Public Prosecutor v UI
[2007] SGHC 139

Case Number : CC 19/2007

Decision Date : 28 August 2007

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Peter Koy (Attorney-General's Chambers) for the Prosecution; S Balamurugan (B M Selvarajan & Co) and Paul (Sim & Wong LLC) for the accused

Parties : Public Prosecutor — UI

Criminal Procedure and Sentencing – Sentencing – Principles – Prosecutorial discretion to proceed with certain charges – Section 18 Criminal Procedure Code (Cap 68, 1985 Rev Ed)

Criminal Procedure and Sentencing – Sentencing – Principles – Cases as guidelines for sentencing – Distinction between rape simpliciter and aggravated rape – Aggravating factors for rape – Whether other aggravating factors existing for rape besides those provided by Legislature – Whether forgiveness by victim mitigating factor – Sections 376(1), 376(2) Penal Code (Cap 224, 1985 Rev Ed)

[EDITORIAL NOTE: The details of this judgment have been changed to comply with the Children and Young Persons Act and/or the Women's Charter]

28 August 2007

Choo Han Teck J:

1 The accused was 55 years old and married with a 20 year old son. The accused did not divorce. In 1990, he became intimate with Madam B who used to be his colleague in a construction business in 1981 or 1982, neither of them appeared to be able to recall the exact year. The accused and Madam B rented a flat and lived together "like husband and wife" and Madam B gave the impression to her parents that they were married. She gave birth to a daughter, C, on 11 September 1992. At that time Madam B had a business providing workers to commercial companies and the accused worked with her. However, this business failed in 1994 and Madam B decided to be unemployed in order to look after C. The accused then had to hold down two jobs to manage. He was a security guard as well as a despatch rider. About a year later, they moved to a new flat and Madam B started working again, this time in a child care centre. She gave birth to their second daughter. The accused then began to change jobs frequently. In 2002, Madam B bought a flat in Jurong West Street 42. She and the accused occupied the master bedroom and their two daughters shared another room. C slept on the top of a double decker bed and her younger sister on the lower deck.

2 In December 2006, C quarrelled with a young cousin and in the course of settling that dispute, C told her maternal aunt that she did not like the love her father gave her, and that led to the disclosure that the accused had molested and had sex with C at various times from 2002 to November 2006. The first rape took place in 2005. The aunt told Madam B and after some deliberation, she reported the accused to the police. The accused was subsequently charged with five charges of molest under s 354 of the Penal Code (Cap 224, 1985 Rev Ed) and five charges of rape under s 376(2) of the Penal Code. He pleaded guilty to three of the rape charges and agreed to have all the other charges taken into consideration for the purposes of sentencing.

3 The accused had no antecedents and appeared to have worked hard to sustain his two families. Defence counsel said in mitigation that the acts were made with no violence, and no threat was used to coerce C. C told the examining doctor that "no physical force was ever used upon her, she was never threatened, and she never put up a struggle". Counsel stated in mitigation that the accused had a hard life and was under a great deal of stress coping with his jobs and maintaining his two families. He had expressed his remorse through counsel, and has done so personally to C and Madam B. They have forgiven him and still regard him as part of the family. They have written several unsolicited letters expressing their support for him and pleading for leniency to be shown to him. They wrote a joint letter on 14 March 2007. Madam B wrote two individual letters, one to the Public Prosecutor and one to the Registrar of the Supreme Court, and C wrote a personal letter addressed to the court. She wrote to say:

> I am writing this letter to appeal for leniency to be granted to my father, *UI*. He has been a loving and concerned father and I totally forgive him for what he has done as he has apologised for his mistake.
>
> I feel very sorry and sad for him when I saw him in court on 21 June at the Preliminary Inquiry as he had grown so thin and looked frail and weak. I do not wish for him to stay in prison for many many years as he is already old.
>
> Thank you and I hope my appeal will be considered.

4 The range of sentence for this offence is imprisonment for not less than eight years and no more than 20 years, and with caning of not less than 12 strokes. The accused was spared caning because he was more than 50 years old. The DPP addressed the court and asked the court to take into account "several aggravating factors". He submitted that the offences had taken place over a period of four years, and he cited a number of cases involving s 376(2) which he said might "serve as useful guides" in sentencing the accused. The cases cited involved sentences of 12 to 15 years imprisonment for each of the charges there concerned. The DPP submitted that

> … even though the Prosecution has not been able to adduce direct evidence of any post offence trauma suffered by the victim… the court should take into account the emotional and psychological harm that the offences had caused to the victim by the very nature of the offences.

The DPP then asserted that "[in] fact, it would appear that there has been some manifestation of such harm on the victim". He referred to the report of Dr Cai reporting a change of behaviour in C in the second half of 2005 in that she "cut her hair short and bind her breasts down. In June 2006, she cut her wrist and would not disclose to the mother the reason. In September 2006, she stole money from her classmate". The DPP, however, conceded that neither Dr Cai, nor C, nor Madam B had attributed the "change of behaviour" to the accused's conduct. Nonetheless, the DPP asserted that there "is always the possibility that the effects of the harm caused to the victim by the offences manifesting more clearly in the future and recurring to affect the victim when she grows older." The DPP submitted thus that there was a need for a deterrent sentence.

5 The list of cases cited by the DPP as guides are useful so far as guides go and I have no criticism for any of the cases in particular or to guidelines in general. If there were any inadequacy, it is guidelines on how to use guidelines that are lacking. Guidelines or precedents can never replace the statutory range set by the legislature. If Parliament had set the range between eight years and 20 years imprisonment, no court should reduce that range in any way because courts should not exercise

its discretion in such a way as to amend the statutory limit. Statutory amendments must be left to the legislature. Within the statutory range, courts may formulate principles in order that the appropriate sentence might be imposed. These principles are principles of law and must, like every such principle, apply to the facts of the case in question. Legal principles are not the same as administrative guidelines which are intended to apply broadly within denoted cases, and unless an administrative discretion is reserved, the individual facts are of little significance. Legal principles must be applied judicially. One important principle in law is that like cases ought to be treated alike, but an equally important one is that the punishment must fit the crime. These two principles must constantly feature when determining what the appropriate sentence ought to be. In considering them, the court would then consider the incidents of aggravating factors and balancing them against the mitigating ones, but always with its sight fixed firmly on the facts of the case that is before it, keeping the facts of similar cases within sight, as "guides", and not the principal determinants. It is the facts of each case that will determine whether a lighter or harsher sentence should be imposed.

6 That the offences had taken place over a period of four years is not an aggravating factor in itself. The incidents concerned during this period have all been the subject matter of a charge, and each charge is being dealt with in the same proceedings. Generally, an accused will be sentenced for each of those charges which resulted in conviction, and will have to reckon with the others that he had agreed to have them taken into account for the purposes of sentencing. Bearing in mind that no details would have been established in relation to those charges, in taking them into account, the court may - not must - impose a sentence that is harsher than it might otherwise have imposed. The nature and number of the charges that actually proceeded and those that were not are also relevant. For instance, in this case, the accused faced five charges of molest punishable under s 354 with a term of imprisonment of between three years and ten years for each charge, and five charges of rape under s 376(2). Furthermore, the DPP had chosen to proceed with three charges, and thus by virtue of s 18 of the Criminal Procedure Code (Cap. 68, 1985 Rev Ed) the court would have to order two of the sentences of imprisonment of those charges to run consecutively. The three charges that DPP had chosen to proceed with were rape charges. The DPP had the discretion to do so, of course. It is the same discretion to choose whether to proceed with two molest charges and one rape charge, or two rape charges and one molest charge, or three molest charges. The choice was entirely a matter of prosecutorial discretion, an area outside the court's purview. The punishment of offenders, on the other hand, is a matter of the court's discretion. That is the nature and function of the judicial process. It is a process designed to meet the needs of social justice as well as fairness to the accused person.

7 The three specific instances cited as aggravating factors in this case were, first, the young age of the victim; secondly, the abuse of trust and authority; and thirdly, the harm to the victim. The first example cannot be considered an aggravating factor if the victim's age is just below 14 or a couple of years below that because of the fact that the charge was brought under s 376(2) itself has that factor taken into account. It is not right to charge the accused under s 376(2) instead of s 376(1) which provides for the punishment for rape, on the ground that s 376(2) covers rape of persons below the age of 14 and for that a harsher range of punishment is already provided in the statutory section, and then cite the age as an aggravating factor. That is not to say that the court may not impose a higher sentence if the age was much lower, or even if the victim was just 13 years old. The age factor must be taken into account in the entire circumstances of the case.

8 The second aggravating factor referred to by the DPP was the fact that the accused was the father of the victim and thus had abused his position of trust and authority in respect of his daughter. There is a justifiable aversion to persons who use their positions for perverse gratifications, but without lowering the gravity of that conduct, one must consider that in the instance of rape, there is really no general amelioration of the crime. Rape is the unwanted intrusion by one person against the

wishes of another. It may be described as a violation that no one should commit and no one should be made to endure. An aggravating factor that merits a harsher punishment on its own is difficult to define because that suggests that an aggravating factor is different from a fact that makes the rape in question more serious and warrants a heavier sentence. I am doubtful that a distinction between these two notions should be made. The legislature had already differentiated between rape *simpliciter* and rape where hurt was caused, or where the victim was put in fear of death, or where the victim is below the age of 14. These are statutory provisions for aggravated rape. Any fact other than the ones just mentioned would have to be taken into account by the court when it determines the sentence. It is the sum of all the facts, statutorily indicated as well as any other relevant ones that, considered in totality, presents the final picture from which the court determines what sentence would be appropriate. Hence, the fact that the accused was the father of the victim is not an aggravating factor in itself, but may be taken as a fact that raises the level of opprobrium and sanction against the accused; and that has to be reviewed in the context of all other relevant facts of the case.

9 I now come to the third instance, namely, the harm caused to the victim by the criminal act. It is an example not found in the facts but only in the DPP's address on sentence which I had quoted above, and now repeat for convenience:

> even though the Prosecution has not been able to adduce direct evidence of any post offence trauma suffered by the victim…the court should take into account the emotional and psychological harm that the offences had caused to the victim by the very nature of the offences.

The DPP proceeded to cite a case in which the court stated in passing that rape was inherently violent. That is true, but that would mean that it cannot be counted as a special factor. What would count would be proof of severe post-rape trauma which is absent in this case. On the contrary, Dr Cai reported that C told him that the accused "was a nice man and she had no fear of seeing him. She had no signs and symptoms of a post traumatic stress disorder".

10 Taking into account the matters raised by the DPP, I am of the view that the first two factors merited consideration, and I thus took them into account together with the mitigating factors. The fact that the accused had no antecedents and had given no one trouble at work or elsewhere in itself may not amount to much, but it is of relevance in its connection with the other factors, that he was the main person sustaining the family financially, that he has had a good relationship with his two families, and more importantly, that the families, especially C, have forgiven him and regard him as part of the family still, and long for his return. The DPP responded to this last point by emphasizing that the family's forgiveness was a private matter and that the court should consider the public interest to be more important. The commission of any gazetted crime is always a matter of public interest, and I assume that the DPP was not expressing any doubt that insufficient regard is given to the public interest here, and that his point really, was that the act of forgiveness in this case ought not to be given much weight as a mitigating factor. On that point, I would like to say that although the forgiveness shown by C and Madam B to the accused was indeed a private affair between the criminal and his victim, it should not be dismissed merely as such. Punishment has many purposes and aims, not least of which is the correction of the criminal and the appeasement of his victim. Where, as here, the victim has forgiven her remorseful offender, the law can further help them on their way back to rehabilitation and normalcy. Forgiveness is a universal virtue and is balm to giver and recipient alike; it is, in the words of some unknown sage, "the scent the rose leaves on the foot that crushes it". So let it not be said that forgiveness is a virtue more preached than practised, or that in applying the law impartially and rationally, a court is incapable of recognising such virtues and the good they bring. I thus think that a total of 16 years imprisonment sufficiently deals with all the different needs

in this case.