IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 136

Criminal Case No 91 of 2017

Between

Public Prosecutor

And

BQW

GROUNDS OF DECISION

[Criminal law] — [Offences] — [Sexual assault by penetration]

[Criminal procedure and sentencing] — [Sentencing] — [Sexual assault by penetration]

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v
BQW

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7, 14 May 2018

4 June 2018

Woo Bih Li J:

Introduction

1 The accused, BQW, committed multiple sexual offences against the granddaughter ("the Victim") of the boss of the restaurant which employed him as a delivery driver. The abuses started sometime in September 2015 and continued over a span of nearly 15 months. When the first offence was committed, the Victim was seven years old and BQW was 57 years old. BQW faced the following charges:

1st charge	On the first occasion sometime in September 2015, in the office rest area of [the Restaurant], Singapore, did penetrate, with your finger, the vagina of [the Victim], a girl then under 14 years of age, without her consent, and you have thereby committed an offence under [s 376(2)(*a*)] and punishable under [s 376(4)(*b*)] of the [Penal Code (Cap 224, 2008 Rev Ed) ("the PC")].
2nd charge	On the 2nd occasion sometime between September 2015 and

December 2015, in the office rest area of [the Restaurant], Singapore, did penetrate, with your finger, the vagina of [the Victim], a female then under 14 years of age, without her consent, and you have thereby committed an offence under [s 376(2)(*a*)] and punishable under [s 376(4)(*b*)] of the [PC].

3rd charge On the 3rd occasion sometime between September 2015 and December 2015, in the office rest area of [the Restaurant], Singapore, did penetrate, with your finger, the vagina of [the Victim], a female then under 14 years of age, without her consent, and you have thereby committed an offence under [s 376(2)(*a*)] and punishable under [s 376(4)(*b*)] of the [PC].

4th charge On the 4th occasion sometime between September 2015 and December 2015, in the office rest area of [the Restaurant], Singapore, did commit an obscene act with [the Victim], a female then under 14 years of age, *to wit*, by pulling down her pants, kissing and licking her vagina, and you have thereby committed an offence under [s 7(*a*)] of the [Children and Young Persons Act (Cap 38, 2001 Rev Ed) ("CYPA")].

5th charge On the 5th occasion sometime between September 2015 and December 2015, in the office rest area of [the Restaurant], Singapore, did commit an obscene act with [the Victim], a female then under 14 years of age, *to wit*, by exposing your penis and causing [the Victim] to touch your penis, and you have thereby committed an offence under [s 7(*a*)] of the [CYPA].

6th charge Sometime between February 2016 and March 2016, inside [the Restaurant] delivery van bearing registration number [XXX] which was parked at the carpark of [XXX], Singapore, did commit an obscene act with [the Victim], a female then under 14 years of age, *to wit*, by pulling down her pants, kissing and licking her vagina, and you have thereby committed an offence under [s 7(*a*)] of the [CYPA].

7th charge On the [first] occasion sometime between June 2016 and December 2016, at Block [XXX], Singapore, did penetrate, with your finger, the vagina of [the Victim], a female then under 14 years of age, without her consent, and you have thereby committed an offence under [s 376(2)(*a*)] and punishable under [s 376(4)(*b*)] of the [PC].

8th charge On the 2nd occasion sometime between June 2016 and December 2016, at Block [XXX], Singapore, did penetrate,

with your finger, the vagina of [the Victim], a female then under 14 years of age, without her consent, and you have thereby committed an offence under [s 376(2)(*a*)] and punishable under [s 376(4)(*b*)] of the [PC].

9th charge On the 3rd occasion sometime between June 2016 and December 2016, at Block [XXX], Singapore, did penetrate, with your finger, the vagina of [the Victim], a female then under 14 years of age, without her consent, and you have thereby committed an offence under [s 376(2)(*a*)] and punishable under [s 376(4)(*b*)] of the [PC].

10th charge On the 4th occasion sometime between June 2016 and December 2016, at Block [XXX], Singapore, did commit an obscene act with [the Victim], a female then under 14 years of age, *to wit*, by licking her breasts, exposing your penis and causing [the Victim] to touch your penis, and you have thereby committed an offence under [s 7(*a*)] of the [CYPA].

11th charge On 5 December 2016, sometime between 2.50pm and 5.00pm, at Block [XXX], Singapore, did exhibit an obscene object, *to wit*, a pornographic video on your handphone to [the Victim], a female then under 21 years of age, and you have thereby committed an offence under [s 293] of the [PC].

12th charge On 5 December 2016, sometime between 2.50pm and 5.00pm, at Block [XXX], Singapore, did penetrate, with your finger, the vagina of [the Victim], a female then under 14 years of age, without her consent, and you have thereby committed an offence under [s 376(2)(*a*)] and punishable under [s 376(4)(*b*)] of the [PC].

2 The Prosecution proceeded with the 1st, 7th and 12th charges. BQW pleaded guilty to them. He admitted to the Statement of Facts without qualification. I accepted his plea of guilt and convicted him on each of the 1st, 7th and 12th charges. He also consented to the remaining charges being taken into consideration for the purpose of sentencing.

3 The punishment for an offence under s 376(2)(*a*) of the PC is set out in s 376(4)(*b*) of the PC which states:

> (4) Whoever —
>
> …
>
> (*b*) commits an offence under subsection (1) or (2) against a person (B) who is under 14 years of age,
>
> shall be punished with imprisonment for a term of not less than 8 years and not more than 20 years and shall also be punished with caning with not less than 12 strokes.

4 After hearing the submissions on sentencing, I sentenced BQW to 10 years' imprisonment for each of the 1st, 7th and 12th charges. Pursuant to s 307(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"), I ordered the sentences of imprisonment for the 1st and 7th charges to run consecutively and the sentence for the 12th charge to run concurrently with that for the 1st charge. The sentence of imprisonment for the 1st charge was to commence from 12 December 2016 being the date on which BQW was remanded. Therefore, the aggregate sentence of imprisonment was 20 years. No caning was ordered as BQW was more than 50 years old.

5 The Prosecution has filed an appeal against my decision on sentence.

Background to the offences

6 Sometime in 2006, BQW was hired by the Victim's father to work as a delivery driver of the restaurant which was owned by the paternal grandfather of the Victim. BQW drove the company van. He became trusted and the family of the owner and the children treated him like an uncle or grandfather.

7 Prior to June 2016, the Victim lived with her family at the residence of the grandfather. He would often bring his grandchildren to the restaurant. BQW would treat the Victim and her younger sisters like his own daughters and buy

toys and sweets for them, though he was always reimbursed by the grandfather. BQW was observed by the family to be particularly close to the Victim.

8 In June 2016, following a fallout between the Victim's father and grandfather, the Victim's family moved out of the grandfather's residence to her parents' residence. BQW became the trusted link between the estranged families. The grandfather sought BQW's assistance to bring household items and food to the parents' residence. Sometimes BQW visited them on his own accord. Thus, BQW visited the Victim at least once a week.

9 The Victim described BQW as her best friend and an uncle who gave her gifts. A colleague of BQW observed that the Victim appeared to lack attention from her father and step-mother and she would be very happy whenever she saw BQW.

Facts pertaining to the 1st charge

10 The first offence occurred sometime in September 2015. During the school holidays, the Victim went to the restaurant with her grandparents. She was studying in Primary One and was seven years old.

11 BQW was in the storeroom near the office area. The office rest area was located in an obscure corner behind the office area. When a colleague of BQW left the office area, BQW brought the Victim into the office rest area to play. He knew there was no CCTV camera inside the office rest area and no one else was around. He closed the door of the office rest area.

12 After the two had played together for a while, BQW sat on a sofa inside the office rest area. The Victim sat on BQW's lap and he became sexually aroused. He put his left hand into the front of her panties and inserted his middle

finger into her vagina. He digitally penetrated her vagina for a few seconds. The Victim felt uncomfortable and shifted her body around in order to stop BQW's action. As the Victim kept moving her body, BQW eventually removed his hand. He instructed the Victim not to tell anyone as this was their secret. BQW then left to continue with his work while the Victim remained in the office area.

Facts relating to the 7th charge

13 After the Victim and her immediate family had moved out of the residence of the grandfather, BQW visited the Victim sometime between June and December 2016 at her home bringing some sweets for her. She was about eight years old then. A domestic helper and the Victim's sibling who was a toddler were also at home.

14 BQW was sitting on a sofa in the living room to watch television when the Victim finished her shower and meal. The Victim sat on BQW's lap. When the Victim leaned on BQW, he became sexually aroused. In the meantime, the toddler was sitting on the floor in the living room watching television and the domestic helper was cooking in the kitchen.

15 BQW seized the opportunity and put his left hand into the front of the Victim's panties and inserted his middle finger into her vagina. He digitally penetrated her vagina for a few seconds. The Victim started to shift her body around. BQW stopped and took out his hand when the domestic helper came into the living room.

Facts relating to the 12th charge

16 On 5 December 2016, BQW went to the Victim's home at about 2.50pm to deliver a baby cot. The Victim was eight years old. The toddler and the domestic helper were at home.

17 After placing the baby cot in the living room, BQW sat on the sofa. The domestic helper saw BQW make the Victim sit on his left and place his left arm around her. The domestic helper was seated at the dining table opposite the sofa, about two to three metres away. She was facing the main door and not the sofa.

18 BQW played a pornographic video (of an adult female and male engaging in sexual intercourse) on his mobile phone and showed it to the Victim. After a while, the Victim told BQW she did not want to continue watching it. After showing the video for a while more, BQW switched off the video and put the phone into his pocket.

19 BQW felt sexually aroused. He put his left hand into the front of the Victim's panties. He inserted his left middle finger into the Victim's vagina. The Victim closed her thighs as she felt uncomfortable, but BQW continued to digitally penetrate her.

20 At about that time, the domestic helper turned her head and saw BQW's left hand inside the tights which the Victim was wearing. She also heard the Victim saying, "Uncle, stop it". She saw the act of BQW for a few more seconds before BQW removed his hand. He was unaware that the domestic helper had seen what he had done. He left at about 5.00pm.

The police report

21 After BQW left, the domestic helper asked the Victim what had happened. The Victim started to cry and told the helper what BQW had done. The domestic helper brought the matter to the attention of the Victim's grandfather.

22 Three days later, on 8 December 2016, the Victim's family members brought her to a police centre to lodge a police report stating that she was "molested by one male/Chinese". Thereafter, BQW was arrested and his mobile phone seized for forensic examination.

The submissions

23 The Prosecution submitted that general deterrence was the predominant consideration and specific deterrence was also pertinent. The Prosecution also submitted that in view of many aggravating factors, the case came within the upper reaches of Band 2 as set out in the decision of the Court of Appeal in *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015 ("*Pram Nair*"). This meant that an appropriate sentence for each of the three charges was 14 to 15 years' imprisonment. Pursuant to s 307(1) of the CPC, two of the terms of imprisonment must run consecutively. Hence, the aggregate would be at least 28 years' imprisonment. Notwithstanding the age of BQW, the Prosecution submitted that an aggregate of at least 28 years' imprisonment would not be crushing. The Prosecution also pointed out that as BQW was more than 50 years of age, he would not be caned. Furthermore, the Prosecution pointed out that to ensure that the punishment was not crushing, it had refrained from urging the court to impose an additional term of imprisonment in lieu of caning under s 325(2) of the CPC.

24 The Defence submitted that the Prosecution had proceeded on three of the most serious charges presented against the Accused. It submitted that an aggregate sentence of at least 28 years would be crushing.

25 The Defence accepted that the Victim was young and "there possibly could have been an abuse of trust" (see: para 24 of Mitigation Plea and Submissions on Sentence). However, it distinguished the present case from other cases where the trust arose from a family relationship. Also, BQW had not been a personal family friend. Nor was he employed in a position of trust. There was no violence. BQW had no similar criminal antecedents and had pleaded guilty.

26 Accordingly, the Defence submitted that an appropriate sentence for each offence would be 10 years' imprisonment with an aggregate sentence of 20 years' imprisonment. The Defence's submission of 10 years for each offence was at the lowest end of Band 2 or the highest end of Band 1 in *Pram Nair*.

27 As mentioned above at [4], I sentenced BQW to 10 years' imprisonment for each offence with an aggregate sentence of 20 years. The Prosecution has filed an appeal against my decision on sentence.

The court's reasons

28 In *Pram Nair*, the Court of Appeal said that there is an intelligible difference between penile penetration of the vagina and digital penetration of the vagina. The former was more serious. Adopting the framework in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 ("*Terence Ng*"), the Court of Appeal in *Pram Nair* set out three sentencing bands for the offence of sexual penetration of the vagina using a finger:

(a) Band 1: 7 to 10 years' imprisonment and 4 strokes of the cane;

(b) Band 2: 10 to 15 years' imprisonment and 8 strokes of the cane;

(c) Band 3: 15 to 20 years' imprisonment and 12 strokes of the cane.

29 In *Terence Ng*, the Court of Appeal had also set out three sentencing bands but these were for the sentence of the more serious offence of rape involving penile penetration of the vagina. Hence the range of sentences in each band there was higher than those set out in *Pram Nair*.

30 It was not disputed that deterrence was an important consideration in the circumstances before this court. I agreed that general deterrence was more important but specific deterrence was still relevant. Although BQW would have advanced in age after he served his sentence, a strong signal had to be sent to him never to repeat his deviant conduct. Retribution was also a relevant principle.

31 In *Terence Ng*, the Court of Appeal said that a sentencing court should adopt a two-step approach. The first was to consider the offence-specific factors and the second was to consider the offender-specific factors. I add that in *Terence Ng*, the Court of Appeal also said that the three bands of sentences stated there were for contested cases. It seems that, likewise, the three bands of sentences stated in *Pram Nair* were also for contested cases. Hence, a discount could be given where an accused person had pleaded guilty.

32 I come now to the offence-specific factors. I would say at the outset that generally I agreed with the Prosecution about the existence of some aggravating factors. However, I differed on the weight to be given for reasons which I elaborate below.

33 In this connection, I would mention that on 17 April 2018, I delivered my Grounds of Decision in *PP v BMR* [2018] SGHC 89 ("*BMR*"). Although the charges on which the accused there was convicted pertained to statutory rape involving penile penetration of the vagina and not digital penetration, that case was still useful as I had also considered various aggravating factors there similar in nature to those in the case before me now, but where the gravity was more serious as I elaborate later. *BMR* was therefore useful as a comparison of the aggravating factors, although I should mention that the accused in *BMR* is appealing against my decision on sentence while the Prosecution did not appeal.

34 First, the vulnerability of the Victim was especially important. Here the offences commenced when she was seven. In *BMR*, the offences commenced when the victim was eight.

35 Second, there was an element of an abuse of trust. However, as the Defence had submitted, there was no family relationship between BQW and the Victim. In *BMR*, the accused was the step-father of the victim.

36 BQW was also not in an occupation of trust like a teacher or coach or a lawyer or doctor. As the Defence submitted, he was not employed as a personal assistant of the father or grandfather of the Victim. Nevertheless, there was still an element of trust as he had been working for a number of years for the grandfather's business and had come to be trusted. While there was no family relationship he was treated like a grandfather or uncle of the Victim and he was particularly close to the Victim.

37 Accordingly, it was important to bear in mind that there are different levels of trust.

38 Third, the offences had been committed over a period of about 15 months. This, according to the Prosecution, showed that BQW was a persistent and recalcitrant offender. While 15 months was not a short period and was an aggravating factor, it was not as long as the period of offending in *BMR* which was about four years.

39 Fourth, not only was there an absence of consent in law, there was in fact no consent given by the Victim.

40 Fifth, there was some planning by BQW in the sense that most, if not all, of these acts were not committed on the spur of the moment, although they fell short of premeditation. The Prosecution submitted that there was evidence of premeditation, but there was no evidence that BQW had planned to take advantage of and abuse the Victim right from the beginning. There was also no evidence that he deliberately volunteered to look after the Victim or to bring items to her new home after she moved out of the grandfather's residence knowing that it was likely that he would have the opportunity to sexually abuse her. However, it seemed that over time, he realised that he could abuse her and did do so. This was not a case where he impulsively abused her and then refrained from repeating his misconduct. He must have realised that he would have opportunities to do so and when the opportunities came, he seized them.

41 Sixth, he committed other sexual abuse against the Victim such as the acts of sexual abuse as stated in the 4th, 5th, 6th and 10th charges. These were among the charges taken into consideration for sentencing. Fortunately, he did not penetrate her mouth with his penis or ask her to fellate him. In *BMR*, there were both penile and digital penetration of the victim's vagina and penile penetration of the victim's mouth.

42 As for the Prosecution's argument about moral corruption when BQW showed the Victim a pornographic video, this was already the subject of the 11th charge which was taken into consideration for sentencing. As this was no more serious than the other acts of sexual abuse mentioned above under the sixth factor, I considered this misconduct under the sixth factor instead of treating it as an additional aggravating factor.

43 As for the harm caused to the Victim this was not an additional aggravating factor as there was no harm beyond that that is usually associated with the offences in question. As I mentioned in *BMR* at [32]:

> ...[T]he point that the CA [in *Terence Ng*] was making was that where there are especially serious physical or mental effects on the victim such as pregnancy, the transmission of a serious disease or psychiatric illness, that is a serious aggravating factor. The physical and emotional harm caused to a victim of rape is what already causes the offence to be a very serious one. However, that harm should not then be used as an aggravating factor as that would be giving that harm double weight. Thus, in *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58, Aedit Abdullah J said, at [154], that there needs to be a relatively severe state of psychological or physical harm for the court to find that there is an additional offence-specific aggravating factor.

44 As for the Defence's argument that no violence was used, this was not a mitigating factor. Given the very young age of the Victim, it was not necessary for BQW to resort to violence.

45 As can be seen, the aggravating factors in the present case before me were not as severe as those in *BMR*. There, I considered the accused's conduct to fall within the middle to upper reaches of Band 2 for offences of penile penetration of the vagina.

46 In the present case before me, I was of the view that the offence-specific factors fell within the low to mid-range of Band 2 for offences of digital penetration of the vagina. Band 2 is between 10 and 15 years of imprisonment. A low to mid-range was somewhere between 10 and 12 and a half years of imprisonment. Thus, 11 years and three months of imprisonment seemed appropriate as a starting point.

47 As for the offender-specific factors, there was no additional aggravating factors over and above those already considered above.

48 I add that BQW's age was neither an aggravating nor mitigating factor. While the Defence stressed that BQW had not slept on the same bed with his wife for over 20 years and had instead been living at his friend's residence, I was of the view that this was not a mitigating factor.

49 This brings me to BQW's plea of guilt. The Prosecution submitted that it had already accounted for the plea of guilt when it sought a sentence of 14 to 15 years of imprisonment for each charge. To ensure that the aggregate punishment was not crushing (since at least two sentences would run consecutively), the Prosecution said that it had refrained from urging the court to impose an additional term of imprisonment in lieu of caning.

50 I was of the view that the correct approach was to consider first whether an additional term of imprisonment should be imposed in lieu of caning. The Prosecution did not identify any factor to support the imposition of such an additional term. In addition, the offences which BQW pleaded guilty to carried a long minimum term of imprisonment (of eight years): see *Amin bin Abdullah v PP* [2017] 5 SLR 904 at [69]. I saw no reason to impose an additional term of imprisonment in lieu of caning.

51 Therefore, even though an additional term of imprisonment was not to be imposed in lieu of caning, some discount should be given for the plea of guilt. The Prosecution accepted that BQW had demonstrated a degree of remorse by pleading guilty. I was also of the view that in any event, his plea of guilt meant that the Victim did not have to testify and the resources of the state for a trial were saved. In the circumstances, I applied a discount to reduce the sentence from the starting point of 11 years and three months to 10 years' imprisonment for each charge.

52 I also took into account the fact that two of the sentences would run consecutively and BQW's age. I further took into account the availability of remission for good behaviour as did the Court of Appeal in *PP v UI* [2008] 4 SLR(R) 500 at [78]. I was of the view that an aggregate sentence of 20 years of imprisonment was not crushing and, indeed, the Defence had submitted that such an aggregate sentence was appropriate. I was also of the view that such an aggregate sentence was just in the circumstances.

Woo Bih Li
Judge

David Khoo and N K Anitha (Attorney-General's Chambers) for the Prosecution;
Wee Hong Shern (Ong & Co LLC) for the Accused.
