Public Prosecutor v NF
[2006] SGHC 165

Case Number : CC 22/2006

Decision Date : 21 September 2006

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : Imran Hamid and Ong Luan Tze (Deputy Public Prosecutors) for the Prosecution; The accused in person

Parties : Public Prosecutor — NF

Criminal Procedure and Sentencing – Mitigation – Accused charged with raping daughter – Accused pleading guilty to rape charge – Accused sole breadwinner of family and arguing that long-term imprisonment would cause substantial hardship to family – Weight to be attached to such circumstances in sentencing accused

Criminal Procedure and Sentencing – Mitigation – Plea of guilt – Whether true remorse present – Relevance of willingness to facilitate the course of justice – Discount to be applied

Criminal Procedure and Sentencing – Sentencing – Accused charged with raping daughter – Accused pleading guilty to rape charge – Relevance of prior convictions – Whether prior unrelated criminal antecedents to be considered in sentencing

Criminal Procedure and Sentencing – Sentencing – Benchmark sentences – Accused charged with raping daughter – Accused pleading guilty to rape charge – Relevant sentencing considerations

Criminal Procedure and Sentencing – Sentencing – Principles – Accused charged with raping daughter – Accused pleading guilty to rape charge – Importance of deterrence as consideration in sentencing for sexual offences

21 September 2006

V K Rajah J:

1 The accused pleaded guilty on 31 July 2006 to the following charge:

> You … are charged that you, on … November 2005, at or about 2.00 pm, in … Singapore, did commit rape of your daughter, [B], … and you have thereby committed an offence punishable under section 376(1) of the Penal Code (Chapter 224).

After considering the accused's mitigation plea and the Prosecution's submissions on sentencing, I ordered that the accused be sentenced to 15 years' imprisonment and 15 strokes of the cane. I now set out my reasons.

The factual matrix

2 The accused is 48 years old. He has been married for 17 years and has three children, a daughter and two sons. B, the eldest child, is the victim. She was just 15 years old when the offence occurred.

3 In November 2005, B returned home from an outing with her best friend, C. No one else was at home at this point in time. B changed her clothes in her bedroom and slipped into a dress. She then decided to take a nap and soon fell asleep.

4 Shortly after, the accused returned home. He had just consumed two cans of beer at a nearby 7-Eleven store. He took his shower in the main bedroom, which he occupied with his wife, D. After the shower, he wrapped a towel around his waist and entered B's room.

5 The accused acknowledged being aroused on seeing B asleep on her bed. He proceeded to touch her body, legs and breasts. B, startled from her nap, was panic stricken when she realised that the accused was lying on top of her. She struggled and pleaded with the accused not to harm her. The accused unfeelingly ignored her.

6 The accused repeatedly tugged and pulled at her dress and eventually succeeded in removing it. B was left exposed in her bra and panties. The accused then hugged her while simultaneously removing her bra and later her panties. Even as B placed her arms across her body to cover her breasts and protectively crossed her legs, the accused inserted his hands between her legs and pried them apart. B felt the accused using a finger to "dig" inside her vagina several times. She tried to push the accused aside but was unsuccessful as he was much stronger.

7 The accused eventually used his legs to pry her legs apart and forced his penis into her vagina. B frantically struggled and attempted to turn her body away but to no avail. Subsequently, the accused withdrew his penis from B's vagina and ejaculated on her stomach. The accused then left the bedroom, leaving behind a traumatised B in considerable distress.

8 B did not confide in her mother, D, about the incident as she was confused and feared that the accused would deny the incident and perhaps even subsequently assault her. She also thought that her mother might scold her or become deeply agitated and that it would cause her parents to bitterly quarrel.

9 A few days after the incident, B spent the night in C's flat. She confided in C that the accused had raped her. C advised her to report the matter to the police and to inform her mother about the rape. B, despite her misery, chose not to do so. She had no desire to further aggravate the situation.

10 Sometime in January 2006, B was late in returning from school. The accused reprimanded her in the presence of D. B furiously responded by saying that the accused had no right to scold her after what he had done to her. When D admonished her for being rude to the accused, B tearfully recounted what the accused had done to her.

11 D was shocked and confronted the accused. The accused initially denied having raped B. However, on further questioning, he became quiet and suddenly walked away. B later heard her parents quarrelling furiously about the incident. In due course, the accused expressed regret for what he had done and sought B's and D's forgiveness.

12 It was revealed in court that soon after the incident, B started absenting herself from school without explanation. Towards the end of January 2006, B's English language teacher, E, noticing her frequent absence, approached B and enquired why she was so often absent from class. Hesitantly, B revealed that she had been raped by her father. E asked if B had reported the matter to the police. B indicated that she had not and was in a dilemma as to whether she should lodge a complaint given that the incident involved her father. E subsequently informed the school's principal of her conversation with B.

13 Some time later, in February 2006, B failed to attend her classes again. Upon learning of this, the principal called for a meeting with D. When it became clear that no report had yet been made to

the police, E was directed to do so immediately.

14 On 3 March 2006, some three months after the incident, the accused surrendered himself at the Serious Sexual Crimes Branch of the Criminal Investigation Department.

15 In the meantime, B had been sent to KK Women's and Children's Hospital for a medical examination. Dr John Yam, an associate consultant at the Department of General Obstetrics and Gynaecology, found tears on B's hymen. This confirmed that a recent act of sexual intercourse had indeed taken place.

16 B was also examined by Dr Bernardine Woo, a consultant psychiatrist at the Child Guidance Clinic run by the Institute of Mental Health. Dr Woo reported that B had been feeling sad and fearful since the incident. She had also attempted to cut her wrist on a few occasions after the abuse. She now fears males and has difficulty trusting others. Dr Woo opined that this could lead to interpersonal difficulties as well as problems with physical intimacy later in life. The abuse has also affected B's ability to concentrate on her studies manifesting in irregular school attendance after the incident. In addition, B has also developed a brittle temper, becoming easily irritable of late.

Benchmark sentence for familial rape

17 The last occasion on which the Court of Appeal considered the appropriate sentencing benchmark for rape was in 1992 in *Chia Kim Heng Frederick v PP* [1992] 1 SLR 361 ("*Chia Kim Heng Frederick*"). It held at 367, [20], that a rape committed without any aggravating or mitigating factors ought to attract an imprisonment term of ten years and not less than six strokes of the cane as a starting point.

18 In the intervening years, a disturbing and distinct strand of cases has emerged involving vulnerable victims, where the perpetrator is either the parent of the victim, a close relative or a person occupying a position of trust and authority. The sentencing for these cases has tended to be less consistent and it is therefore appropriate to review this entire area of sentencing practice.

19 In this regard, it would be profitable to refer to *R v William Christopher Millberry* [2003] 2 Cr App R (S) 31 ("*Millberry*"), where the English Court of Appeal recently had the opportunity to review the sentencing practice of the English courts for rape offences. Building upon the analytical sentencing framework established in the leading case of *R v Keith Billam* (1986) 8 Cr App R (S) 48 ("*Billam*"), the Court of Appeal in *Millberry* accepted the continued relevance and validity of the four broad categories of rape first articulated in *Billam*. These categories were designed and calibrated to ensure both stability and a measure of predictability in sentencing rape offenders by assigning a benchmark sentence to each category.

20 At the lowest end of the spectrum are rapes that feature no aggravating or mitigating circumstances. The second category of rapes includes those where any of the following aggravating features are present:

(a) The rape is committed by two or more offenders acting together.

(b) The offender is in a position of responsibility towards the victim (*eg*, in the relationship of medical practitioner and patient, teacher and pupil); or the offender is a person in whom the victim has placed his or her trust by virtue of his office of employment (*eg*, a clergyman, an emergency services patrolman, a taxi driver or a police officer).

(c) The offender abducts the victim and holds him or her captive.

(d) Rape of a child, or a victim who is especially vulnerable because of physical frailty, mental impairment or disorder or learning disability.

(e) Racially aggravated rape, and other cases where the victim has been targeted because of his or her membership of a vulnerable minority (*eg*, homophobic rape).

(f) Repeated rape in the course of one attack (including cases where the same victim has been both vaginally and anally raped).

(g) Rape by a man who is knowingly suffering from a life-threatening sexually transmissible disease, whether or not he has told the victim of his condition and whether or not the disease was actually transmitted.

21 The third category of cases involves those in which there is a campaign of rape against multiple victims. The fourth category deals with cases where the offender "has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time": see *Billam* at 50–51.

22 The benchmark sentences set by the court in *Millberry* for each of the four categories are as follows: for the first category of rape offences, the starting point is five years' imprisonment; for the second, eight years' imprisonment; for the third, 15 years' imprisonment; and for the fourth, a life sentence.

23 Because Singapore's legislative sentencing scheme and policy considerations are not altogether similar, it would be decidedly inappropriate for our courts to unreservedly adopt the precise sentencing benchmarks articulated in *Millberry*. It also bears reiteration that s 376(2) of the Penal Code (Cap 224, 1985 Rev Ed) ("PC") unequivocally mandates that offenders who cause hurt or put victims in fear of death or hurt or commit rape by having sexual intercourse with a woman under 14 years of age without her consent, shall be punished with not less than eight years' imprisonment and not less than 12 strokes of the cane. Section 376B of the PC prescribes that if a man commits incest on a female who is less than 14 years old, he *shall* be punished with imprisonment of up to 14 years. That said, the approach in *Millberry* and *Billam* of classifying rape offences into various broad categories is both helpful and useful and may be broadly adopted and employed with appropriate adaptation.

Category 1 rapes

24 As noted above, the Court of Appeal in *Chia Kim Heng Frederick* ([17] *supra*) has already determined that the benchmark sentence for a rape offence without mitigating or aggravating factors should be ten years' imprisonment and not less than six strokes of the cane as a starting point. There is absolutely no reason or basis to revise or revisit this benchmark.

Category 2 rapes

25 The common thread running through category 2 rapes is that there has been exploitation of a particularly vulnerable victim – either because the perpetrator is related to the victim in a way that allows him to abuse his position of trust or authority, or the perpetrator exploits a numerical advantage or acts out of hate towards a minority group.

26 The leading case in Singapore involving the rape of vulnerable victims is *PP v O* [1999] 4 SLR 257. In that case, the accused pleaded guilty to three counts of raping his daughter pursuant to s 376(1) of the PC. Several aggravating factors were taken into account, including the following:

(a) he was the natural father of the victim;

(b) she was nine years old when he first raped her;

(c) she was physically handicapped;

(d) the rapes took place over a period of one year;

(e) no condoms were used;

(f) the victim suffered from deep psychological scars as a result; and

(g) he had a previous conviction of a similar offence.

The accused was sentenced by the trial court to merely five years' imprisonment on each of the three charges of rape. Two of the sentences were ordered to run consecutively. After an appeal by the Prosecution, the Court of Appeal enhanced the sentence to 15 years' imprisonment on each charge, and ordered that two of the sentences were to run consecutively, making a total of 30 years' imprisonment. No caning was ordered because the accused was 51 years old.

27 In *Radhakrishna Gnanasegaran v PP* (Criminal Appeal No 9 of 1999), the offender had raped his seven-year-old daughter over a period of ten years. For four charges of aggravated rape, he was sentenced to 15 years' imprisonment and 12 strokes of the cane for each charge, with the jail terms for two of the charges to run consecutively.

28 In *Liew Kok Meng v PP* [1999] SGHC 128, an offender who raped his 13-year-old neighbour three times was sentenced to 15 years' imprisonment and eight strokes for each of the two charges he pleaded guilty to. The jail terms were to run concurrently, so that his total sentence amounted to 15 years' imprisonment and 16 strokes of the cane. The Court of Appeal dismissed the offender's appeal against sentence. It bears mention that the victim was mildly retarded and became pregnant as a result of the rape.

29 In *PP v MU* [1999] SGHC 107, the accused claimed trial to three charges under s 377 of the PC of committing carnal intercourse against the order of nature with his daughter (*ie*, fellatio) and four charges of rape by having sexual intercourse with his daughter without her consent pursuant to s 376(2)(*b*) of the PC. He was found guilty of the charges and sentenced to five years' imprisonment on each of the three charges under s 377 and to 15 years' imprisonment and 12 strokes of the cane on each of the four charges under s 376(2)(*b*). Two of the sentences for rape were ordered to run consecutively while the others were to run concurrently, resulting in a total of 30 years' imprisonment and 24 strokes of the cane.

30 In *PP v Peh Thian Hui* [2002] 3 SLR 268, the first accused raped his girlfriend's daughter when she was just nine years old. This continued until some five years later when the victim finally made a police report. The first accused pleaded guilty to, *inter alia*, five charges of aggravated rape for non-consensual intercourse with a person below 14 years of age pursuant to s 376(2) of the PC. The mother, the second accused, was also complicit in these offences and pleaded guilty to five charges

of abetting her boyfriend's rapes. The age of the victim, the number of occasions of rape, the indignity and degradation of the victim having to engage in a threesome with her own mother compelled the court to sentence the first accused to 12 years' imprisonment and 15 strokes of the cane on each charge. The second accused was sentenced to 12 years' imprisonment on each charge. Three of the sentences for the rape charges were ordered to run consecutively, totalling 36 years' imprisonment and 24 strokes of the cane for the first accused and 36 years' imprisonment for the second accused.

31 In *PP v MW* [2002] 4 SLR 912, the accused pleaded guilty to three charges of having committed rape against his daughter, then just under 14 years of age. The accused had raped his daughter as an act of revenge against his wife for divorcing him. The daughter was considered to be mildly retarded and, after the rapes, was reported to have difficulty trusting others. Tay Yong Kwang JC (as he then was) sentenced the accused to 12 years' imprisonment and 12 strokes of the cane for each charge. The sentences for two of the charges were ordered to run consecutively, resulting in a total of 24 years' imprisonment and 24 strokes of the cane.

32 In *PP v MV* [2002] SGHC 161, the accused pleaded guilty to three charges of raping his stepdaughter pursuant to s 376(2) of the PC. He was sentenced to 12 years' imprisonment for each of the charges.

33 In yet another case, *PP v Jumadi bin Mohiden* (Criminal Case No 42 of 2002) the accused pleaded guilty to two charges of raping his daughter under s 376(1) of the PC and consented to have another charge of attempted rape taken into account. Tay JC sentenced the accused to 12 years' imprisonment for each charge. No caning was ordered on account of the accused's age. In another unreported decision by Tay JC, *PP v Muhammad Erwan bin Johari* (Criminal Case No 50 of 2001), the accused pleaded guilty to two counts of raping his daughter under s 376(2) of the PC and another three counts of raping his daughter pursuant to s 376(1) PC. Tay JC sentenced the accused to 12 years' imprisonment and 12 strokes of the cane for each of the charges under s 376(2) of the PC and ten years' imprisonment and ten strokes of the cane for the charges under s 376(1) of the PC. The sentences for the two charges under s 376(2) of the PC were ordered to run consecutively.

34 In the recent case of *PP v MX* [2006] 2 SLR 786, the accused pleaded guilty to five charges of rape under s 376(1) and four charges of aggravated rape under s 376(2) of the PC. The accused's victims were his five daughters from his various wives. The accused was sentenced to ten years' imprisonment and eight strokes of the cane for each of the charges under s 376(1) and to 12 years' imprisonment and 12 strokes of the cane for each of the charges under s 376(2). Two of the sentences for the s 376(1) charges and one of the sentences for the s 376(2) charges were to run consecutively, totalling 32 years' imprisonment and 24 strokes of the cane.

35 Finally, in the most recent Court of Appeal decision in *V Murugesan v PP* [2006] 1 SLR 388, an accused was sentenced to 18 years' imprisonment and 14 strokes of the cane for having abducted and raped a stranger together with an accomplice. The aggravating factors in this case were that the accused had orchestrated the rape and conducted it in a "brazen and audacious manner" in a public housing estate.

36 This catalogue of cases reveals that where vulnerable victims are involved or where the presence of one or more of the factors enunciated in *Millberry* are present (see [20] above), the courts have tended to mete out sentences ranging from 12 to 18 years' imprisonment with the majority of cases settling on 12 strokes of the cane as the norm. In the light of the overarching and compelling need for general deterrence in this genre of offences (see [39] and [40] below), I am of the view that the appropriate starting point for category 2 rapes is 15 years' imprisonment and 12

strokes of the cane.

Category 3 rapes

37 Category 3 rapes are those involving repeated rape of the same victim or of multiple victims. I agree with the courts in *Millberry* ([19] *supra*) and *Billam* ([19]) *supra*) that such offenders pose more than an ordinary danger to society and therefore ought to be penalised severely with draconian sentences. However, in most cases where the offender has terrorised the same victim multiple times or where he has assaulted multiple victims, the Prosecution would proceed with multiple charges against the accused. A sentencing judge has then the option to exercise his discretion to order more than one sentence to run consecutively in order to reflect the magnitude of the offender's culpability. As such, there is no overriding need for judges to commence sentencing at a higher benchmark than that applied to category 2 rapes. In fact, to do so may in many cases result in double accounting and excessive sentences.

Category 4 rapes

38 Category 4 rapes are rapes committed by offenders who have demonstrated that they will remain a threat to society for an indefinite period of time. In contradistinction to England, the option of a life sentence is unavailable in Singapore currently. Accordingly, it would not be inappropriate to sentence a category 4 offender to the maximum allowed under s 376 of the PC, *ie*, 20 years' imprisonment and 24 strokes of the cane, if the circumstances so dictate.

Application of benchmark sentences

39 Apart from achieving a measure of consistency and predictability in sentencing, one of the primary reasons for the setting of benchmark sentences is that it conveys a deterrent message. It notifies would-be offenders of the consequences of a particular breach of the law. In holding that the starting point for category 2 rapes is 15 years' imprisonment and 12 strokes of the cane, it is apposite to appreciate why deterrent sentences are especially warranted in cases of familial rape.

40 Crimes of sexual assault are notoriously difficult to prosecute. For every victim that comes forward, unfortunately, so many others remain silent for a multitude of reasons. Not least of these are the fear of confronting the offender, the humiliation and the destabilising emotional conflict and turmoil that keep relentlessly swirling in a victim's mind. Others, as Judith Lewis Herman in *Trauma and Recovery* (Basic Books, 1997) points out, simply cope with the trauma by "walling off" the incident and choosing to ignore that it happened, or preferring to view the incident as their fault: see [49] and [50] below. In cases of incest, the victim may face additional pressure from other family members not to expose the rapist out of an instinctive albeit misguided reaction to preserve the unity of the family and to avoid the publicity and shame that inevitably ensues from such a conviction. A victim of incest may *herself* wish to avoid these consequences and therefore choose not to report the matter. That such pressures are real and palpable are more than amply borne out in many of the cases examined earlier where the perpetrators have repeatedly, remorselessly and brazenly satisfied their perverse and predatory sexual inclinations and lust: see, for example, *PP v MU* ([29] *supra*) where the perpetrator tragically raped his daughter over a period of ten years.

41 I stated in *Tan Kay Beng v PP* [2006] SGHC 117 ("*Tan Kay Beng*") at [31] that:

> [General deterrence] is premised upon the upholding of certain statutory or public policy concerns or alternatively, upon judicial concern or disquiet about the prevalence of particular offences and the attendant need to prevent such offences from becoming contagious. Deterrence, as a

general sentencing principle, is also intended to create an awareness in the public and more particularly among potential offenders that punishment will be certain and unrelenting for certain offences and offenders.

42 That instances of rape should justly cause judicial disquiet is borne out by the fact that while current statistics show that crime has broadly fallen, the number of reported rapes for the months of January to June 2006 has not abated. More significantly, 95% of the reported rape cases involved rapists who were known to their victims. In my view, our 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.

43 However, I pause here simply to caution that while benchmark sentences serve to provide stability and predictability in our sentencing practices, they should never be applied mechanically, without a proper and assiduous examination and understanding of the factual matrix of the case. As Lord Woolf CJ stated, at [34], in *Millberry* ([19] *supra*):

> [W]e would emphasise that guidelines such as we have set out above can produce sentences which are inappropriately high or inappropriately low if sentencers merely adopt a mechanical approach to the guidelines. It is essential that having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances. Double accounting must be avoided and can be a result of guidelines if they are applied indiscriminately. Guideline judgments are intended to assist the judge arrive [*sic*] at the current sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge.

44 Lord Woolf's sentiments reflect the local position. In *Dinesh Singh Bhatia s/o Amarjeet Singh v PP* [2005] 3 SLR 1, having summarised the jurisprudence on the importance, utility and employment of sentencing benchmarks, I remarked, at [24], that:

> The circumstances of each case are of paramount importance in determining the appropriate sentence. Benchmarks and/or tariffs (these terms are used interchangeably in this judgment) have significance, standing and value as judicial tools so as to help achieve a certain degree of consistency and rationality in our sentencing practices. They provide the vital frame of reference upon which rational and consistent sentencing decisions can be based. They ought not, however, to be applied rigidly or religiously. No two cases can or will ever be completely identical or symmetrical. The lower courts, while obliged to pay careful and thoughtful attention to tariffs and/or sentencing precedents, must not place them on an altar and obsessively worship them. The judicial prerogative to depart in a reasoned and measured manner from sentencing and precedent guidelines in appropriate cases should not be lightly shrugged off. Sentencing is neither a science nor an administrative exercise. Sentences cannot be determined with mathematical certainty. Nor should they be arbitrary. The sentence must fit the crime. Every sentence reflects a complex amalgam of numerous and various factors and imponderables and requires the very careful evaluation of matters such as public interest, the nature and circumstances of the offence and the identity of the offender. Most crucially, it calls for the embodiment of individualised justice. This in turn warrants the application of sound discretion. General benchmarks, while highly significant, should not by their very definition be viewed as binding or fossilised judicial rules, inducing a mechanical application.

45 In the present matter, the accused pleaded guilty to one charge of raping his daughter.

Accordingly, the starting point is 15 years' imprisonment and 12 strokes of the cane. It remained to be determined if there were any further mitigating or aggravating factors present in this case that would have served to either enhance or reduce his sentence in accordance with his legal and moral culpability.

Aggravating factors

Harm to victim

46 In almost every instance of rape, the potential harm which will be suffered by the victim is an aggravating factor. It must be acknowledged that rape is an inherently odious and reprehensible act that almost invariably inflicts immeasurable as well as irreparable harm on a victim because it destroys two central facets of his or her life. First, it cannot be gainsaid that respect for the dignity, privacy and free will of a person must surely include his or her inalienable right not be a victim of predatory sexual aggression. An act of rape violates a person's autonomous choice in sexual matters: see Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4th Ed, 2005) at p 128. This intrusion of a person's body is infinitely far more heinous, egregious and profound than simply trespassing on or damaging property. As Prof Ashworth incisively observes in *Principles of Criminal Law* (Oxford University Press, 3rd Ed, 1999) at p 349:

> [S]exuality has a certain uniqueness which is absent from much property: sexuality is an intrinsic part of one's personality, it is one mode of expressing that personality in relation to others, and it is therefore fundamental that one should be able to choose whether to express oneself in this way – and, if so, towards and with whom. The essence of such self-expression is that it should be voluntary, both in the giving and in the receiving. Thus, *even where a sexual assault involves no significant physical force, it constitutes harm in the sense that it invades a deeply personal zone, gaining non-consensually that which should only be shared consensually*. [emphasis added]

47 Secondly, further manifestation of the evil of rape is that it exacts irretrievable physical, emotional and psychological scars on a victim. As the Court of Appeal aptly put it in *Chia Kim Heng Frederick* ([17] *supra*) at 364, [9]:

> It can be seen from the above that rape is a serious offence for which a severe punishment is prescribed by law. In this connection it would not be out of place for us to follow the example of Lord Lane CJ in *R v Billam* in citing a passage from the Criminal Law Revision Committee's 15th report on sexual offences in 1984 which he said reflected accurately the views of the English Court of Appeal, and which also accurately reflect the views of the Singapore Court of Criminal Appeal. The passage was as follows:
>
> > Rape is generally regarded as the most grave of all the sexual offences. In a paper put before us for our consideration by the Policy and Advisory Committee on Sexual Offences the reasons for this are set out as follows —
> >
> > > Rape involves a severe degree of emotional and psychological trauma. It may be described as a violation which in effect obliterated the personality of the victim. Its physical consequences equally are severe: the actual physical harm occasioned by the act of intercourse; associated violence or force and in some cases degradation; after the event, quite apart from the woman's continuing insecurity, the fear of venereal disease or pregnancy. We do not believe this latter fear should be underestimated, because abortion would usually be available. This is not a choice open to all women and it is not a welcome consequence for any. Rape is also particularly unpleasant because it

involves such intimate proximity between the offender and victim. We also attach importance to the point that the crime of rape involves abuse of an act which can be a fundamental means of expressing love for another, and to which as a society we attach considerable value. ...

48 The UK Sentencing Advisory Panel's *Advice on the Sexual Offences Act 2003* to the Sentencing Guidelines Council (available at <http://www.sentencing-guidelines.gov.uk/docs/advice-sexual-offences.pdf>) also highlights at para 16 that:

> *The psychological trauma caused by sexual offences can be so deep-seated that it can have a permanent impact on a victim's ability to function in society*. This can particularly be the case where sexual violation has been perpetrated over a long period of time, *especially where the perpetrator is a family member or a person in a position of trust. Existing personal relationships may break down and victims often find it extremely difficult to develop intimate relationships in the future*. [emphasis added]

49 When young persons are the victims of rape, the harm that is occasioned by the sexual assault is severely exacerbated. Herman, writing on child abuse in her illuminating book, *Trauma and Recovery* ([40] *supra*), soberingly observes (at p 96):

> REPEATED TRAUMA in adult life erodes the structure of the personality already formed, but repeated trauma in childhood forms and deforms the personality. The child trapped in an abusive environment is faced with formidable tasks of adaptation. She must find a way to preserve a sense of trust in people who are untrustworthy, safety in a situation that is unsafe, control in a situation that is terrifyingly unpredictable, power in a situation of helplessness. Unable to care for or protect herself, she must compensate for the failures of adult care and protection with the only means at her disposal, an immature system of psychological defenses.

50 In a passage that further explains the psychological injury that is inflicted particularly where the abuser is the victim's parent, Herman continues (at pp 101 and 102):

> In this climate of profoundly disrupted relationships the child faces a formidable developmental task. She must find a way to form primary attachments to caretakers who are either dangerous or, from her perspective, negligent. She must find a way to develop a sense of basic trust and safety with caretakers who are untrustworthy and unsafe. She must develop a sense of self in relation to others who are helpless, uncaring or cruel. ... And ultimately, she must develop a capacity for intimacy out of an environment where all intimate relationships are corrupt ...
>
> …
>
> All of the abused child's psychological adaptations serve the fundamental purpose of preserving her primary attachment to her parents in the face of daily evidence of their malice, helplessness, or indifference. To accomplish this purpose, the child resorts to a wide array of psychological defenses. By virtue of these defenses, the abuse is either walled off from conscious awareness and memory, so that it did not really happen, or minimized, rationalized, and excused, so that whatever did happen was not really abuse.

51 Dr Woo's report on B's current psychological health (see [16] above) demonstrates with stark and perturbing clarity that these passages are not merely the theoretical musings of an academic. It is undeniable that most rape victims suffer long-lasting and often permanent psychological trauma. Such psychological trauma often manifests itself in self-destructive behaviour. It will be recalled, for

example, that Dr Woo also reported that B had cut her wrists a few times since her rape. Such self-mutilating behaviour is widely acknowledged as a common symptom of the sexual abuse of a child. As Herman cogently explains (at pp 108–109):

> [A] great many survivors develop chronic anxiety and depression which persist into adult life. …
>
> This emotional state … cannot be terminated by ordinary means of self-soothing. Abused children discover at some point that the feeling can be most effectively terminated by a major jolt to the body. The most dramatic method of achieving this result is through the deliberate infliction of injury. The connection between childhood abuse and self-mutilating behaviour is by now well documented. …
>
> Survivors [of abuse] who self-mutilate consistently describe a profound disassociative state preceding the act. …
>
> The mutilation continues until it produces a powerful feeling of calm and relief; physical pain is much preferable to the emotional pain that it replaces. …
>
> Self-injury is also frequently mistaken for a suicidal gesture. …
>
> Self-injury is intended not to kill but rather to relieve unbearable emotional pain, and many survivors regard it, paradoxically, as a form of self-preservation.

52 It is axiomatic that the immediate as well as future impact of a crime on a victim is a relevant factor in the sentencing equation. As Stuart-Smith LJ put it in *R v Nottingham Crown Court, Ex parte Director of Public Prosecutions* [1996] 1 Cr App R (S) 283 at 288:

> In my judgment, *it is a cardinal principle of sentencing that the court should take into account when considering the gravity of the offence and the appropriate sentence, the consequences to the victim*. This is because one of the purposes of the criminal law is to assuage the feelings of victims and their friends and relations. The law must redress their grievance by inflicting an appropriate punishment and then there is no excuse for the victim or his friends to exact their own retribution. [emphasis added]

In *Attorney-General's Reference (No 1 of 1989)* [1989] 1 WLR 1117, the English Court of Appeal (Criminal Division) opined, in the context of incest, that actual evidence of psychological or physical trauma is plainly an aggravating factor.

53 It should however be noted, broadly speaking, that before a court considers the impact of a crime on a victim, it is necessary and crucial that there be a firm evidential basis for the determination of the extent of the damage that the crime has had on the victim. When such evidence is available the court should carefully assess the harm that has befallen the victim in arriving at a sentence that fairly and accurately represents the gravity of the offence: *R v Anthony Hobstaff* (1993) 14 Cr App R (S) 605; *R v Peter O's* (1993) 14 Cr App R (S) 632. I should add, that by acknowledging the relevance and importance of the extent of the injury caused to the victim by an offender's criminal act, it does not invariably follow that the failure or omission of the Prosecution to adduce direct evidence of the victim's suffering should entitle the offender, as of right, to receive a more lenient sentence. This is especially so where the offence is rape. As such, in *R v David N* [2001] EWCA Crim 792, the English Court of Appeal (Criminal Division) dismissed an appeal against sentence where the appellant pleaded, *inter alia*, that there was no evidence that the victim had suffered physically or psychologically. This is only right because, as stated above, an act of rape is *inherently*

violent – if not because of the trauma it causes, then because of the fact that it violates the bodily integrity of the victim and shatters the victim's invaluable and inalienable right to autonomy and privacy: see *PP v Soh Lip Yong* [1999] 4 SLR 281 at [29].

54 In the present case, there is incontrovertible and compelling evidence that B is suffering from post-rape trauma several months after the rape. Most significantly, the trauma that B wrestles with is distressingly and inexorably amplified by the fact that the perpetrator is her natural father. In the circumstances, I was unreservedly inclined, indeed compelled, to take into account for the purposes of sentencing, the undeniably intense suffering that B has been and will be made to endure as a consequence of the accused's rape.

Other aggravating factors

55 In *Millberry* ([19] *supra*), Lord Woolf, at [32], identified a further list of nine aggravating factors that are often present in rape offences:

i. the use of violence over and above the force necessary to commit the rape;

ii. use of a weapon to frighten or injure the victim;

iii. the offence was planned;

iv. an especially serious physical or mental effect on the victim; this would include, for example, a rape resulting in pregnancy, or in transmission of a life-threatening or serious disease;

v. further degradation of the victim, *e.g.* by forced oral sex or urination on the victim …

vi. the offender has broken into or otherwise gained access to the place where the victim is living …

vii. the presence of children when the offence is committed …

viii. the covert use of a drug to overcome the victim's resistance and/or obliterate his or her memory of the offence;

ix. a history of sexual assaults or violence by the offender against the victim …

56 The agreed facts did not disclose the presence of any of these aggravating factors. On the basis of the statement of facts tendered to the court, the rape was not premeditated. There were no further degrading acts committed against B, apart from the rape itself. There is no evidence that the accused had committed acts of violence or sexual assault against B on any prior occasion. Neither weapons nor excessive or gratuitous force were employed. The medical examination of B did not reveal pregnancy or any sexually-transmitted disease. As such, the principal aggravating factor, in this case, other than the familial relationship is the devastating psychological harm and trauma that has been inflicted on B.

Mitigating factors

Plea of guilt and remorse

57 It will be recalled that the accused pleaded guilty to having raped his daughter. However, a plea of guilt does not *ipso facto* entitle an offender to a discount in his sentence. Whether an early

plea of guilt is given any mitigating value depends on whether it is indicative of genuine remorse and a holistic overview of the continuum of relevant circumstances: *Angliss Singapore Pte Ltd v PP* [2006] SGHC 155 at [77]. A court should also carefully examine the conduct of the offender after the commission of the offence in order to determine whether the offender is genuinely contrite.

58 It may be argued, in the accused's favour, that he not only surrendered himself to the police on 3 March 2006 but also apologised to B sometime in January 2006 for his actions. However, on closer examination of the facts, I am not persuaded that there was any manifestation of sincere or veritable contrition. It will be recalled that the accused apologised to B only after his vile deed had been exposed, and even then, only after making a futile attempt to deny the incident initially. It was D's insistent interrogation of the accused that precipitated a cul-de-sac and the resulting apology. Similarly, the accused's surrender to the police came only after E had lodged a police report against him. In both instances, the accused acted only after his guilt surfaced and came under the glare of scrutiny. Had the accused been genuinely contrite for indiscriminately and wantonly acting on his depraved impulse in November 2005, he would not have waited for at least two months to apologise to B. In fact, if B had not unexpectedly exposed him in front of D in January 2006 and subsequently told E about the incident, the accused may not even have belatedly conveyed his apology to B. He would have been content simply to pretend that nothing was amiss. In the circumstances, I cannot accept that the accused's plea of guilt ought to be accorded any appreciable weightage save for his apparent willingness to facilitate the course of justice. In any event, a plea of guilt even if properly motivated by remorse or contriteness is only one consideration in the sea of sentencing factors. Its importance and weightage may vary in different cases.

Hardship caused to the family

59 The accused pleaded for leniency in his sentence because of the hardship that would be caused to his immediate and extended family by a long term of imprisonment. The accused was also the sole breadwinner of the family.

60 It is almost inevitable that whenever the breadwinner of the family has committed an offence and is sentenced to a lengthy term of imprisonment, his family is made to bear and suffer the brunt of his folly. However, the cases are both clear and consistent on one point. Little if any weight can be attached to the fact that the family will suffer if the accused is imprisoned for a substantial period of time: *Lai Oei Mui Jenny v PP* [1993] 3 SLR 305; *PP v Perumal s/o Suppiah* [2000] 3 SLR 308; *Ang Jwee Herng v PP* [2001] 2 SLR 474.

61 In this regard, it is apposite to reproduce the observations of Tay Yong Kwang J in *PP v MX* ([34] *supra*), at [40]:

> It is always an extremely difficult task for the court to sentence the main provider of a family, particularly where the victim herself is also dependent on him for her livelihood. The court, in delivering the victim from her tormentor by putting him away for a long period of time, becomes her shining light but paradoxically also casts a lengthy shadow on her life by depriving her of her main provider. …The family must therefore accept that the accused will not be contributing financially for a significant period and make the necessary adjustments.

62 I can only add to these astute comments by noting that, particularly, in a case where an accused has committed an offence against a family member, it does not lie in his mouth to exploit the sympathy that naturally arises for his family for his own personal benefit in seeking a reduction of his sentence. The essence of the offence is the emotional and psychological trauma the offender has inflicted on his family. The offender's culpability cannot be simply brushed aside lightly or dusted off

purely because of economic considerations. Lamentably, there are no easy or right answers in cases of this nature. It can be said, however, that if the accused had any genuine care and concern for his family, he could and would have resisted his unnatural impulse in the first place.

The need for specific deterrence

63 In assessing whether specific deterrence is a necessary consideration in sentencing the particular offender, a court may take into account the circumstances of the offence (*PP v Tan Fook Sum* [1999] 2 SLR 523 at [18]), the personal circumstances of the offender (*Tan Kay Beng* ([41] *supra*) at [50]–[51]; *PP v Aguilar Guen Garlejo* [2006] 3 SLR 247 at [44]) and the criminal record of the offender (*PP v Ng Bee Leng Lana* [1992] 1 SLR 635 at 637–638, [13]).

64 In so far as the circumstances of the offence are concerned in this particular instance, I am satisfied that they do not indicate that the offender is likely to repeat his heinous act. The rape in November 2005 was not premeditated; nor was it part of a series of rapes against B or anyone else. Nor do the facts disclose that the offender is of an unstable character (*PP v Chee Cheong Hin Constance* [2006] 2 SLR 707 at [5]–[6]) such that he likely to re-offend.

65 The personal circumstances of the accused in this case are neither here nor there. While there is nothing on the record to suggest that he will commit a sexual offence again, there is on the other hand nothing particularly compelling or suggestive to indicate that he will not. As such, it would be inappropriate to draw any positive or adverse inferences from the personal circumstances of the accused.

Prior criminal antecedents

66 As for the accused's criminal antecedents, he clearly does not have an immediately relevant history. However, before analysing the implications of an offender's criminal record, it would be useful to bear in mind the exact relevance of such a record. Needless to say, it would be wrong to penalise someone again for his past misdeeds, particularly if he has already served his sentence for them. To do so would be tantamount to a violation of the constitutional safeguard eschewing double jeopardy. Accordingly, it would be inappropriate to mechanically enhance the sentence of an offender simply by virtue of the fact that he has a criminal record. One's criminal record is relevant to the extent that a sentencing judge may draw certain inferences about the accused's character, attitude and likelihood of rehabilitation: *Sim Yeow Seng v PP* [1995] 3 SLR 44 at 47, [8]. In *Tan Kay Beng* ([41] *supra* at [17]) I cited with approval, a passage from *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 477–478:

> [T]he antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences: *Director of Public Prosecutions v Ottewell* [[1970] AC 462 at 650]. *The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law*. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. *It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instance case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind.* Counsel for the applicant submitted that antecedent criminal history was relevant only to a prisoner's claim for leniency. That is not

and has never been the approach of the courts in this country and it would be at odds with the community's understanding of what is relevant to the assessment of criminal penalties. [emphasis added]

6 7 In a case of somewhat greater vintage, Hilbery J similarly remarked in *R v Kenneth John Ball* (1951) 35 Cr App R 164 at 166:

> It follows that when two persons are convicted together of a crime or series of crimes in which they have been acting in concert, it may be right, and very often is right, to discriminate between the two and to be lenient to the one and not to the other. *The background, antecedents and character of the one and his whole bearing in Court may indicate a chance of reform if leniency is extended, whereas it may seem that only a harsh lesson is likely to make the other stop in his criminal career*. [emphasis added]

68 Therefore, a court is not compelled to assign any weight to an offender's previous convictions if they do not constitute a reasonable basis on which to infer that an offender might re-offend. As Yong Pung How CJ held in *PP v Boon Kiah Kin* [1993] 3 SLR 639 at 647–648, [37], a court "shall also be open to persuasion as to the weight that should be assigned to these convictions for earlier offences". In other words, was the present offence a fleeting moment of weakness or did it involve an element of scheming or planning? If the offence under consideration was committed as a result of pressures or provocation that might be viewed as separate and unrelated to any previous offences, a court should not feel obliged to impose a heavier sentence by mere dint of the fact that the accused has a criminal record: see also D A Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2nd Ed, 1979) at p 203. This general approach is, needless to say, subject to any statutory provision prescribing an enhanced sentence for a repeat offender.

69 One instructive, and entirely logical yardstick that the courts have adopted in determining what, if any, weight should be assigned to a previous conviction comes in the form of an enquiry as to whether the previous offence(s) bears any similarity to the offence under consideration. If an offender has committed a similar offence on previous and/or multiple occasions, it would not be illogical to surmise that a longer sentence is justified on the principle that specific deterrence is necessary to curb his criminal activity. Conversely, a dissimilar offence is by parity of reasoning of no *direct* relevance: *Tan Kay Beng* ([41] *supra*) at [14]. However, as with all principles of law, it would be a mistake to apply these considerations unthinkingly, without an adequate assessment of the precise facts before the court. Therefore, even though the antecedents of an offender may be technically and/or literally dissimilar, this has not deterred the courts from according them weight on the basis that, viewed cumulatively, they either share a common denominator with the present conviction (see *eg*, *Wong Sin Yee v PP* [2001] 3 SLR 197 at [23]) or demonstrate a progressive proclivity towards increasingly serious criminal activity (*Tan Kay Beng* at [16]).

70 Apart from examining the similarity or dissimilarity of the offender's criminal antecedents *vis-à-vis* the present conviction, it may also be relevant to take into account the interval between the most recent conviction and the current conviction. It has by and large been assumed that the doctrine of spent convictions does not apply in Singapore following the High Court's decision in *Leong Mun Kwai v PP* [1996] 2 SLR 338. This may not be entirely correct. *Leong Mun Kwai v PP* merely established that as a matter of statutory interpretation, an English statute (the Rehabilitation of Offenders Act 1974 (c 53)) barring the admission of spent convictions could not be imported into Singapore law via s 5 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) given that the English provision dealt with substantive rather than procedural law. On this point, I express my agreement with Yong CJ. However, the court did not foreclose the development of a similar doctrine through the

common law. In fact, Yong Pung How CJ, at 342, [19], presciently observed:

> The effect that these convictions have on sentencing in any case must depend on the facts of the case. In my view, relevant considerations would be the number and nature of these previous convictions. Similarly, *for convictions which occurred a long time ago, it would also be relevant to consider the length of time during which the defendant has maintained a blemish-free record.* All these are part and parcel of the convicted person's antecedents which the court should take into account. [emphasis added]

71 In Victoria, this, too, is the general approach. As summarised by Richard G Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2nd Ed, 1999) at p 272 (para 3.706):

> Not every prior conviction or finding of guilt is considered relevant in the exercise of the sentencing discretion. …
>
> [O]ffences that occur after a significant period free of crime will be regarded less seriously. The longer the period without offending the greater the mitigatory effect, even if the previous record was considerable. The gap in the record must be due to the defendant's own efforts at rehabilitation and not merely because the person's law breaking was undetected, or because a sentence of imprisonment was being served.

72 The rationale for according weight to the length of time that an offender has stayed clean is two-fold. First, "isolated convictions in the long distant past" should not, as a matter of logic, be considered evidence of irretrievably bad character. They might simply be indicative of an occasional lapse in judgment. Secondly, the nature of the lapse being scrutinised is crucial. A substantial gap between one conviction and another may be testament to a genuine effort to amend wanton ways which may even lead a court to consider the possibility of rehabilitation: see also D A Thomas ([68] *supra*) at pp 200–202.

73 It is significant that Parliament has decided that where a previous conviction resulted in an imprisonment of not more than three months or a fine not exceeding $2,000, the record of the offender is considered "spent" after five years: see Pt IIA of the Registration of Criminals Act (Cap 268, 1985 Rev Ed) ("ROCA"). The rationale underlying the ROCA, *ie*, that the prospects of an offender ought not to be prejudiced forever as long as he evinces an intention to stay free from crime for five years, is one which is laudable and *ought* to be given full expression by the courts in their sentencing decisions. I am, however, aware that the ROCA does not literally apply to sentencing decisions by the courts; see s 7E(2)(*c*) of the ROCA. Therefore, all prior convictions of an offender are in theory *relevant* in sentencing. However, nothing either in the ROCA or any other statute prevents the courts from disregarding such antecedents or duly granting credit to an offender who has attempted to stay on the straight and narrow for a significant length of time for the reasons already articulated in [72] above. Nor is there anything in the ROCA, any other statute or current sentencing practice compelling the court to treat an offender's antecedents as an aggravating factor in all cases.

74 In the present case, the accused had prior convictions for housebreaking and theft by day and by night, trafficking in a controlled drug and consumption of a controlled drug. These offences were of a wholly different nature from the present transgression. They were neither sexual nor violent in nature. Moreover, the last of these convictions was 24 years ago. In *PP v Siew Boon Loong* [2005] 1 SLR 611 at [12], Yong CJ held that even though the previous offences of the offender were similar to the conviction he was now facing, the previous offences had been committed while he was

a juvenile some 11 years ago. Therefore, "some, but not too much" weight was placed on his antecedents. Similarly, in *R v Boyd* [1975] VR 168, the Supreme Court of Victoria considered a 12-year gap free of violent crime as equivalent to good behaviour. Considering the facts of the present matter, I found that it was similarly inappropriate to attach any weight to them or, indeed, to find that they are portentous of a risk of re-offending.

Conclusion

75 Sentencing requires the exercise of measured discretion and a sentencing judge must always assess on a balancing scale several competing and often conflicting considerations. In rape cases, a deterrent sentence is usually warranted; and this is reflected in the benchmark sentences set out both in *Chia Kim Heng Frederick* ([17] *supra*) and in this case. However, as I observed in *Tan Kay Beng* ([41] *supra*) at [31], "[d]eterrence must always be tempered by proportionality in relation to the severity of the offence committed as well as by the moral and legal culpability of the offender". In rape offences, there are invariably at least three dimensions involved in the determination of the appropriate sentence. They are: (a) the offender's culpability; (b) the extent of harm to the victim; and (c) the risk of repetition of similar offences. While rape is a heinous offence that invites heavy punishment, an offender's culpability and precise punishment should be carefully calibrated in each and every case.

76 In the instant case, the starting point is 15 years' imprisonment and 12 strokes of the cane. This benchmark, as I said, reflects the pressing need for general deterrence apropos familial rape. That said, it is vital to examine the precise factual matrix of this case in order to determine whether the benchmark is too low or too high, in proportion to the accused's culpability. To the credit of the accused, he has stayed away from crime for a substantial period of 24 years. This suggests that the accused is not beyond rehabilitation. This episode was not, as far as the facts demonstrate, a premeditated act. While an odious act, it was committed in a moment of sheer unrestrained impulse. Granting that a maximum sentence was clearly not warranted, other factors however militated strongly and compellingly against any leniency or sentencing discount in this matter. In particular, the grave and probably irreparable psychological damage to B weighed heavily in the equation. In the result, notwithstanding the accused's apparent co-operation and professed contrition, I determined that a sentence of 15 years' imprisonment and 15 strokes of the cane was both warranted and dictated by the circumstances of this case.