Public Prosecutor v Heng Swee Weng
[2009] SGHC 275

Case Number : MA 130/2009

Decision Date : 03 December 2009

Tribunal/Court : High Court

Coram : V K Rajah JA

Counsel Name(s) : Aedit Abdullah (Attorney-General's Chambers) for the appellant; Raymond Tan (T H Tan Raymond & Co) for the respondent

Parties : Public Prosecutor — Heng Swee Weng

Criminal Procedure and Sentencing – Sentencing – Benchmark sentences – Principles

3 December 2009

V K Rajah JA:

Introduction

1 The respondent in this appeal ("the Respondent"), a 57-year-old taxi driver, pleaded guilty to one charge of outrage of modesty under s 354(1) of the Penal Code (Cap 224, 2008 Rev Ed) before a district judge ("the District Judge") at a hearing in the Subordinate Courts on 4 May 2009. The victim was a 15-year-old female ("the Victim"). The charge in question, *viz*, DAC No 8259 of 2009, reads as follows:

> You, [the Respondent] are charged that you, on the 1st day of November 2008, on a second occasion sometime after 8.15pm, at Harvey Ave, Singapore, did use criminal force on [the Victim] …, to wit, by hugging her, knowing it likely that you would thereby outrage the modesty of [the Victim] … and you have thereby committed an offence punishable under Section 354(1) of the Penal Code, Chapter 224.

The relevant provision, *viz* , s 354(1) of the Penal Code, reads as follows:

> Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with caning, or with any combination of such punishments.

2 The District Judge sentenced the Respondent to a fine of $2,000 with one week's imprisonment in default. A further charge relating to the Respondent's touching of the Victim's hand was taken into consideration for the purposes of sentencing. The Prosecution appealed against the sentence imposed.

3 The Respondent also pleaded guilty to a second charge, *viz*, DAC No 8260 of 2009, for an offence under the Moneylenders Act (Cap 188, 1985 Rev Ed) at the same hearing on 4 May 2009. The sentence imposed for this charge, *viz*, a fine of $20,000 with four months' imprisonment in default, was not appealed against.

Facts of the case

4 At around 8.15pm on 1 November 2008, the Respondent, while driving his taxi, was hailed by the Victim along Bedok Road. When the Respondent pulled over, the Victim, a foreigner studying in Singapore, informed him that she was lost and had no money. She enquired if the Respondent would take her to Parbury Avenue where she lived. The Respondent agreed to give her a free ride home.

5 However, the Respondent did not take the Victim to Parbury Avenue, and took her, instead, to Harvey Avenue (some 5km from Parbury Avenue). Sometime in the course of the journey, the Respondent used his left hand to touch the right hand of the Victim. The Victim eventually alighted from the taxi along Harvey Avenue. As soon as the Victim alighted from the taxi, the Respondent also got out of the taxi, and went over to her and hugged her. The Victim struggled and managed to break free from his grasp. The Respondent then left the scene in his taxi. Eventually, the Victim found her way home.

The decision below

6 The reasons for the District Judge's decision can be found in his grounds of decision (*ie*, *PP v Heng Swee Weng* [2009] SGDC 339 ("GD")).

7 From the GD, it is apparent that the District Judge had accepted that a fine was an appropriate starting point for an outrage of modesty offence involving the "intrusion of the victim's body other than private parts … except in circumstances where there is aggravation in the manner of the intrusion" (see GD at [15]). Such an approach was, in his view, supported by the sentencing decision in *PP v David Chee Dah Wei*, DAC No 25570 of 2008 (22 July 2009) (unreported) (see GD at [16]). In that case, the accused, a former vice-chairman of the Paya Lebar Kovan Community Club Youth Executive Committee, had been fined $2,000 for hugging a 14-year-old girl whom he had brought to a room in a hotel after some community club activities. The District Judge observed that *PP v David Chee Dah Wei* and the present case had an "almost similar factual matrix" (see GD at [16]). He concluded (see GD at [17]–[18]):

> 17. I am minded that it is a fundamental tenet of justice that "like cases should be treated alike" and that is one of the purposes of the sentencing benchmark as a guideline in ensuring parity of sentences meted out to offenders in the Subordinate Courts.
>
> 18. Having considered the facts disclosed in the [Statement of Facts], the mitigation plea of the [Respondent] (wherein the Prosecution made no submissions against) and the circumstances of the present case, I find that justice would be served against the [Respondent], a taxi driver and a first offender, by imposing a fine of $2,000 in default 1 week imprisonment [*sic*].

Summary of the submissions of the parties on appeal

8 The Prosecution submitted that the District Judge had failed to consider the aggravating circumstances in the case, such as the fact that the Victim was a young girl alone at night and the fear and trauma that was likely to be suffered by the Victim. It was, in addition, submitted that the District Judge had failed to consider that the cases he cited could be distinguished from the present case based on, *inter alia*, the Respondent's position of responsibility. It was also submitted that the District Judge had failed to consider the position of responsibility of a taxi driver *vis-à-vis* his passenger, and the need to deter offences against public transport users, especially women and young girls (citing, *inter alia*, *PP v Neo Boon Seng* [2008] 4 SLR 216). The following was submitted in

conclusion:[note: 1]

> In the present case, it is respectfully submitted that in view of the need for general deterrence to protect users of public transport, and also that the victim was a vulnerable person, namely a young girl who was lost at night and who had sought the assistance and help of the [R]espondent, the sentence to be imposed ought to be one of several weeks' to several months' imprisonment.

(In fairness to the District Judge, I should point out that none of these submissions were made to him.)

9 In response, the Respondent submitted that it is trite law that fines are meted out for cases where there is a lack of intrusion of private parts (citing *Teo Keng Pong v PP* [1996] 3 SLR 329 and *Kwan Peng Hong v PP* [2000] 4 SLR 96). It was also submitted that it was unnecessary to consider the significance of the position of a taxi driver *vis-à-vis* his passenger, as the act of molestation had occurred outside the taxi and the Respondent had been acting in goodwill by giving the Victim a free ride home.

Legal principles relating to appeals against sentence

10 The legal principles relating to an appellate court's revision of a trial court's decision on sentence are well-established, and need not be set out at length. Suffice it to say that an appellate court would consider revising a trial court's decision only if:

(a) the trial judge erred in respect of the proper factual basis for the sentence imposed;

(b) the trial judge failed to appreciate the material placed before him;

(c) the sentence imposed was wrong in principle and/or law; and/or

(d) the sentence imposed was manifestly excessive or manifestly inadequate, as the case may be.

Preliminary observations

11 The present facts painted a troubling picture with a number of patent aggravating features. The Victim here did not know the Respondent. Lost, distressed and penniless, she had placed her trust in the Respondent, a member of the public transport workforce whom she was entitled to expect would unhesitatingly act with rectitude and common decency. As the Victim was unfamiliar with the area, the Respondent had complete control of the situation, both in terms of the vehicle and the route. In these perturbing circumstances, he hugged the Victim against her will, and the Victim even had to struggle to free herself. The Victim's situation can be properly described as a textbook case of vulnerability and haplessness. In contrast, the Respondent was in a position of complete control, in respect of the vehicle, the route chosen, and, indeed, the entire situation.

The cases cited by the District Judge

12 It seemed plain to me that the District Judge should have been slow to rely on *PP v David Chee Dah Wei* ([7] *supra*). The facts in that case were somewhat unusual. Apparently, the accused had a prior friendship with the victim.[note: 2] The victim herself was a troubled teenager who unreservedly accompanied the accused to the hotel, despite noticing earlier that he had condoms in his

backpack.[note: 3] The victim was not restrained from leaving the hotel room. It also bears mention that the victim took ten days to report the offence initially.[note: 4] The lenient sentence imposed by the District Court in that matter should perhaps be explained as one peculiar to its own facts and ought not to be relied on as a sentencing precedent by any court. Consistency in sentencing is a worthy goal, but at times, particularly in cases involving atypical fact situations, there is a very real danger that the exception might overwhelm the rule if one were to rigidly adhere to "precedent". The courts should be alert in guarding against this.

13 The District Judge had also relied on *Chandresh Patel v PP* [1995] 1 CLAS News 323 as another precedent pointing to the imposition of fines as the appropriate sanction for infractions not involving the touching of private parts. In that case, the accused had pleaded guilty to a charge of outrage of modesty for touching the vaginal area of a sleeping female flight passenger. In enhancing the sentence from three months' imprisonment to six months' imprisonment and three strokes of the cane, Yong Pung How CJ stated the following in his brief oral judgment (*id* at 324):

> The offence of outraging modesty under s 354 covers a wide spectrum of behaviour. *But this is not a case of someone who is guilty of a seemingly innocent act, like stroking a woman's thigh on impulse, or making a naughty but harmless nudge. It is also not a case of someone who has had something to drink on the plane, and cannot resist pinching or smacking a passing woman passenger's bottom, in which case a fine of $4,000 or $5,000 in today's circumstances would probably be adequate punishment*. [emphasis added]

14 The importance of *Chandresh Patel v PP* in sentencing jurisprudence was noted in *PP v QO* [2006] SGDC 250 by District Judge Kow Keng Siong, who said (at [10]):

> *Chandresh Patel* is undoubtedly invaluable – (a) in terms of the guidance that it provides and (b) as a sentencing precedent for the purpose of parity and consistency in sentencing.

Pertinently, however, Kow DJ did not stop there and went on to perceptively observe (*id* at [11]):

> Having said that, it is also important to note that sentencing precedents and guideline judgements are 'not binding authorities in the sense that decisions of the [higher courts] on points of substantive law are binding … on lower courts. Indeed they could not be, since the circumstances of the offence and of the offender present an almost infinite variety from case to case': *De Havilland* (1993) 5 Cr App R (S) 109, 114 (words in square brackets added). It is trite law that '*each case depends on its own facts and circumstances when it comes to sentencing and … no pre-established sentence can be applied in respect of a particular offence*': *DT v PP* [2001] 3 SLR 587 @ para 75. [emphasis added in original]

15 *Chandresh Patel v PP* would appear, at first blush, to be instructive and relevant to the present case. But a closer inspection reveals a divergence in the present facts and circumstances from the examples countenanced in the passage from that decision (which is set out at [13] above) that Yong CJ had said would warrant a fine. The District Judge found that there had been no aggravating factors present on the facts, stating that "[t]he [Statement of Facts] did not disclose any aggravating factors except the fact that the [Respondent] had hugged the [V]ictim outside the taxi and [touched] her hand" (see GD at [15]). With respect, he had failed to properly appreciate the facts. There were, as noted earlier (see [11] above), several outstanding features that aggravated the offence. In particular, it bears repeating that the Victim had to struggle in order to be free of the Respondent's unwelcome embrace. This would be starkly dissimilar to the examples set out in the above passage from *Chandresh Patel v PP*, as a "naughty but harmless nudge" and the "smacking [of]

a passing woman passenger's bottom" would have been brief (although nonetheless offensive) and would not have placed the respective victims under any apprehension of any prolonged or great risk to their personal safety.

The need for a deterrent sentence

16 Public transport providers, such as taxi drivers, have a "special position" *vis-à-vis* their passengers. As was astutely observed in *PP v Neo Boon Seng* ([9] *supra*) by Chan Sek Keong CJ (at [10]):

> [A] taxi driver is in a special position *vis-à-vis* his passenger. The taxi driver provides a transport service to the passenger for a fee and a passenger, in purchasing the service, not only entrusts the safety of his person but also custody of his property to the taxi driver during the journey.

17 In *Wong Hoi Len v PP* [2009] 1 SLR 115, a taxi driver was assaulted by the accused, a passenger, after he had chastised the latter for vomiting in his taxi. The taxi driver was subsequently pronounced dead at the scene by attending paramedics. In increasing the sentence of the accused from one month's imprisonment to three months' imprisonment, I observed (*id* at [11] and [18]):

> 11 The reported increase in criminal acts targeting persons working in the field of public transport is worrying. It should be nipped in the bud through, *inter alia*, deterrent sentencing of offenders. There is little doubt that public transport workers (this includes bus captains) are more vulnerable to criminal violence than their counterparts in most other professions. *They are constantly exposed on the service frontline and, very often, are left to fend for themselves when confronted with difficult and/or unruly passengers*. In Duncan Chappell & Vittorio Di Martino, *Violence at Work* (International Labour Office, 2nd Ed, 2000) at p 67, the authors observed that, of lone workers, taxi drivers in many places were at the "greatest risk of violence". At the same time, other public transport workers such as bus drivers were observed to be at "special risk" (*id*, at pp 68–69). The authors also noted that night time was the highest-risk driving period for taxi drivers, and that customer intoxication appeared to play a role in precipitating violence.
>
> …
>
> 18 With the above in mind, I had no hesitation in agreeing with the district judge's view that it would be in the public's interest to impose a custodial sentence. The courts must send a clear message that all acts of criminal violence against public transport workers will not be tolerated. These workers provide the larger community with an invaluable and essential service, and they have every right to work in a safe and secure environment.
>
> [emphasis added]

18 The converse is also true. Just as public transport workers deserve special protection, those who abuse the trust placed in them must expect the law to view their conduct as meriting particular denunciation. The "service frontline" has two sides and the protection accorded to one side of the line must, as a matter of logic, be also extended to the other side. In this connection, I reiterate what I had stated in *Wong Hoi Len v PP* (at [17]):

> Likewise, in *PP v Law Aik Meng* [2007] 2 SLR 814 at [24], I had stated unequivocally that where an offence involved a *vulnerable victim* or where a criminal act affected the *provision of a public service*, general deterrence should then assume special significance and relevance. [emphasis added]

19 In *PP v Law Aik Meng* [2007] 2 SLR 814, these two sides – both requiring protection – were identified in the context of a discussion singling out categories of offences that warrant sentences of general deterrence. I stated (*id* at [24]):

General deterrence aims to educate and deter other like-minded members of the general public by making an example of a particular offender: *Meeran bin Mydin v PP* [1998] 2 SLR 522 at 525, [9] ... Premeditated offences aside, there are many other situations where general deterrence assumes significance and relevance. These may relate to the type and/or circumstances of a particular offence. Some examples of the types of offences, which warrant general deterrence, are:

…

(b) *Offences against vulnerable victims*: Offences against vulnerable victims often create deep judicial disquiet and general deterrence must necessarily constitute an important consideration in the sentencing of perpetrators. In *PP v NF* [2006] 4 SLR 849, [42], I stated as follows:

> [O]ur courts would be grievously remiss if they did not send an *unequivocal and uncompromising message to all would-be sex offenders* that abusing a relationship or a position of authority in order to gratify sexual impulse will inevitably be met with the harshest penal consequences. *In such cases, the sentencing principle of general deterrence must figure prominently and be unmistakably reflected in the sentencing equation*. [emphasis added]

Australian courts have taken a similar stance toward offences against vulnerable groups of victims such as the old, the young, the weak and the disadvantaged: see *R v Kane* (1987) 29 A Crim R 326.

…

(d) *Offences affecting public safety, public health, public services, public or widely used facilities or public security*: … The court must show that such conduct, however well intended, cannot and will not be tolerated in the community. An example of an offence affecting public safety is that of drunk driving, which puts other road users at a grave risk of danger. *Conduct that hinders or impedes public or social policies must also be categorically denounced*. For example, offences that may subvert the security and convenience of electronic commerce need to be firmly dealt with … . In fact, all offences threatening to undermine or impair financial systems merit consideration under another category of offences altogether prescribing inexorably hard deterrent sentencing … . Such a broad head of public interest protection can also embrace any conduct that forebodes systemic risk or peril of any kind.

…

[emphasis added in original]

20 There was no doubt in my mind, therefore, that the present offence warranted a deterrent custodial sentence. A strong message has to be sent out to those working in the public transport service sector: behaviour taking advantage of more helpless commuters utilising these transport services will and shall not be tolerated by the courts. In *PP v Neo Boon Seng* ([8] *supra*), Chan CJ had no qualms about imposing a custodial sentence for a property offence committed by a taxi driver against a passenger. He explained (*id* at [10]–[11]):

In my view, the district judge was wrong in principle in regarding this case as not meriting a custodial sentence. Although the offence of criminal misappropriation under s 403 of the Penal Code is considered to be one of the less serious property offences in ch XVII of the Penal Code because it does not require a positive act of taking as contrasted with a negative act of keeping something that belongs to another (Jasvender Kaur *et al, Sentencing Practice in the Subordinate Courts* (LexisNexis, 2nd Ed, 2003) at p 414), this consideration, in my view, should not apply to a taxi driver. The reason is that a taxi driver is in a special position *vis-à-vis* his passenger. The taxi driver provides a transport service to the passenger for a fee and a passenger, in purchasing the service, not only entrusts the safety of his person but also custody of his property to the taxi driver during the journey. If the taxi driver finds lost property in the taxi, he should return it to the passenger if he knows who he is and where he lives. If he does not have such knowledge, he should place the goods within a reasonable time with the taxi company. At the very least, a taxi driver has a legal obligation not to take his passenger's property and, in my opinion, this duty should be enforced strictly and vigorously.

For these reasons, *I am of the view that the benchmark for a property offence committed by a taxi driver against a passenger is a custodial sentence* unless there are countervailing mitigating factors (such as the nature and insignificant value of the property) that would make a fine an appropriate sentence. In the present case, however, the value of the misappropriated items was not insignificant …, and the contents of the laptop computer (which might be of no value to the respondent) could be worth much more to the victim than the market price of the laptop itself. Even if the recovered items were disregarded, the value of the unrecovered items was approximately $4,000 … . On these facts, it was difficult to justify a fine of $6,000 as being sufficient punishment for a taxi driver in whom a passenger is entitled to repose some degree of trust as to the safety of any property he may have inadvertently left behind in the taxi.

[emphasis added]

21 The present case involved the outrage of a 15-year-old girl's modesty. This was an offence against the person, and was not merely a case of a passenger leaving property behind in a taxi and the taxi-driver failing to return the property (as had been the case in *PP v Neo Boon Seng*, where the accused was eventually sentenced to three weeks' imprisonment for criminal misappropriation). The circumstances of the present offence are far more troubling and were far more traumatising than those established in *PP v Neo Boon Seng*. Accordingly, I was of the view that the $2,000 fine imposed by the court below is wholly inadequate for the purposes of both punishing the Respondent proportionately and sending out an unequivocal deterrent signal to would-be offenders.

The appropriate sentence

22 In *PP v QO* ([14] *supra*) at [14]–[15], Kow DJ helpfully set out the following considerations as a guideline for sentencing in outrage of modesty cases:

(a) Which part of the victim's body did the offender touch? ("Factor (a)")

(b) How did the offender touch the victim? ("Factor (b)")

(c) How long did the molestation last? ("Factor (c)")

(d) Was the offence premeditated or committed on the spur of the moment? ("Factor (d)")

(e) Were the circumstances in which the offence was committed inherently reprehensible? ("Factor (e)")

(f) Is the offender recalcitrant? ("Factor (f)")

(g) Is the offender suffering from a mental disorder or intellectual disability? ("Factor (g)")

23 While the above factors are far from exhaustive, they offer a useful framework for an analytical sentencing decision. To begin with, it was not disputed by the Prosecution that the Respondent had not molested the Victim's private parts (Factor (a)). However, the Respondent had used force in order to initiate and maintain the unsolicited hug, so much so that the Victim had to struggle to free herself (Factor (b)). In *Kwan Peng Hong v PP* ([9] *supra*), it was held that an offender would be dealt with more leniently where "the act of molest was minor and neither force nor coercion was used" (at [64]). This was not the case here. Furthermore, while the hug did not last for a long duration, it could have led to something else, but for the Victim's resistance (Factor (c)).

24 On the facts, the Respondent appeared to have already developed inappropriate intentions whilst in the taxi with the Victim, given that he had already used his left hand to touch her right hand in the course of the journey to Harvey Avenue. This could not have been a completely spontaneous incident (Factor (d)). There must have been some degree of planning on the part of the Respondent, as it was a conscious effort by him to emerge from the taxi and to walk over to the passenger's side of the taxi to deliver his unwanted hug. Giving the benefit of the doubt to the Respondent, however, this factor would neither be to the Respondent's favour nor disfavour.

25 In contrast, there is no doubt that the circumstances under which the offence was committed were entirely reprehensible (Factor (e)). The Victim, a girl lost at night with no money, had placed her trust in the Respondent to assist in helping her find her way home. Instead of doing his utmost to ensure the safety of this young female, the Respondent chose to take advantage of her, under the cover of darkness, in a most odious manner. His acts must have left the Victim in a state of considerable distress because the police received a call at 8.45pm – barely half-an-hour after the Victim had first met the Respondent – from the Victim's mother who informed them that her daughter "was assaulted by a taxi-driver".

26 In the light of the above, the fact that the offender was neither a recidivist (Factor (f)) nor mentally disabled (Factor (g)) did little to mitigate his position.

27 Having considered the overarching policy concerns and individual features unique to this case, I was satisfied that a term of eight weeks' imprisonment would be an appropriate sentence in the circumstances.

Conclusion

28 While taxi drivers and other public transport workers certainly ought to be protected from dangerous and or unreasonable commuters, particularly given the potentially risky nature of their jobs, vulnerable members of the public should likewise be protected from errant members of the transport sector workforce. This reciprocal protection is sensible, particularly in cases such as this where the female victim was young, lost and helpless, and the male perpetrator was completely in control throughout. I emphasise that all passengers travelling in taxis are entitled to expect, at all times, that they can do so in complete safety without being taken advantage of by taxi drivers regardless of

whether they are fare paying passengers or not.

29 For the foregoing reasons, the Prosecution's appeal was allowed and the sentence of the District Judge was set aside. The Respondent was sentenced to eight week's imprisonment. The fine of $2,000, which had already been paid by the Respondent, was ordered to be returned to him. Finally, I would like to thank counsel for their assistance. In particular, I would like to commend Mr Aedit Abdullah for having ably presented his case in an even-handed and concise manner.

[note: 1] Appellant's Case at para 36.

[note: 2] See Statement of Facts dated 30 June 2009 at para 4.

[note: 3] *Id* at para 5.

[note: 4] Elena Chong, "Ex-youth leader who molested girl fined $2,000" *The Straits Times* (23 July 2009) at A6.