Public Prosecutor *v* Muhammad Shafie bin Ahmad Abdullah and others [2010] SGHC 274

Case Number : Criminal Case No 54 of 2009

Decision Date : 17 September 2010

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Christina Koh, Gordon Oh and Sabrina Choo (Attorney-General's Chambers) for the prosecution; Ganesan Nadesan, Chong Soon Pong Adrian and Darius Chan (Assigned by CLAS) for the first defendant; Peter Ong Lip Cheng (Assigned by CLAS) for the second defendant; Ramesh Chandr Tiwary (Messrs Ramesh Tiwary) for the third defendant; Wee Heng Yi Adrian (M/s Characterist LLC) for the fourth defendant; Anand Nalachandran and Jansen Lim (M/s ATMD Bird & Bird LLP) for the fifth defendant.

Parties : Public Prosecutor — Muhammad Shafie bin Ahmad Abdullah and others

Criminal Law

17 September 2010

Chan Seng Onn J:

Introduction

1 This was a matter involving 5 young offenders (collectively "the Offenders") who had each pleaded guilty to a reduced charge of aggravated outrage of modesty ("the Offence") under section 354A(1) of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"). I sentenced the Offenders to imprisonment terms between 3½ and 5 years with caning ranging from 5 to 8 strokes and I now set out my reasons.

Background

2 On the night of 25 December 2008, the First Offender ("Shafie") invited the Second to Fifth Offenders ("Sadruddin", "Lim", "Rishi" and "Firdaus" respectively) and one Taufik to Shafie's flat ("the Flat") to spend Christmas night together. Shafie's parents had then gone abroad and were not expected to return to the Flat until the following day. Sometime after they arrived at the Flat, the Offenders became bored and wanted to have female company in the Flat. Lim then called the Victim on her handphone. It was not clear how Lim obtained the Victim's handphone number but suffice to mention that the Victim and the Fourth Offender, Rishi, were former schoolmates. During the telephone conversation with the Victim, Lim identified himself as one "Jonathan" who was an ITE student studying in the class next to the Victim's and arranged with the Victim to have supper at Woodlands. The Victim agreed and Rishi eventually picked her up in a taxi at a taxi-stand at Woodlands Bus Interchange. At that point in time, Rishi told the Victim that they would be going for supper at Woodlands Market. En route, however, Rishi brought the Victim to the Flat instead, explaining that he wanted to look for his friends at the Flat first before having supper. At around 1.00am on 26 December 2008 upon arrival at the Flat, Rishi invited the Victim into the Flat on the assurance that his friends would not bother her and the Victim obliged. It was then that the Victim was introduced to Lim, Shafie, Firdaus, Sadruddin and Taufik.

3 In the Flat, the Victim played drinking games with the company she found herself with until about 3.00am to 4.00am. There was no dispute that Lim had told Shafie and Sadruddin shortly after the Victim's arrival to buy liquor as he planned for the Victim to drink alcohol that night. There was also no dispute that the Victim had joined in the drinking games because she was feeling festive as it was the Christmas season and the school holidays. Taufik did not join in the drinking games and was playing a PSP game console in the Flat. Firdaus also did not join in the drinking games as he had left the Flat temporarily after the Victim's arrival. In the course of the drinking games, the Victim drank more than 5 disposable plastic cups of vodka cocktail. As a result, she felt dizzy.

4 Sometime later that night, the Victim had consensual sexual intercourse with Lim after he made sexual advances towards the Victim privately in Shafie's bedroom. After sexual intercourse, the Victim then returned to the living room to rest as she was still feeling dizzy from the alcohol she had earlier consumed. The Victim subsequently ended up resting on a chair in Shafie's bedroom in the presence of all the Offenders. At this point in time, Lim attempted to pull her from the chair for her to lie down with him on the mattress in the bedroom, to which she responded by replying in Mandarin "*bu yao*" ("I don't want to"). The Victim eventually lost her balance and landed on the mattress. In the presence of the other Offenders, Lim then crossed his leg over the Victim's legs, laid beside and started kissing her. The Victim tried unsuccessfully to push Lim's leg away. At that point, one of the Offenders told the rest, "Let's start", and Lim starting removing the Victim's shorts. The Victim was eventually stripped naked by the Offenders who took turns to sexually assault the Victim by penetrating her mouth and her vagina concurrently with their penises without her consent between 4.00am to 6.00am, in the course of which there was also digital penetration of the Victim's vagina committed by the Fourth and Fifth Offenders. All this while, Taufik remained in the living room watching television. The Victim suffered bleeding from her vagina during the sexual assault.

5 The Offenders were originally variously charged under sections 375(1)(a), 376(1)(a) and 376(2)(a) of the Penal Code for rape and sexual assault by penetration of the Victim who was then 17 years old at the material time. The charges were later reduced to outraging modesty under section 354A(1) of the Penal Code with some other charges taken into consideration after 19 days of trial, by which time the Victim had already undergone several days of cross-examination. The table below sets out in detail the reduced charges against the Offenders.

Name of Offender	**Charge(s)**	**Charge(s) Taken into Consideration**
Muhammad Shafie bin Ahmad Abdullah (First Offender)	One charge under section 354A(1) of the Penal Code for penetrating Victim's vagina with penis	-
Mohd Sadruddin bin Azman (Second Offender)	One charge under section 354A(1) of Penal Code for penetrating Victim's vagina with penis	-
Lim Boon Tai (Third Offender)	One charge under section 354A(1) of Penal Code for penetrating Victim's mouth with penis	One charge under section 354A(1) of Penal Code for penetrating Victim's vagina with penis shortly after the group assault ended

Rishi Mohan (Fourth Offender)	One charge under section 354A(1) of Penal Code for penetrating Victim's mouth with penis	One charge under section 354A(1) of Penal Code for digital penetration of Victim's vagina
Mohamed Firdaus bin Roslan (Fifth Offender)	One charge under section 354A(1) of Penal Code for penetrating Victim's vagina with penis	One charge under section 354A(1) of Penal Code for digital penetration of Victim's vagina

6 The Offenders pleaded guilty upon the reduction of the original charges of rape and sexual assault by penetration. All the Offenders were between 17 to19 years old at the time the Offence was committed.

Sentencing benchmark

7 The sentence for an offence under section 354A(1) of the Penal Code is provided for in the same section which states:

> Whoever, in order to commit or to facilitate the commission of an offence against any person under section 354, voluntarily causes or attempts to cause to that person death, or hurt, or wrongful restraint, or fear of instant death, instant hurt or instant wrongful restraint, shall be punished with imprisonment for a term of not less than 2 years and not more than 10 years and with caning.

8 Sub-section 354(1) of the Penal Code in turn provides that:

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

9 Both the Prosecution and Defence referred to the case of *Seow Fook Thiam v PP* [1997] 2 SLR(R) 887 at [36] ("*Seow Fook Thiam*") where it was held by the High Court that the norm for offences committed under section 354A(1) of the Penal Code is 30 months' imprisonment and 6 strokes of the cane. It appeared to have been accepted by the Prosecution that the sentencing norm laid down in *Seow Fook Thiam* was an appropriate starting point against which the Offenders' culpable conduct was to be calibrated for the purposes of sentencing.

10 The difficulty of the matter, however, was that there was no direct sentencing precedent insofar as the factual circumstances of the present case were brought within the charge of aggravated outrage of modesty under section 354A(1) of the Penal Code. In *Seow Fook Thiam*, the accused person had hugged the complainant from behind and used both of his hands to squeeze her breasts at a staircase in her block of flats. Such culpable conduct in *Seow Fook Thiam* clearly differed by a huge margin from the conduct of the Offenders in the present case. Here, the Offenders had not merely molested the Victim; they had collectively committed acts which, but for the reduction of the original charges by the Prosecution, would have categorically and factually also constituted gang rape and sexual assault by penetration based on the same statement of facts admitted to without qualification by all the Offenders.

11 In arriving at the appropriate sentence, I had borne in mind the principles of ordinal proportionality and cardinal proportionality so that crimes of varying degrees and culpability are redressed proportionally and rationally. The principles of ordinal proportionality and cardinal proportionality were recognised and adopted in *Xia Qin Lai v Public Prosecutor* [1999] 3 SLR(R) 257 at [28] where Yong Pung How CJ (as he was then) stated:

> ... I found recourse to the academic distinction between ordinal proportionality and cardinal proportionality (see generally Ashworth, Sentencing and Criminal Justice (2nd Ed, 1992), ch 3) helpful. Briefly, ordinal proportionality measures the seriousness of the offence in question against other offences, whereas cardinal proportionality involves the question: "How serious is this particular offence of its type?"

12 Applying these principles to the present case, I was of the view that the circumstances surrounding the Offence warranted, as a matter of starting point against which any mitigating factors would then subsequently be considered for the purposes of arriving at an appropriate sentence, a penalty that fell within the higher end of the statutory sentencing regime under section 354A(1) of the Penal Code. In arriving at this view, I took into account that there was factual rape and sexual assault by penetration in the circumstances notwithstanding that the criminal acts committed were eventually brought under section 354A(1) of the Penal Code. As such, I found myself to be sufficiently justified in being guided analogously by the Court of Appeal's holding in *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 at [93] which stated non-exhaustively that:

> In so far as the aggravating factors which warrant an increase from the benchmark sentences [for the offence of rape] are concerned, it may also be helpful to refer to the case of Regina v Roberts [1982] 1 WLR 133, in which the English Court of Appeal listed many of the factors considered to aggravate the offence of rape as follows (at 135):
>
> > Some of the features which may aggravate the crime are as follows. Where a gun or knife or some other weapon has been used to frighten or injure the victim. Where the victim sustains serious injury, whether that is mental or physical. Where violence is used over and above the violence necessarily involved in the act itself. Where, there are threats of a brutal kind. *Where the victim has been subjected to further sexual indignities or perversions*. Where the victim is very young or elderly. Where the offender is in a position of trust. Where the offender has intruded into the victim's home. Where the victim has been deprived of her liberty for a period of time. *Where the rape, or succession of rapes, is carried out by a group of men*. Where the offender has committed a series of rapes on different women, or indeed on the same woman.
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> In the (also) English Court of Appeal decision of Regina v Millberry [2003] 1 WLR 546 ("Millberry"), Lord Woolf CJ also identified (at [32]) a list of nine aggravating factors that are often present in rape offences, namely:
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> (a) the use of violence over and above the force necessary to commit the rape;
>
> [...]
>
> (e) *further degradation of the victim*, eg*, by forced oral sex* or urination on the victim; ...
>
> (emphasis added)

13 In the present case, the Offenders clearly had a numerical advantage over the Victim who was only 17 years old and vulnerable because she was under the influence of alcohol at the material time. In committing an offence under section 354A(1) of the Penal Code, the Offenders did, as a group, wrongfully restrain the Victim and carried out acts that were factually identical to rape and sexual assault by penile penetration of the Victim's mouth and digital penetration of the Victim's vagina. There was also further degradation of the Victim by way of oral sex that was forced on her while she was at the same time being vaginally penetrated by the Offenders.

14 It is apposite at this juncture to pause and consider the decision of *Sim Gek Yong v Public Prosecutor* [1995] 1 SLR(R) 185 where it was held by the High Court at [15] that:

> The onus lies on the Prosecution in the first place to assess the seriousness of an accused's conduct and to frame an appropriate charge in the light of the evidence available. Once an accused has pleaded guilty to (or been convicted of) a particular charge, it cannot be open to the court, in sentencing him, to consider the possibility that an alternative - and graver - charge might have been brought and to treat him as though he had been found guilty of the graver charge.

15 In Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) at para 13.117, the view was similarly taken that:

> When referring to analogous cases, a court must, however be mindful ... to only impose a punishment for an offence of which the accused had been convicted. It is impermissible to consider the fact that a graver charge might have been preferred against him in sentencing ...

16 Let it be clear that in arriving at my decision on sentencing in the present case, my taking of cognizance that there was factual rape and sexual assault by penetration was not an exercise in consideration of the possibility that an alternative and graver charge of rape or sexual assault by penetration might have been preferred against the Offenders, much less to treat them as though they had been legally found guilty of the charge of rape or sexual assault by penetration (for which the prescribed maximum sentence of imprisonment of 20 years is twice that for the reduced charge of aggravated outrage of modesty proceeded with by the Prosecution against each of the Offenders). Instead, what this exercise really entailed was to recognise that the precise nature of the criminal acts carried out by the Offenders against the Victim – being factually identical to acts constituting rape and sexual assault by penetration – effectively brought the Offenders' conduct within the more if not most serious category of cases under section 354A(1) of the Penal Code, which warranted a substantial sentence within the legislatively prescribed range of not less than 2 years and not more than 10 years of imprisonment with caning. To this end, it is fruitful to note that in the recent High Court decision of *Public Prosecutor v Firdaus bin Abdullah* [2010] 3 SLR 225, Chan Sek Keong CJ explained as a matter of general principle at [17] that:

> The principle for imposing the maximum prescribed punishment for any offence is clear. It is only warranted when the particular crime belongs to the most serious category of cases under that offence, although it need not be restricted to the "worst case imaginable": see *Sim Gek Yong v PP* [1995] 1 SLR(R) 185 at [13] and *Angliss Singapore Pte Ltd v PP* [2006] 4 SLR(R) 653 where the court stated at [84]:
>
> > By imposing a sentence close to or fixed at the statutory maximum, a court calibrates the offender's conduct as among the worst conceivable for that offence. In other words, when Parliament sets a statutory maximum, it signals the gravity with which the public, through Parliament, views that particular offence: *Cheong Siat Fong v PP* [2005] SGHC 176 at [23];

> R v H (1980) 3 A Crim R 53 at 65. Therefore, it stands to reason that sentencing judges must take note of the maximum penalty and then apply their minds to determine precisely where the offender's conduct falls within the spectrum of punishment devised by Parliament.
>
> Therefore, even if the conduct in a particular case could have been exacerbated in some way, the maximum penalty is still appropriate where the conduct could be objectively characterised as belonging to the worst end of the scale when comparing instances of that offence.

17 For the reasons stated above, it was therefore tenuous to think that the criminal conduct of the Offenders did not warrant a substantial sentence under section 354A(1) of the Penal Code.

Mitigating factors

18 The key mitigating factors under contention in the present case were, first, the Offenders' pleas of guilt to the reduced charges under section 354A(1) of the Penal Code and, second, the young age of the Offenders at the time of the Offence.

19 It is trite that a plea of guilt can be taken into consideration in mitigation when it was motivated by genuine remorse, contriteness or regret and/or a desire to facilitate the administration of justice (see *Angliss Signapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [77]). However, in the present case, I concluded that the Offenders' pleas of guilt carried little weight because they were not made timeously enough to be sufficiently indicative of genuine remorse (cf *Sinniah Pillay v Public Prosecutor* [1991] 2 SLR(R) 704 at [27]; *Xia Qin Lai v Public Prosecutor* [1999] 3 SLR(R) 257 at [26]; *Chen Weixiong Jerriek v Public Prosecutor* [2003] 2 SLR(R) 334 at [22]). Here, the Offenders' first and further joint representations to reduce the original charges were only advanced to the Prosecution on the second and seventh day of the Victim's cross-examination respectively. This was unlike the cases (to name just a few) of *Annis bin Abdullah v Public Prosecutor* [2004] 2 SLR(R) 93, *Public Prosecutor v Liew Kok Meng @ Lai Meow Onn* [1999] SGHC 128 and *Public Prosecutor v Koh Jin Lie* [1998] SGHC 180 where the accused persons had pleaded guilty early and saved their sexual victims the trauma of having to testify in court.

20 Neither could it be said that the guilty pleas were genuinely motivated by the Offenders' desire to facilitate the administration of justice as the trial hearing had already gone on for a substantial period of 19 days by the time the guilty pleas were made. Accordingly, the Offenders' guilty pleas could not be taken to be a significant mitigating factor in the present case.

21 I now turn to the young age of the Offenders at the time of the Offence. The Defence had variously submitted that rehabilitation should be the dominant consideration for the purposes of sentencing in the present case because of the Offenders' young adolescent age and because the Offenders' conduct during the commission of the Offence was not particularly heinous. The Prosecution, on the other hand, submitted that public interest required that deterrence be the dominant consideration for sentencing in the present case because the Offence committed was repugnant and one of the most aggravated forms of outrage of modesty envisaged within section 354A(1) of the Penal Code. [note: 1]

22 I agreed that a sentence of probation or reformative training would be excessively lenient in light of the serious nature of the criminal acts visited upon the Victim by the Offenders in the present case. Young age does not *per se* automatically attract rehabilitation as the dominant sentencing consideration in all cases. In this regard, it is useful to reproduce the relevant segment found in Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) at para 22.008:

> Although rehabilitation is an important sentencing objective for young offenders, it is not the sole or overriding consideration. Deterrence, protection and retribution are still relevant considerations. This is clear when the High Court reminded in *Public Prosecutor v Mok Ping Wuen Maurice* [1999] 1 SLR 138 at [25] that "[t]here is a need to strike a balance between public interest and the interest of the offender". Courts have the "responsibility to safeguard the interests of the law-abiding general public and of applying the law uniformly to all those who violate it": *Fay v Public Prosecutor* [1994] 2 SLR 154 at [17]. Thus, where the offence is so serious and the actions of the offender so "contemptible" and committed with "shocking audacity", the rehabilitative principle should be subordinated to the other sentencing principles. ...

23 It cannot be accepted that the Offenders' conduct during the commission of the Offence was not particularly heinous. The factors considered at [13] above speak for themselves in this regard. The absence of any specific use of violent force against a victim in any given criminal offence does not necessarily preclude the offence committed from being characterised as a heinous crime. There can be no one formula for ascertaining the gravity and reprehensibility of an offence and every offence must be considered in light of its own circumstances. Needless to say, it follows that absence of physical violence cannot by itself be the controlling factor for the purpose of determining that a particular offence is not heinous.

24 On the foregoing bases, the dominant consideration for sentencing in the present case should, as the Prosecution rightly pointed out, [note: 2] therefore be deterrence in order for the public interest to be properly served by communicating society's aversion to the grave criminal acts committed by the Offenders despite their young age.

Conclusion

25 A substantial sentence under section 354A(1) of the Penal Code would have been justified in the circumstances of this present case. Indeed, if not for the young age of the Offenders, I would have meted out an imprisonment sentence closer to the maximum of 10 years under section 354A(1) of the Penal Code.

26 Having said that, it should however be noted that in the course of the Prosecution's submissions, the Prosecution had very generously indicated a sentence of between 3 to 5 years' imprisonment with caning when I asked for its opinion on what would be an appropriate sentence for the Offenders in the present case. It was principally a result of what the Prosecution had submitted that I was more lenient with the Offenders than I would otherwise have been. The Offenders should therefore count themselves very lucky on account of the Prosecution's generosity in the present case.

27 For all the reasons stated above and having regard to the varying degrees of culpability among the Offenders themselves and the charges which were taken into consideration for the purposes of sentencing, I therefore sentenced the Offenders respectively as follows:

(a) The First Offender, Muhammad Shafie bin Ahmad Abdullah, to 3½ years' imprisonment (backdated to 30 December 2008) and 5 strokes of the cane. He was 18 years and 2 months old at the time of the Offence;

(b) The Second Offender, Mohd Sadruddin bin Azman, to 3½ years' imprisonment (backdated to

30 December 2008) and 5 strokes of the cane. He was 18 years and 8 months old at the time of the Offence;

(c) The Third Offender, Lim Boon Tai, to 5 years' imprisonment and 8 strokes of the cane. He was the oldest being 19 years and 8 months old at the time of the Offence;

(d) The Fourth Offender, Rishi Mohan, to 4 years' imprisonment (taking into account the remand periods of 30 December 2008 to 12 March 2009 and 13 October 2009 to 19 November 2009) and 5 strokes of the cane. He was the youngest being 17 years old at the time of the Offence; and

(e) The Fifth Offender, Mohamed Firdaus bin Roslan, to 4½ years' imprisonment and 5 strokes of the cane. He was 17 years and 10 months old at the time of the Offence.

[note: 1] Prosecution's Submissions on Sentence, paras 46-48.

[note: 2] Prosecution's Submissions on Sentence, para 51.