a conviction, leaves the sentencing to the discretion of the court. Sometimes, the court might find assistance from counsel of both sides to help determine the appropriate sentence that is consistent with similar cases in the past and predictable for cases in the future. The limitations of a Newton hearing were summarised by Judge LJ in *R v Kevin John Underwood & Others* ("Underwood") [2005] 1 Cr App R(S) 90, at [10] as follows:

(a) There will be occasions when the [Newton hearing] will be inappropriate. Some issues require a verdict from the jury. To take an obvious example, a dispute whether the necessary intent under s 18 of the Offences against the Person Act 1861 has been proved should be decided by the jury. Where the factual issue is not encapsulated in a distinct count in the indictment when it should be, then, again, the indictment should be amended and the issue resolved by the jury. We have in mind, again for example, cases where there is a dispute whether the defendant was carrying a firearm to commit a robbery. In essence, if the defendant is denying that a specific criminal offence has been committed, the tribunal for deciding whether the offence has been proved is the jury.

(b) At the end of the [Newton hearing] the judge cannot make findings of fact and sentence on a basis which is inconsistent with the pleas to counts which have already been accepted by the Crown and approved by the court. Particular care is needed in relation to a multi-count indictment involving one defendant, or an indictment involving a number of defendants, and to circumstances in which the Crown accepts, and the court approves, a guilty plea to a reduced charge.

(c) Where there are a number of defendants to a joint enterprise, the judge, while reflecting on the individual basis of pleas, should bear in mind the relative seriousness of the joint enterprise on which the defendants were involved. In short, the context is always relevant. He should also take care not to regard a written basis of plea offered by one defendant, without more, as evidence justifying an adverse conclusion against another defendant.

(d) Generally speaking, matters of mitigation are not normally dealt with by way of a [Newton hearing]. It is, of course, always open to the court to allow a defendant to give evidence of matters of mitigation which are within his own knowledge. From time to time, for example, defendants involved in drug cases will assert that they were acting under some form of duress, not amounting in law to a defence. If there is nothing to support such a contention, the judge is entitled to invite the advocate for the defendant to call his client rather than depend on the unsupported assertions of the advocate.

(e) Where the impact of the dispute on the eventual sentencing decision is minimal, the [Newton hearing] is unnecessary. The judge is rarely likely to be concerned with minute differences about events on the periphery.

(f) The judge is entitled to decline to hear evidence about disputed facts if the case advanced on the defendant's behalf is, for good reason, to be regarded as absurd or obviously untenable. If so, however, he should explain why he has reached this conclusion.

Counsel must not think that it is an obligation to address the court before sentence. All too often, the less said the better — especially in pre-sentence addresses to the court.

6 Reverting to the circumstances of the present case, I am of the view that the Stress Disorder of the accused was adequately proved on the basis of Dr Ngui's evidence. Dr Lim's report was made for the purposes of determining whether the accused was fit to plead. His testimony before me failed to persuade me that the accused was not suffering from a Stress Disorder at the material time. However, I was of the view that the Stress Disorder as described by Dr Ngui did not ameliorate the gravity of the offence or reduce the culpability of the accused in any substantial way. Dr Ngui's report merely helped to explain the personal circumstances of the accused which the court would have taken into consideration in the overall assessment of the offence and the other factors, if any, in mitigation. Even without the psychiatric evidence, the court was entitled to accept the submission that the accused was troubled by his son's emigration and the thought of living in a home for the aged. The fact or otherwise of a diagnosis of a Stress Disorder in this case therefore, in the words of Judge LJ in *Underwood*, had a "minimal impact". Thus, in summary, the factors I considered relevant, were (not in order of merit) first, the number of offences, namely, the four which the prosecution had proceeded with (as well as the 11 taken into account for the purposes of sentencing); secondly, the period in which the offences were committed, namely, between July and August 2008; thirdly, the ages of the victim and the accused; fourthly, the personal circumstances of the accused such as his anxiety over his son's impending emigration and the prospect of living in a home for the aged; fifthly, the absence of any previous antecedents; and finally, the range of sentences for the offence charged and the total length of incarceration. The accused did not commit any such offences before, and I am of the view that he would not likely repeat these offences which he had committed in a relatively late stage of his life. I therefore sentence the accused to three years imprisonment on each of the four charges and ordered that the sentence of the 1st, 2nd, and 14th charges shall run concurrently, and the sentence of the 15th charge shall run consecutively. The total length of imprisonment would be six years with effect from 15 May 2009.