Iskandar bin Muhamad Nordin
v
Public Prosecutor

[2005] SGHC 207

High Court — Magistrate's Appeal No 90 of 2005
Yong Pung How CJ
2 August; 4 November 2005

Criminal Procedure and Sentencing *— Appeal — Plea of guilty — Appeal against sentence imposed for conviction on offence of outrage of modesty — Existence of aggravating factors — Whether mitigating factors warranting reduction in sentence existing — Section 354 Penal Code (Cap 224, 1985 Rev Ed)*

Facts

The appellant, who had a mild intellectual disability, pleaded guilty to one charge of outrage of modesty under s 354 of the Penal Code (Cap 224, 1985 Rev Ed) ("the Offence"). He was convicted and sentenced to nine months' imprisonment and three strokes of the cane. Prior to the commission of the Offence, the appellant already had several previous brushes with the law, including a similar charge for outrage of modesty for which he was given a discharge amounting to an acquittal after compounding that offence. Further, the appellant had committed the Offence on the day of his release from prison for committing offences of theft in dwelling. He appealed against his sentence.

Held, dismissing the appeal and enhancing the sentence:

(1) The appellant's mild intellectual disability did not preclude him from being criminally culpable for his actions. Similarly, offenders of low intellect did not receive differentiated treatment in sentencing unless it was justified on the facts. The weight to be attached to the low intellectual capacity of such offenders as a mitigating factor, if any, would depend on the particular circumstances of the case: at [8], [9] and [14].

(2) Case law had established that the tariff sentence in respect of offences under s 354 of the Penal Code where the victim's private parts or sexual organs had been intruded upon applied even where the accused person was of low intellect: at [10] to [13].

(3) On the facts, the appellant's intellectual disability was not such that any significant mitigating weight should be given in sentencing. It was clear that his reduced intellectual faculty did not impair his ability to gain insight into his actions as well as the consequences of those actions: at [18].

(4) On the contrary, the aggravating factors present called for a heavier sentence. The appellant who had a string of recent antecedents had committed the Offence almost immediately after his release, within a stone's throw from the prison gates. The abominable manner in which the appellant had preyed on the victim also inflicted a traumatic ordeal upon her. Both the appellant's past experiences of incarceration and the second chance given to him for the similar

offence of outrage of modesty had failed abysmally to make him mend his ways. Taking into account the pillars of sentencing, his sentence was enhanced to 24 months' imprisonment with nine strokes of the cane: at [19] to [22].

[Observation: The requirements under s 232 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the CPC") served as a safeguard against the execution of the punishment of caning without proper regard for the offender's welfare. Even where the courts decided that an offender should suffer the punishment of caning, it was still for the medical officer referred to in s 232 of the CPC to determine, at the post-sentence stage, if an offender was fit to undergo such punishment: at [24].]

Case(s) referred to

Balasubramanian Palaniappa Vaiyapuri v PP [2002] 1 SLR(R) 138; [2002] 1 SLR 314 (folld)

Chandresh Patel v PP [1995] 1 *CLAS News* 323 (folld)

Chou Kooi Pang v PP [1998] 3 SLR(R) 205; [1998] 3 SLR 593 (folld)

Chua Tiong Tiong v PP [2001] 2 SLR(R) 515; [2001] 3 SLR 425 (folld)

Ng Chiew Kiat v PP [1999] 3 SLR(R) 927; [2000] 1 SLR 370 (folld)

PP v Huang Rong Tai [2003] 2 SLR(R) 43; [2003] 2 SLR 43 (folld)

PP v Mohamad Zaffinoor bin Mohamad Kassim Magistrate's Appeal No 224 of 1999 (folld)

PP v Ng Bee Ling Lana [1992] 1 SLR(R) 448; [1992] 1 SLR 635 (folld)

PP v Rozman bin Jusoh [1995] 2 SLR(R) 879; [1995] 3 SLR 317 (folld)

PP v Tan Fook Sum [1999] 1 SLR(R) 1022; [1999] 2 SLR 523 (folld)

R v J(H) [2002] CarswellOnt 5962 (refd)

R v Rundle (1983) 24 Man R (2d) 252 (refd)

R v Sargeant (1974) 60 Cr App R 74 (folld)

Tan Eng Chye v Director of Prisons [2004] 2 SLR(R) 640; [2004] 2 SLR 640 (folld)

Tok Kok How v PP [1995] 1 SLR(R) 292; [1995] 1 SLR 735 (folld)

Wong Churn Hoong v PP Magistrate's Appeal No 250 of 1998 (folld)

Legislation referred to

Criminal Procedure Code (Cap 68, 1985 Rev Ed) s 232

Penal Code (Cap 224, 1985 Rev Ed) s 354 (consd)

The appellant in person;
Christina Koh (Deputy Public Prosecutor) for the respondent.

4 November 2005

Yong Pung How CJ:

1 This was an appeal against the decision of District Judge Siva Shanmugam. In the court below, Iskandar bin Muhamad Nordin, the appellant, pleaded guilty to one charge of outrage of modesty, an offence punishable under s 354 of the Penal Code (Cap 224, 1985 Rev Ed). The

appellant was convicted and sentenced to nine months' imprisonment and three strokes of the cane. I dismissed his appeal against sentence and enhanced the sentence. I now set out the reasons for my decision.

The facts

2 The Statement of Facts presented in the court below disclosed that on 29 April this year at about 9.30pm, the victim informed the police that she had detained the appellant for molesting her. Earlier on, at about 9.00pm, the appellant had been walking towards a bus-stop along Margaret Drive when she noticed the appellant coming towards her. As he walked past her, he grabbed her left breast with his right hand. The victim shouted at the appellant who fled the scene. She gave chase and managed to detain him with the help of two female passers-by.

3 The appellant is an eighteen-year-old male with an Intelligence Quotient ("IQ") of 58. (It transpired later that there was a 3 October 2004 psychiatric report tendered by the Deputy Public Prosecutor in an earlier prosecution against him, but this report was not before the trial court or in the appeal before me).

4 Prior to the commission of the present offence, the appellant already had several previous brushes with the law. In August 2004, he was convicted for theft and sentenced to two weeks' imprisonment. Shortly after, in March 2005, the appellant was again arrested for two offences of theft in dwelling. He was subsequently convicted on one charge, with the other charge taken into consideration, and sentenced to six weeks' imprisonment. It was on the day of the appellant's release from Queenstown Remand Prison on 29 April 2005 that he committed the present offence.

5 Apart from the appellant's prior convictions for theft, it was stated in his antecedent report that he had been charged in September 2004 under s 354 of the Penal Code for one count of outrage of modesty. As he had apologised to the victim in court for squeezing her breast, and was allowed to compound the offence in November 2004, he was given a discharge amounting to an acquittal.

The decision below

6 The trial judge held that the tariff sentence for offences of outrage of modesty involving the intrusion of a victim's private part was nine months' imprisonment and three strokes of the cane. He noted that there were no mitigating factors applicable to the appellant; on the contrary, the appellant had brazenly committed the offence in a public place right after his release from prison. In the circumstances, the trial judge found no reason to depart from the benchmark sentence.

The appeal

7 The sole ground of appeal forwarded by the appellant was that the sentence imposed was excessive. While he stated that he would willingly serve out his sentence of imprisonment, or even a longer term of imprisonment, he implored that the sentence of caning be quashed.

The law

8 At the outset, I noted that the appellant suffered from mild intellectual disability. However, this did not preclude him from being criminally culpable for his actions. In *PP v Rozman bin Jusoh* [1995] 2 SLR(R) 879, a case involving an accused person of low intellect, the Court of Appeal stated at [35] that:

> … [The accused] may be a person of low intellect or subnormal intellect. But, as the learned judge held, and we agree, low or subnormal intellect is not unsoundness of mind and is not a defence to a criminal charge, and an educationally subnormal person can be criminally culpable for his actions … In our judgment, [the accused's] 'low intellect' and his disposition of being easily susceptible to manipulation by others is not a defence to a criminal charge. Nor can such low intellect and malleable disposition diminish or eradicate the presence of *mens rea*.

9 This decision was reaffirmed by the Court of Appeal in the subsequent cases of *Chou Kooi Pang v PP* [1998] 3 SLR(R) 205 and *PP v Huang Rong Tai* [2003] 2 SLR(R) 43. In the same vein, intellectually disabled offenders are not treated differently for the purposes of sentencing, but are instead punished in like manner as other offenders. The appropriate sentence to be passed would necessarily turn on the factual matrix of each case.

10 The benchmark sentence in respect of offences under s 354 of the Penal Code where the victim's private parts or sexual organs have been intruded upon is nine months' imprisonment with caning: *Chandresh Patel v PP* [1995] 1 *CLAS News* 323; *Ng Chiew Kiat v PP* [1999] 3 SLR(R) 927; *Balasubramanian Palaniappa Vaiyapuri v PP* [2002] 1 SLR(R) 138. In *Tok Kok How v PP* [1995] 1 SLR(R) 292, the accused pressed his knuckles against the victim's breast whilst sharing her umbrella during a rain. He was charged under s 354, and he pleaded guilty to outraging the victim's modesty. The District Court sentenced him to nine months' imprisonment and three strokes of the cane. In dismissing his appeal against sentence, I reiterated the sentencing benchmark for such offences and observed that the behaviour of the accused did not fall outside the category of cases which were deserving of custodial sentences with caning.

11 Case law has also established that the above tariff sentence applies even where the accused person is of low intellect. In *Wong Churn Hoong v*

PP (Magistrate's Appeal No 250 of 1998), the accused person had a low IQ, impaired social judgment as well as a fetish for wearing female undergarments. He pleaded guilty to five charges under s 354 of the Penal Code for molesting five different women, whereby he had, *inter alia*, grabbed the breast of one victim and touched the breast of another victim. Seven other charges, of which six were made pursuant to s 354 of the Penal Code, were taken into consideration. The accused was sentenced by the District Court to 18 months' imprisonment and three strokes of the cane for each of the offences of intruding upon the victims' breasts. He was sentenced to a total of 45 months' imprisonment and nine strokes of the cane. On appeal, his sentence was enhanced to 54 months' imprisonment and nine strokes of the cane even though he had no prior related antecedents.

12 Similarly, in *PP v Mohamad Zaffinoor bin Mohamad Kassim* (Magistrate's Appeal No 224 of 1999), the accused person was of low intellect and had no antecedents. He pleaded guilty to four charges under s 354 of the Penal Code, with two other charges under the same section taken into consideration. The District Court imposed a sentence of nine months' imprisonment for each charge, all of which were to run consecutively. The Prosecution's appeal against sentence was allowed and a sentence of three strokes of the cane was imposed for each of the four charges. The imprisonment sentence remained the same although only two custodial terms were ordered to run consecutively. In total, the accused was sentenced to 18 months' imprisonment with 12 strokes of the cane.

13 The concept of equality before the law is a common thread that runs through other courts with regard to the sentencing of intellectually impaired offenders. In *R v J(H)* [2002] CarswellOnt 5962, the accused sexually abused his daughter and her friend. He was charged and found guilty on two counts of sexual assault, another two counts of sexual interference and one count of incest. His full-scale intelligence was found to be in the low-average range and he also suffered from a mental illness. In sentencing the accused, the Ontario Superior Court of Justice made the following observations (at [13]–[14]):

> Granted, *his intellectual capacity is in the low average range of functioning* and he was suffering from a major depressive disorder that could lead to disorganized thinking. *However, he knew what he was doing to the victims was wrong. He knew his conduct was wrong by community standards. He knew and appreciated that societal norms prohibited the sexual relationship he had with his daughter and her young friend.* While he lacks insight into his behaviour, he has the capacity to gain that insight and become a law-abiding member of society. *Most people who have his intellectual capability do live as law-abiding citizens …*
>
> This conduct is reprehensible and must be denounced by the court in strong and emphatic terms. *The circumstances of this case require*

> *emphasis on principles of general and specific deterrence without losing sight of the rehabilitative interests of the defendant*.
>
> [emphasis added]

14 It is noteworthy that the court's approach in *R v J(H)* is similar to the local approach in that offenders of low intellect can be criminally culpable and do not receive differentiated treatment in sentencing unless it is justified on the facts. The weight to be attached to the low intellectual capacity of such offenders as a mitigating factor, if any, depends on the particular circumstances of the case.

15 In *R v Rundle* (1983) 24 Man R (2d) 252, the accused pleaded guilty to two counts of indecent assault, each involving him kissing and feeling the private parts of a young boy. The accused had related antecedents going back some seven years and had been on probation at the time of the offences. His intellect was low and was described as being at a very dull normal or mild retardate level. Additionally, he suffered from a personality disorder with features of passivity and poor control over his sexual impulses. In sentencing the accused to two years' imprisonment on each count, the Manitoba Court demonstrated its principled adherence to the notion of equality in sentencing even where intellectually disabled offenders were concerned. It held (at [12]–[13]) that:

> *The court, for its part, has no alternative than to sentence in accordance with the system as it exists. Sentences are determined on the basis of well-known principles laid down, in our own jurisdiction, by the Court of Appeal of Manitoba. They include punishment of the accused, special and general deterrence, and rehabilitation of the offender*. In appropriate cases, the victim is to be compensated. All the ingredients taken together, add up to the aim of the protection of society.
>
> The overriding consideration in the present case must be the protection of society, and, in particular, the protection of young boys. This, in my view, calls for a longer period of imprisonment than has previously been imposed.
>
> [emphasis added]

16 Both *R v J(H)* and *R v Rundle* accord with the local position that the four classical pillars of sentencing – retribution, deterrence, prevention and rehabilitation – as set out by Lawton LJ in *R v Sargeant* (1974) 60 Cr App R 74 (followed in *PP v Tan Fook Sum* [1999] 1 SLR(R) 1022 at [15] and *Chua Tiong Tiong v PP* [2001] 2 SLR(R) 515 at [31]) are to be weighed and applied dispassionately to offenders who violate the law. This includes those who are intellectually impaired.

17 With the foregoing discussion in mind, I now turn to examine the merits of the appellant's appeal.

My decision

18 To my mind, the appellant was fully aware of the wrongfulness of his act in spite of his impediments. He clearly knew that it was wrong to intrude upon a female person's breasts as he had apologised barely six months ago to another victim for having squeezed her breast. He understood that the similar act of grabbing a female person's breast would not be condoned. The fact that he ran away after committing the present offence attested to that. He also realised from past experience that he would have to face the consequences of his actions if he were caught. I was of the view that the appellant's intellectual disability was not such that I should give it any significant mitigating weight in sentencing. It was clear that his reduced intellectual faculty did not impair his ability to gain insight into his actions as well as the consequences of those actions.

19 Although the appellant had asked to be spared the rod, I found no reasons justifying a departure from the benchmark sentence of a custodial term *and* caning for offences of the present nature. On the contrary, I found that the aggravating factors present called for a heavier sentence. I was greatly disturbed that the appellant had molested the victim on the very same day he was released from prison. In fact, he had committed his vile act almost immediately after his release, within a stone's throw from the gates of Queenstown Remand Prison. In my opinion, this evinced a total lack of contrition on his part. Moreover, the abominable manner in which the appellant had preyed on the victim bore out the traumatic ordeal inflicted upon her. He had, wholly unprovoked, identified her before sexually attacking her by *grabbing* her breast along a public road, when it was dark at night.

20 The appellant's string of recent antecedents also weighed heavily on my mind. He was, to say the least, a recalcitrant offender who acted in defiant disregard of the law. It seemed that the appellant, in addition to being a thief, had now morphed into a sexual predator. Without the fortuitous intervention of the two passers-by, the appellant might have escaped and become embroiled in further trouble with the law.

21 Under these circumstances, I found that the sentence imposed by the trial judge was manifestly inadequate. It was palpable that the appellant's past experiences of incarceration had hitherto failed to steer him away from the allure of crime. Likewise, the second chance given to him after a similar offence of outrage of modesty in late 2004 had failed abysmally to make him mend his ways. Against this background, the appellant's plea to substitute caning with a longer sentence of imprisonment impressed upon me that an imprisonment sentence alone would not only be inconsistent with the standard sentence of caning for offences of the present nature, but would also be inimical to the object of deterrence. Clearly, there is a need for the sentence imposed in cases of this nature to deter both the perpetrator from such further attacks as well as others who may be similarly disposed. I was

thus of the opinion that the appellant should not escape the punishment of caning but should receive nine strokes of the cane.

22 As the appellant's unrepentant and aberrant behaviour showed that he posed a real danger to the community, I further increased his sentence of imprisonment to 24 months. A longer term of imprisonment would represent a longer period of protection for society from his depredations: *PP v Ng Bee Ling Lana* [1992] 1 SLR(R) 448 at [14]. At the same time, I was mindful that given the appellant's relatively young age, this term of imprisonment would not encumber his possible rehabilitation upon his release from prison.

23 In reviewing the appellant's sentence, my attention was also drawn to the protection afforded to him under s 232 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the CPC") whereby it is incumbent upon a medical officer to determine that an offender has the requisite fitness of health to undergo a punishment of caning before the punishment can be executed. Section 232 of the CPC states that:

> (1) The punishment of caning shall not be inflicted unless a medical officer is present and certifies that the offender is in a fit state of health to undergo such punishment.
>
> (2) If during the execution of a sentence of caning a medical officer certifies that the offender is not in a fit state of health to undergo the remainder of the sentence the caning shall be finally stopped.

24 The requirements under this provision serve as a safeguard against the execution of the punishment of caning without proper regard for the offender's welfare. As noted in *Tan Eng Chye v Director of Prisons* [2004] 2 SLR(R) 640 at [42], the law is not without compassion; only those found to be fit to undergo caning will be caned. Accordingly, even where the courts decide that an offender should suffer the punishment of caning, it would still be for the medical officer referred to in s 232 of the CPC to determine, at the post-sentence stage, if an offender is fit to undergo such punishment.

Conclusion

25 The appellant was no babe in the woods. He had persisted in his invidious conduct and had committed the present offence knowing full well the gravity of his actions. Having carefully considered all the facts and circumstances of this case, including the various aggravating factors, I dismissed his appeal and sentenced him to 24 months' imprisonment with nine strokes of the cane.

Reported by Ang Ching Pin.