Public Prosecutor *v* Yap Weng Wah
[2015] SGHC 76

Case Number : Criminal Case No 7 of 2014

Decision Date : 20 March 2015

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : David Khoo and Raja Mohan for the Public Prosecutor; Daniel Koh and Favian Kang (Eldan Law LLP) for the accused.

Parties : Public Prosecutor — Yap Weng Wah

Criminal Procedure and Sentencing – Sentencing – Benchmark Sentences

20 March 2015 Judgment reserved.

Woo Bih Li J:

Background

1 The accused, Yap Weng Wah ("Yap"), faced a total of 76 charges; 75 charges were brought under s 376A of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") and one charge was brought under s 7(b) of the Children and Young Persons Act (Cap 38, 2001 Rev Ed) ("CYPA").

2 The prosecution proceeded with 12 charges:

(a) 11 charges of sexually penetrating a minor below the age of 14, punishable under s 376A(3) of the Penal Code; and

(b) one charge of sexually penetrating a minor below the age of 16, punishable under s 376A(2) of the Penal Code.

3 The remaining 64 charges which were taken into consideration for the purposes of sentencing were:

(a) 18 charges of digitally penetrating the anus of a minor below the age of 14, punishable under s 376A(3) of the Penal Code;

(b) 15 charges of receiving fellatio from a minor below the age of 14, punishable under s 376A(3) of the Penal Code;

(c) ten charges of having anal intercourse with a minor below the age of 14, punishable under s 376A(3) of the Penal Code;

(d) seven charges of digitally penetrating the anus of a minor below the age of 16, punishable under s 376A(2) of the Penal Code;

(e) seven charges of receiving fellatio from a minor below the age of 16, punishable under s 376A(2) of the Penal Code;

(f) six charges of having anal intercourse with a minor below the age of 16, punishable under s 376A(2) of the Penal Code; and

(g) one charge of procuring a child to commit an indecent act, punishable under s 7(b) of the CYPA.

4 The offences under the 76 charges were committed against 30 boys aged between 11 and 15 over a period of more than two and a half years (*ie*, 6 November 2009 to 30 June 2012).

5 With respect to the 12 proceeded charges, the offences were committed against 12 boys:

(a) Ten charges were with respect to Yap having anal intercourse with ten boys aged between 11 and 13 years old (*ie*, the sixth charge, 12th charge, 19th charge, 26th charge, 31st charge, 36th charge, 41st charge, 48th charge, 52nd charge, and 75th charge).

(b) One charge was with respect to Yap receiving fellatio from an 11 year old boy (the 13th charge).

(c) One charge was with respect to Yap giving fellatio to a 15 year old boy (the 28th charge).

6 Since all but one of the charges are for offences punishable under s 376A(3), I will highlight that the maximum sentence under s 376A(3) is 20 years' imprisonment and the accused is also liable for a fine or caning. This provision applies where the victims are below the age of 14. Where they are below the age of 16, pursuant to s 376A(2), the maximum sentence is ten years' imprisonment and the accused is liable for a fine but not caning.

7 Yap pleaded guilty to these charges and I accepted his plea of guilt and convicted him on the charges. Yap also consented to having the remaining 64 charges taken into consideration for sentencing.

8 At the time of the offences, Yap was between 26 and 29 years old and worked as a quality assurance engineer. The circumstances in which Yap came to be acquainted with his victims were largely similar. Yap would, under different personas, befriend his victims on "Facebook".

9 Upon befriending them, Yap would earn his victims' trust by portraying himself as an elder brother or mentor to them, inviting them to share their problems with him. Yap would also familiarise himself with the interests and hobbies of his victims, and would use that knowledge to arrange meet-ups with the victims under various pretexts (*eg*, to give them gifts, go for a swim, play computer games and give body building tips).

10 After meeting his victims, Yap would then bring them to a variety of places to commit sexual offences against them. These places included his place of residence, toilet cubicles in shopping centres and swimming complexes, dormitories, hotel rooms and even once in a public park. Yap would cajole and persuade his victims to engage in sexual activities with him despite some of his victims expressing reluctance. In the case of the victim under the 28th charge, Yap fellated him despite his protestations.

11 On most occasions, Yap would use his mobile phone to film the sexual acts with the victims' knowledge. In some cases, Yap would assure the victims that he would delete the videos later on. However, he did not do so. Instead, Yap would upload the videos on his laptop and would view them during masturbation.

12 The offences only came to light when the victim under the sixth charge lodged a police report alleging that Yap had sexually penetrated him. It was on the basis of this report that the police interviewed Yap and he admitted to having oral and anal sex with three boys. After placing Yap under arrest and seizing his laptop and mobile, it was discovered by the police that there were approximately 2,000 video footages capturing Yap performing sexual acts on various persons. It was through these footages that the 30 victims were traced.

13 The video footages also showed the accused engaging in sexual acts in Malaysia with 14 boys who were below the age of 16. These acts were committed when he made his yearly visits to Malaysia between 2009 and 2012.

Medical and psychiatric examination of Yap

14 Upon the discovery that Yap had committed sexual offences against no fewer than 30 victims, Yap was referred to the Institute of Mental Health ("IMH") for assessment. In an IMH report dated 28 May 2013 ("28 May 2013 IMH Report"), Dr Bharat Saluja ("Dr Saluja") concluded that Yap has hebephilia, a term used for sexual interest in pubescent individuals predominantly in the age range of 11 to 14 years old. Dr Saluja also noted that Yap's risk of sexual reoffending was high.

15 On 19 February 2014, in a medical report prepared by Dr Tommy Tan ("Dr Tan's Report"), he concurred with Dr Saluja's assessment that the risk of reoffending was high for Yap. Dr Tan, however, went on to note that Yap wanted to be treated so that he would not reoffend and that Yap exhibited symptoms of major depressive disorder. Dr Tan opined that although Yap was not suicidal, long term imprisonment may increase his suicide risk.

16 In a further report prepared by Dr Saluja on 29 December 2014, he noted that on a strict and semantic adherence to the diagnostic criteria for paedophilic disorder, it would be very difficult to say with confidence that Yap has a paedophilic disorder. However, Dr Saluja highlighted that irrespective of this, Yap's pattern of sexualized behaviours was deviant and resembled that of a high risk sex offender having paedophilic tendencies.

Prosecution's submissions on sentence

17 The prosecution urged me to impose an aggregate sentence of not less than 30 years' imprisonment and 24 strokes of the cane. In justifying this position, the prosecution relied firstly on the numerous aggravating factors in the present case, secondly on the relevant sentencing principles to be applied, and finally on the relevant sentencing precedents.

Aggravating factors

18 The prosecution submitted that there was an abundance of aggravating factors in the present case. I need not set out all of the factors but the pertinent ones include:

(a) Yap targeted young and vulnerable victims.

(b) Offences against young children are difficult to detect.

(c) Yap morally corrupted young boys.

(d) Significant harm was caused to the victims.

(e) The offences were premeditated.

(f) Yap breached the victims' trust and confidence.

(g) Yap recklessly penetrated his victims without protection.

(h) Yap created and possessed videos of the sexual offences.

(i) Yap exploited the internet to widen his reach.

(j) The offences were perpetrated against a large number of victims over a prolonged period of time.

Sentencing principles

19 The prosecution next submitted that while all four sentencing principles (*ie*, prevention, deterrence, retribution and rehabilitation) were relevant in the present case, the principles of prevention and deterrence (both general and specific) were of greatest relevance.

20 The prosecution justified its reliance on the principle of prevention on the basis that the offences committed by Yap were highly premeditated, they were committed against multiple, vulnerable and young victims, and there was a high risk of Yap reoffending.

21 As for the principle of specific deterrence, the prosecution relied both on the high level of premeditation and also that Yap had made the conscious and deliberate choice to commit the various offences. The prosecution argued that general deterrence should also be of significant importance due to the public disquiet that follows from sexual offences against children and also because such offences are often difficult to detect.

Sentencing precedents

Imprisonment term

22 The prosecution relied on the decision of *Lim Hock Hin Kelvin v Public Prosecutor* [1998] 1 SLR(R) 37 ("*Kelvin Lim*") which established the relevant principles and public interest considerations with respect to the sentencing of diagnosed paedophiles who commit sexual offences against young victims between the ages of eight and 12 years old. In *Kelvin Lim*, the accused faced a total of ten charges, four of which were charges under s 377 of the Penal Code (Cap 224, 1985 Rev Ed) ("the 1985 Penal Code"). Thirty charges of a similar nature were taken into consideration for the purposes of sentencing.

23 It should be noted that s 377 of the 1985 Penal Code, which has since been repealed, is the predecessor to the present ss 376 and 376A of the Penal Code. I will refer to this provision as "the previous s 377". Under the previous s 377, a person who voluntarily has carnal intercourse against the order of nature with any man shall be punished with imprisonment for life, or with imprisonment for a term which may extend to ten years, and shall also be liable to a fine. The provision however did not allow for caning to be imposed, unlike s 376A(3).

24 In *Kelvin Lim*, the High Court imposed a sentence of ten years' imprisonment per s 377 charge with the four sentences to run consecutively (aggregate sentence of 40 years' imprisonment). In that case, the accused had engaged in anal intercourse with young boys. In upholding the sentence, the

Court of Appeal said at [23]–[24] that:

> 23 … [U]nnatural carnal intercourse (in the form of anal intercourse) represents the gravest form of sexual abuse. …
>
> 24 … [A] paedophile who commits unnatural carnal intercourse (in the form of anal intercourse) against young children below the age of 14 years, without any aggravating or mitigating factors, should be sentenced to ten years' imprisonment. …

It was also observed in *Kelvin Lim* at [21] that:

> (b) *Social danger*: Paedophilic offences are by their nature unpleasant and most distressing and the society has to express its marked disapproval for such harm to the young and vulnerable victims. The presumption is that the safety of the child must be paramount and chronic paedophiles who have a propensity to reoffend, because they are either totally unable or unwilling to control themselves, have to be put away for long periods.

25 While the prosecution acknowledged that Yap had not been diagnosed with chronic paedophilia but was instead diagnosed with hebephilia, it submitted that as Yap was assessed to have a "high risk of committing sexual violence in the foreseeable future", he remained a clear and present social danger, much like the accused in *Kelvin Lim*.

26 The prosecution also relied on *PP v Tan Ah Kit* [2000] SGHC 254 ("*Tan Ah Kit*"). There, the accused pleaded guilty to three charges under the previous s 377. Two of the charges involved anal intercourse with a young boy. The third charge involved the accused performing fellatio on a young boy. The High Court sentenced the accused to ten years' imprisonment for each of the three charges with each sentence to run consecutively after the other, making an aggregate sentence of 30 years' imprisonment.

27 Furthermore, in *Adam bin Darsin v Public Prosecutor* [2001] 1 SLR(R) 709 ("*Adam bin Darsin*"), the Court of Appeal agreed with what was decided in *Kelvin Lim* by observing (at [21]) that fellatio by the accused on his victim stood at the bottom of the scale of gravity of the three forms of carnal intercourse (*ie*, anal intercourse, the victim performing fellatio on the accused and the accused performing fellatio on the victim).

28 Therefore, the prosecution stressed that in cases involving anal intercourse, the benchmark was ten years' imprisonment, unlike other cases in which lower sentences were imposed for fellatio performed by young victims or on young victims.

29 Using *Kelvin Lim* and *Tan Ah Kit* as a guide, the prosecution submitted that the sentence for each charge involving anal intercourse should be at least ten years' imprisonment and for the two remaining charges involving fellatio, the sentence should be between six and ten years' imprisonment.

Consecutive sentences

30 In urging me to order more than two of the sentences to be imposed to run consecutively, the prosecution highlighted the case of *ADF v Public Prosecutor* [2010] 1 SLR 874 ("*ADF*"). There, V K Rajah JA (as he then was) noted at [146] that:

> … In my view, an order for *more than* two sentences to run consecutively ought to be given serious consideration in dealing with distinct offences when one or more of the following

circumstances are present, *viz*:

(a) dealing with persistent or habitual offenders (see [141] above);

(b) there is a pressing public interest concern in discouraging the type of criminal conduct being published (see [143] – [144] above);

(c) there are multiple victims; and

(d) other peculiar cumulative aggravating features are present (see [92] above).

In particular, where the overall criminality of the offender's conduct cannot be encompassed in two consecutive sentences, further consecutive sentences ought to be considered. …

[emphasis in original]

31 The prosecution submitted that all four factors identified in *ADF* are present in this case and therefore, more than two of the ten years' imprisonment sentences for the offences punishable under s 376A(3) should run consecutively. Accordingly, a sentence of not less than 30 years' imprisonment was warranted.

Caning

32 The prosecution submitted that caning would be warranted in the present case as the circumstances were so aggravating as to repulse human conscience.

33 While it acknowledged that the court will generally not impose a sentence of caning unless violence has been used (see *Chia Kim Heng Frederick v Public Prosecutor* [1992] 1 SLR(R) 63 at [18]–[19]), the prosecution argued that the violation of a sensitive part of a victim's body, such as by anal intercourse, intrinsically constitutes an act of violence. This is notwithstanding that no violence may actually have been used in the commission of the offence.

34 The prosecution next referred to a series of case precedents whereby caning had been imposed for an offence punishable under s 376A(3) (*ie*, *Public Prosecutor v Azmanshah bin Zallamshah* (District Arrest Case No 19807 of 2011 and ors, unreported); *Public Prosecutor v Sulaiman bin Haroon* (Criminal Case No 8 of 2009, unreported); and *Public Prosecutor v Cheong Boon Khing Douglas* (Criminal Case No 4 of 2009, unreported). The prosecution highlighted that in all those cases, despite there not being anal intercourse, caning of three to five strokes for each relevant charge was imposed.

35 The prosecution also disclosed that there were two other cases under s 376A(3) in which no caning was imposed (*ie*, *Public Prosecutor v BDO* [2012] SGDC 449 and *Public Prosecutor v Soh Song Soon* [2010] 1 SLR 857). However, I note that the accused in each of those cases was more than 50 years of age at the time of sentencing. Caning was therefore not an option.

36 Accordingly, the prosecution argued that taking into account the numerous aggravating factors here, five strokes of the cane should be imposed for each offence punishable under s 376A(3). The aggregate should be 24 strokes as that is the maximum allowed by law.

Submissions on mitigation

37 In mitigation, Mr Daniel Koh ("Mr Koh"), counsel for Yap, submitted that an appropriate punishment in this case should be less than eight years' imprisonment for each offence punishable

under s 376A(3) and less than four years' imprisonment for the offence punishable under s 376A(2).

38 In Mr Koh's written submissions, he argued that due to the mitigating factors in the present case, not more than two sentences should be ordered to run consecutively. Mr Koh additionally requested that one of the sentences to run consecutively be the sentence imposed under s 376A(2) (the 28th charge), which is less serious than an offence punishable under s 376A(3). This would entail an aggregate sentence of less than 12 years' imprisonment.

39 However, in his supplemental written submissions, Mr Koh appeared to have altered his position by stating at [117] and [125] that the appropriate aggregate term of imprisonment to be imposed should not be more than 20 years. I will proceed on the basis that this last statement is an accurate reflection of Mr Koh's submission on sentencing.

Mitigating factors

40 Mr Koh relied on several mitigating factors:

(a) Yap's plea of guilt and his expression of remorse in his mitigation plea (in addition to counsel's plea) indicate genuine remorse.

(b) Yap is a first time offender with no antecedents.

(c) Yap is suffering from major depressive disorder and is diagnosed as a suicide risk.

(d) Yap is a promising man who is a useful and productive member of society.

Sentencing principles

41 Mr Koh submitted that due regard should be given to the principle of rehabilitation. He highlighted that Yap is committed towards rehabilitation and has strong familial support to assist him in the rehabilitation process. He further argued that rehabilitation is relevant because Yap was suffering from hebephilia, but not paedophilia, at the time the offences were committed.

Sentencing precedents

Imprisonment term

42 Mr Koh submitted that based on a survey of s 376A case precedents (*eg*, *Public Prosecutor v Terence Thaver* (Criminal Case No 21 of 2013, unreported) ("*Terence Thaver*"), *Public Prosecutor v AOM* [2011] 2 SLR 1057 and *Public Prosecutor v Muhammad Sufian bin Hussain* [2009] SGDC 172 ("*Muhammad Sufian*")), offences punishable under s 376A should attract an imprisonment sentence of less than eight years.

43 Mr Koh next addressed the cases which dealt with the previous s 377. With respect to the prosecution's reliance on *Kelvin Lim*, Mr Koh emphasised that the facts in *Kelvin Lim* were more aggravating than in the present case. In *Kelvin Lim*, the accused was a chronic paedophile who targeted younger prepubescent males aged between eight and 12. Furthermore, the accused in *Kelvin Lim* had previous convictions, refused to have treatment in prison and lacked familial support. In contrast, Yap was extremely committed to rehabilitation and had very strong familial support

44 Mr Koh further relied on the cases of *Adam bin Darsin* and *Public Prosector v Lim Beng Cheok*

[2003] SGHC 54 ("*Lim Beng Cheok*"). In those cases, the accused persons had been sentenced to five years' imprisonment and six years' imprisonment respectively for each s 377 charge. Mr Koh argued that the aggravating and mitigating factors in the present case are more similar to those cases than in *Kelvin Lim* and therefore urged me to use those decisions as a guide when deciding the appropriate sentence to be imposed.

Caning

45 Mr Koh referred to the District Court decision in *Muhammad Sufian*, where caning had been imposed for an offence punishable under s 376A(3). Mr Koh sought to distinguish *Muhammad Sufian* on the basis that there, the accused was a diagnosed paedophile, impersonated a police officer in the commission of the offence, and had other similar antecedents.

46 In contrast, Mr Koh highlighted that in *Terence Thaver*, which was a decision by the High Court, the accused was not sentenced to caning in respect of two charges punishable under s 376A(3). The charges were for giving fellatio to two victims aged ten and 11. This was notwithstanding the fact that the accused, as the victims' tuition teacher, had abused his position of trust and authority in committing the offences. Mr Koh argued that here, Yap was not in a position of trust, and he further emphasised that as *Terence Thaver* was a case decided by the High Court, it should be more persuasive than *Muhammad Sufian*.

47 Mr Koh submitted that caning should not be imposed in this case, but that even if it is imposed, the number of strokes per charge should be much less than 12 strokes and that the total number of strokes imposed should be less than 24.

48 Mr Koh supported this position by referencing cases which pertain to the rape and sexual assault by penetration of victims below the age of 14 (s 375(1)(b) and s 376(4)(b) of the Penal Code), from which he concluded that generally, 12 to 15 strokes of the cane are imposed for such offences. He argued that as Yap's offences were not as depraved or violent as that of rape, much less than 12 strokes of the cane should be imposed for each offence punishable under s 376A(3).

The court's decision

Applicable sentencing principles

49 I accept the prosecution's submission that the principles of prevention and deterrence are significant. I am also of the view that the principle of retribution is relevant. As was noted by V K Rajah JA in *Public Prosecutor v Loqmanul Hakim bin Buang* [2007] 4 SLR 753 at [46]:

> The concept of retribution operates on the commonsensical notion that the punishment meted out to an offender *should reflect the degree of harm and culpability that has been occasioned by such conduct*. This is premised on the belief that "the societal interest is expressed in the recognition that typical crimes are wrongs, for which public censure through criminal sanction is due": see Andrew Von Hirsch *et al*, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) at p 4. [emphasis added]

50 Here, it is not just the physical harm caused to the victims which is relevant. The actual and possible long term emotional and psychological harm must also be taken into account. Accordingly, it is my view that the principle of retribution is applicable as well.

51 With respect to Mr Koh's reliance on the principle of rehabilitation, I take into account the fact

that Yap has strong familial support which would no doubt aid in the rehabilitation process. I note however that ultimately, much would depend on the individual. While both Dr Tan and Dr Saluja recognise that there are treatments available for Yap, it is not indicated in their reports what the prospects of Yap being successfully treated are.

52 In any event, I am of the view that rehabilitation should not be the dominant sentencing principle. In *Public Prosecutor v Goh Lee Yin and another appeal* [2008] 1 SLR(R) 824, it was noted by V K Rajah JA at [107] that:

> … [T]his is not to say that in *all* offences committed owing to a psychiatric disease, rehabilitation must be the foremost consideration. Indeed, ***assuming that an offender suffers from a psychiatric disease which causes him to commit a particular heinous offence, it would surely not be correct to say that such an offender ought to be rehabilitated to the exclusion of other public interests. Rehabilitation may still be a relevant consideration, but such rehabilitation may very well have to take place in an environment where the offender is prevented from recommitting similar offences*** . [emphasis in original in italics; emphasis added in bold italics]

53 Here, although there is no argument that hebephilia is a psychiatric disorder which *causes* an offender to commit sexual offences, Yap had committed particularly heinous offences which would require greater weight to be placed on the principles of prevention, deterrence and retribution. This is not to say that rehabilitation is an irrelevant consideration but rather, I take cognisance of the fact that Yap has the option of being rehabilitated while incarcerated. This is affirmed by Dr Saluja, who notes in the 28 May 2013 Report at p 11 that:

> If, he was sentenced to prison, the sex offender treatment program is available and medications can be made available in prison and [he] can be supervised by the prison psychiatrist. …

54 Accordingly, the sentencing principles of prevention, deterrence and retribution carry more weight than rehabilitation.

Benchmark imprisonment term for s 376A(3) offences involving anal intercourse

55 In arriving at the appropriate benchmark imprisonment term for s 376A(3) offences involving anal intercourse, I give particular regard to two main aspects that distinguish such offences from other sexual offences—that the victims are below the age of 14 and that anal intercourse is involved.

Victims below the age of 14

56 As mentioned above at [23], the maximum sentence under the previous s 377 was either life or ten years' imprisonment. After repealing the previous s 377, s 376A was enacted in its place (along with s 376) whereby the maximum sentence under s 376A(2), for sexual offences against minors below the age of 16, is ten years' imprisonment. However, if the sexual offence is committed against victims below the age of 14, the maximum sentence is 20 years' imprisonment. While a higher maximum sentence does not always mean that the benchmark sentence should also be higher, it seems to me that the higher maximum sentence under s 376A(3) reflects Parliament's view that sexual abuse against victims below the age of 14 is to be viewed more seriously than those where the victims are 14 years of age and above.

57 Hence, there is statutory demarcation whereby sexual offences committed against minors below the age of 14 are viewed more seriously. This also explains why an accused is liable for caning under

s 376A(3) but not under s 376A(2).

Distinction between anal intercourse and fellatio

58 In *Kelvin Lim*, the Court of Appeal said that anal intercourse represents the gravest form of sexual abuse (see [24] above). This was acknowledged in *Adam bin Darsin* where the Court of Appeal said that fellatio by the accused on his victim stood at the bottom of the scale with anal intercourse being at the top (see [27] above). Both these cases involved the previous s 377 where the maximum sentence was life or ten years' imprisonment and while I have earlier observed that the sentencing regime under s 376A is harsher than the previous s 377, it does not detract from the reasoning by the Court of Appeal that anal intercourse is the gravest form of sexual abuse. In this respect, the Court of Appeal said in *Kelvin Lim* at [24] that with respect to the previous s 377, a paedophile who commits anal intercourse against young children below the age of 14, without any aggravating or mitigating factors, should be sentenced to ten years' imprisonment.

59 In *Public Prosecutor v ABJ* [2010] 2 SLR 377, which concerned an appeal against the sentence imposed by the High Court, the accused was charged with various offences against one female victim, over a continuous period of about seven years. One of the charges was under the previous s 377 for anal intercourse when the victim was 13 years old. The High Court sentenced the accused to eight years' imprisonment on this charge. The High Court also sentenced the accused to eight years' imprisonment for offences under the present s 376A(1)(*a*) and s 376A(1)(*b*) for penetrating the victim's vagina with his penis and a wooden stick respectively when she was 15 years old. Therefore, it was s 376A(2) and not s 376A(3) which applied as she was more than 14 years of age at the time the two offences were committed. The accused was also charged with five offences under the previous s 376(2) of the 1985 Penal Code, which involved the rape of the victim when she was between eight and 11 years old, for which he received 16 years' imprisonment for each offence. The aggregate sentence imposed was 24 years' imprisonment with two of the sentences running consecutively—one sentence of 16 years' imprisonment and one sentence of eight years' imprisonment.

60 The Court of Appeal did not vary the individual sentences but was of the view that three of them should run consecutively, thereby making an aggregate of 32 years' imprisonment. There was no elaboration in the High Court or in the Court of Appeal as to why eight years' imprisonment was appropriate for an offence under the previous s 377, where anal intercourse had taken place, or for an offence under the previous s 376A(1)(*a*) and s 376A(1)(*b*), punishable under s 376A(2), where the victim's vagina was penetrated.

61 In any event, *Kelvin Lim* and *Adam bin Darsin* are authorities for the proposition that anal intercourse is the gravest form of sexual abuse and this must therefore be reflected in the benchmark sentence for sexual offences involving anal intercourse.

62 I am accordingly of the view that in the absence of aggravating or mitigating circumstances, ten years' imprisonment should be the benchmark at the first stage of sentencing for offences involving anal intercourse which are punishable under s 376A(3).

63 As for sexual offences involving fellatio, I note that five years' imprisonment was imposed for an offence under the previous s 377 in *Adam bin Darsin* where the accused performed fellatio on the victims and in *Lim Beng Cheok*, six years' imprisonment was imposed where the victim performed fellatio on the accused. These sentences were imposed in the context of aggregate imprisonment sentences of 20 years and 18 years respectively. It was also noted in *Adam bin Darsin* at [23] that with respect to an accused performing fellatio on a young victim, subject to any aggravating or

mitigating circumstances, an appropriate sentence would be in the region of five years' imprisonment. It must once again be emphasised, however, that the previous s 377 did not distinguish victims who are below the age of 14, unlike the present s 376A of the Penal Code.

64 It is my view that for offences involving fellatio which are punishable under s 376A(3), in the absence of aggravating or mitigating circumstances, six to seven years' imprisonment should be the benchmark at the first stage of sentencing.

Aggravating and mitigating factors

Aggravating factors

65 At this juncture, it bears mentioning that pursuant to *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998, a distinction should be drawn between aggravating factors that are considered at the first stage of sentencing (*ie*, when determining the appropriate sentence to be imposed for each individual offence) and the second stage (*ie*, when determining the number of sentences to run consecutively). There, Sundaresh Menon CJ ("Menon CJ") noted at [78]–[79] that factors which had already been taken into account at the first stage should not be taken into account at the second. Menon CJ further directed that "judges should be mindful to articulate which factors have been taken into account at which stage". Naturally, if a factor is not really an aggravating one, it should not be taken into account. Following this direction, I elaborate now on which of the factors submitted by the prosecution and set out at [18] above I find to be aggravating, and at which stage of the sentencing process they should be taken into consideration.

Factors not considered aggravating

66 I am of the view that factor (a) (*ie*, Yap targeted young and vulnerable victims) is inherent in an offence punishable under s 376A(3) where the victims are below the age of 14. The same applies for factors (b)–(d) (*ie*, offences against young children are hard to detect, Yap morally corrupted young boys and Yap caused significant harm to the victims). While unfortunate, these are very often the factors associated with such sexual offences. As is evident from the sentencing regime under s 376A(3), the Penal Code already provides for harsher punishment for such offences. To consider these factors as aggravating factors would in effect lead to double-counting. As was observed by Menon CJ in *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [79]:

> First, singling out vulnerable classes could result in double-counting where the Prosecution has framed the charge(s) by reference to the harm actually caused. Vulnerable classes are, by definition, those who are more susceptible to injury. A collision with a member of a vulnerable class is inherently more likely to result in hurt, grievous hurt or death. In this regard, the Penal Code, as a matter of law, provides for harsher punishment if greater harm is caused (see, *eg*, the table set out at [71] above). An offender who collides into a member of a vulnerable class would thus already have a higher chance of falling into a harsher band of punishment, and there is no reason to doubly punish such an offender by enhancing his sentence on the grounds that his victim is a vulnerable victim.

67 Therefore, while these four factors are very serious, on the present facts, they are not considered aggravating bearing in mind the nature of the offences. This is unless, for example, there is specific evidence to show that even more emotional or physical harm was caused than usual, or that the victims were considerably below 14 years of age.

Factors considered in the first stage of sentencing

68 I agree that factor (e) (*ie*, premeditation) is an aggravating factor. In the present case, Yap was planning and hunting for victims to satisfy his deviant urges. This overlaps with factor (f) (*ie*, Yap earned the victims' trust and confidence and breached them). I also accept that factor (g) (*ie*, Yap penetrated his victims without protection) is an aggravating factor.

69 Factor (h) (*ie*, Yap created and possessed videos of the sexual offences) is an aggravating factor that brings his deviant conduct to a higher level. Furthermore, Yap video-recorded the various sexual offences even when some of the victims objected. Although he promised some of the victims that he would delete the videos, he did not do so. In addition, by retaining the videos, Yap exposed his victims to the risk of the files falling into the hands of third parties and being circulated.

Factors considered in the second stage of sentencing

70 I am of the view that factor (i) (*ie*, Yap exploited the internet to widen his reach and factor (j) (*ie*, the offences were perpetrated against a large number of victims over more than two and a half years) are more relevant for the second stage of sentencing. In this respect, I would also highlight that the use of the internet *per se* is not always an aggravating factor. In this case, what makes it aggravating is that Yap had used the internet with the intent of luring his victims and with the intent to commit the sexual offences against them. In *Public Prosecutor v Syamsul Hilal bin Ismail* [2012] 1 SLR 973, Chao Hick Tin JA noted at [36] that:

> In relation to the Prosecution's submission, I accept that the use of the internet is a relevant sentencing consideration in that *there is a strong public interest to deter potential offenders from using that medium to reach a large number of potential victims*. [emphasis added]

I am of the view that there is similarly a strong public interest in the present case to deter potential sexual offenders from using the internet to lure young victims.

Mitigating factors

71 With respect to the mitigating factors submitted by Mr Koh, I give little weight to Yap's plea of guilt. In *Chen Weixiong Jerriek v Public Prosecutor* [2003] 2 SLR(R) 334 ("*Jerriek*") at [19], Yong Pung How CJ (as he then was) noted that:

> While the voluntary surrender by an offender and a plea of guilt by him in court are factors that can be taken into account in mitigation as evidence of remorse, their relevance and the weight to be placed on them must depend on the circumstances of the case: *Wong Kai Chuen Philip v PP* [1990] 2 SLR(R) 361. *I see very little mitigating value in a robber pleading guilty after he has been turned over to the police; in this case, the game was up for the appellant* as his father had handed him over to the police. [emphasis added]

Here, I accept the prosecution's submission that the accused's plea of guilt did not spring from genuine remorse, but from a realisation that his goose was as good as cooked.

72 I am unconvinced by Mr Koh's argument that Yap's "impassioned plea" before me evidenced genuine remorse. In Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) ("*Sentencing Principles in Singapore*") at paras 20.102–20.103, the learned observations in Richard Fox & Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (OUP, 2nd Ed, 1999) were reproduced as follows:

> [Remorse] is an elusive concept; it 'is not to be confused either with sorrow at the fact that a

victim is no longer available as a companion, nor with regret at the position in which an applicant now finds him or herself'. As Asche CJ sardonically remarked [in *Jabaltjari* (1989) 64 NTR 1 at 10]:

> … the difference between being sorry for what one has done and sorry for being caught is a difference which judges may not always wish to investigate too thoroughly.

…

Pious claims of an intention to turn over a new leaf, or to make restitution or to reform oneself, will alone seldom be sufficient. Nor will great weight be attached to remorse that appears only once the 'jaws of Pentridge' gape before the offender. …

[emphasis added]

73 I note that when Yap was first interviewed by the police, Yap had lied by indicating that he had only engaged in oral and anal sex with three boys, when the reality was that he had sexually abused no fewer than 30 victims. Yap's attempt to downplay the extent of his offences similarly leads me to conclude that he was not genuinely remorseful for his actions.

74 With respect to Yap's lack of antecedents, the prosecution sought to impress upon me that given the number of offences Yap was being charged with and that these offences were committed over a long period of time, he cannot be considered a "first offender" in the true sense of the phrase. The prosecution relied on the case of *Jerriek* where it was noted at [15] and [17] that:

> 15 The appellant could not be regarded as a "first offender" in any sense of the phrase. While he had no antecedents in the sense of prior convictions, he had pleaded guilty to seven charges of robbery with common intention, robbery with hurt with common intention and voluntarily causing hurt by means of a dangerous weapon. Further, no less than 38 other charges were taken into consideration for the purpose of sentencing …
>
> …
>
> 17 … I am of the view that it is the prerogative of this court to refuse to consider as a first time offender anyone who has been charged with multiple offences, even if he has no prior convictions. I would venture further to hold that in any case, the courts in general should be extremely reluctant to regard such persons as first time offenders.

The prosecution further highlighted the case of *Public Prosecutor v Leong Wai Nam* [2010] 2 SLR 284 where Tay Yong Kwang J ("Tay J") observed at [31] that:

> The respondent had no previous conviction before the present offences came to light. A clean record may be effective in showing that what an accused did on one or two isolated occasions was totally out of character but carries hardly any mitigating force when an accused person is convicted of a string of offences committed over a spectrum of time. All it means is that the accused person was fortunate not to have been caught by the law earlier. *On the other hand, of course, previous convictions for similar offences would aggravate subsequent offences as they demonstrate a recalcitrant streak which must be dealt with more forcefully*. [emphasis added]

75 In my view, what these cases establish is that where an accused is charged with multiple offences which are committed over a spectrum of time, it is of little mitigating value that he has no antecedents. However, this is not the same as saying that his culpability is as grave as an accused

with antecedents. Nevertheless, given the number of victims and the period over which the various sexual offences were committed, I am unable to accept Yap's lack of antecedents as a mitigating factor.

76 As for Mr Koh's submission that Yap is a promising man who will be a useful and productive member of society, Mr Koh submitted letters from Yap's previous supervisors and co-workers describing Yap in positive terms. Be that as it may, as mentioned above at [52]–[54], the principle of rehabilitation with a view to Yap re-joining and contributing to society, carries less weight than the other principles I have discussed above, although I hope that he truly overcomes his deviant interest in young boys.

77 As for Yap being diagnosed as a suicide risk, this is of little mitigating value. The courts have consistently held that ill health will only be a mitigating factor in the most exceptional circumstances when judicial mercy may be exercised (see *Public Prosecutor v Ong Ker Seng* [2001] 3 SLR(R) 134 at [30]). In this respect, Chao Hick Tin JA noted in *Lim Kay Han Irene v Public Prosecutor* [2010] 3 SLR 240 at [46] that:

> From precedents, judicial mercy has been exercised in two types of cases:
>
> (a) where the offender suffered from a terminal illness: see *Lim Teck Chye v PP* [2004] 2 SLR(R) 525 and *Chng Yew Chin*; and
>
> (b) *where the offender was so ill that a sentence of imprisonment would carry a high risk of endangering his life*: see *Public Prosecutor v Tang Wee Sung* [2008] SGDC 262.
>
> [emphasis added]

With respect specifically to a reliance on depression and suicidal tendencies in mitigation, in *Public Prosecutor v Lim Li Ling* [2006] SGMC 8, it was noted at [6] that depression is a condition that can be treated during incarceration and that the prison wardens will be able to arrest any suicidal tendencies which an accused may harbour or display.

78 On the present facts, I do not find that Yap's suicidal risks were so high that a long term sentence of imprisonment would carry a "high risk of endangering his life". Dr Tan's Report at [17] and [19] states that:

> 17. Dr Gwee has opined that Weng Wah's risk of suicide *may* be increased with his incarceration (paragraph 27 of his report). Currently, Weng Wah has thoughts of dying, *although he is not suicidal*.
>
> …
>
> 19. I will be grateful if the Court can take into consideration that long term imprisonment *may* increase Weng Wah's suicide risk …
>
> [emphasis added]

Yap's suicidal tendencies are phrased in tentative terms and I do not find that they meet the threshold of amounting to "a high risk of endangering his life".

79 In any event, I am of the view that Yap's suicidal tendencies will have to be managed by the prison authorities and that this should be a matter to be properly raised with them.

Imprisonment term

80 In the circumstances, as a preliminary conclusion, I am of the view that a sentence of 12 years' imprisonment for each offence of anal intercourse punishable under s 376A(3), would be appropriate. As for the offence of fellatio which is also punishable under s 376A(3), a sentence of eight years' imprisonment would be appropriate. The appropriate sentence for the offence punishable under s 376A(2) would be five years' imprisonment. These imprisonment terms, however, as will be discussed below, are subject to the second stage of sentencing.

Consecutive sentences

81 Under the law, where an accused is convicted of three or more distinct offences, at least two of the sentences are to run consecutively.

82 Mr Koh argued that only two of the sentences should run consecutively with an aggregate sentence of not more than 20 years' imprisonment. The prosecution argued for three sentences to run consecutively, on the premise that each sentence would be ten years' imprisonment, making an aggregate of 30 years' imprisonment. The prosecution submitted that this was the worst case of sexual offending against pubescent males. There were 76 distinct sexual offences against 30 boys with the accused pleading guilty to 12 proceeded charges, 11 of which are punishable under s 376A(3).

83 As stated above, Mr Koh stressed that Yap is not a paedophile and has no antecedents. On that basis, he distinguished *Kelvin Lim* in which four sentences of 10 years' imprisonment each were ordered to run consecutively, making an aggregate of 40 years' imprisonment. The prosecution did not disagree that Yap was not like the accused in *Kelvin Lim*. Hence, the prosecution did not argue for 40 years' imprisonment.

84 Although Yap is not a paedophile, he does have hebephilia. The prosecution submitted that the difference between the two conditions is that paedophilia is the primary and exclusive attraction to prepubescent children generally aged 13 and below while hebephilia is a conscience preference for pubescent individuals generally aged 11 to 14. While paedophilia is diagnosed in the Diagnostic and Statistical Manual of Disorders (American Psychiatric Publishing, 5th Ed) as a disorder, hebephilia is not.

85 Mr Koh did not argue that the hebephilia reduced Yap's culpability and rightly so. I would have thought that the fact that Yap has hebephilia might be an additional factor for the principle of prevention and specific deterrence to apply but as there was not much more evidence about this condition, I did not take into account his hebephilia beyond the common ground that Yap has a high risk of reoffending (see [14]–[15] above), unless his rehabilitation is successful.

86 Mr Koh asked for not more than 20 years' imprisonment because in *Adam bin Darsin*, the Court of Appeal reduced the aggregate sentence imposed on the accused from 40 years' to 20 years' imprisonment with four of the sentences to run consecutively.

87 In *Lim Beng Cheok*, the High Court had sentenced the accused to an aggregate of 18 years' imprisonment with three of the sentences to run consecutively. Mr Koh submitted that in *Lim Beng Cheok*, the accused was holding a position of trust and authority as a tuition teacher while Yap was not. The accused there was also not as remorseful as Yap is as the accused there sought to give an excuse for his conduct.

88 Although the accused in *Lim Beng Cheok* was holding a position of trust and authority, this was balanced by the positive influence he had on many of his students. Also, as the judge who imposed the sentence in that case and observed the accused there, I do not think that Yap is necessarily more remorseful. Indeed, the risk of recidivism was lower in that case for the reasons I stated then.

89 Furthermore, the cases of *Adam bin Darsin* and *Lim Beng Cheok* involved fellatio and not anal intercourse, and were cases decided under the previous s 377 where no distinction was drawn for victims below 14 years of age.

90 It must also be highlighted that in *Adam bin Darsin*, the accused faced a total of 23 charges (eight proceeded charges and 15 charges taken into consideration) and there were eight victims. In *Lim Beng Cheok*, the accused faced a total of 56 charges under the previous s 377 and s 377A (ten proceeded charges and 46 charges taken into consideration) and there were five victims. In contrast, this is the worst case of sexual offences against pubescent males. There are 76 distinct offences and 30 victims in the present case and Yap had reached his multiple victims through the use of the internet. These stand out as aggravating factors in the second stage of sentencing (see [70] above).

91 After taking into account the totality principle, I am of the view that three of the sentences for Yap should run consecutively. More importantly, the aggregate sentence should be considerably more than 20 years' imprisonment. In my view, an aggregate sentence of 30 years' imprisonment is appropriate and would not be crushing. Therefore, I will adjust downwards the individual sentence for the offences of anal intercourse punishable under s 376A(3), which I tentatively mentioned above at [80], to that of ten years' imprisonment so that the aggregate sentence for three of such offences is 30 years' imprisonment.

Caning

92 I take cognisance of the stiffer sentencing regime under s 376A(3) as compared to the previous s 377—specifically that caning may be imposed under the former. In this respect, I note that there have been lower court cases in which caning has been imposed for an offence punishable under s 376A(3) (see [34] above). On the other hand, there is the High Court case of *Terence Thaver* where no caning was imposed for the offence punishable under s 376A(3). No reasons however were given for that.

93 In my view, *Terence Thaver* is not an indication that caning should rarely be imposed in s 376A(3) cases. Under the s 376A(3) sentencing regime, even where there is a single instance of sexual abuse committed against one victim, an accused would still be liable to be caned, although this may not necessarily be imposed in all cases. Much would depend on the circumstances of a particular case.

94 It is my view, however, that the imposition of caning for an offence punishable under s 376A(3) should be the norm rather than the exception. This would align with Parliament's intention to accord greater protection to young and vulnerable victims.

95 Furthermore, although the distinguishing factor between s 376A(3) and s 376A(2) is the age of the victim, and not the nature of the sexual abuse, I am of the view that once s 376A(3) is engaged, the nature of the sexual abuse also becomes relevant in considering whether caning should be imposed and if so, the number of strokes. In other words, the nature of the sexual abuse is relevant not only to the term of imprisonment to be imposed, but also to caning.

96 In the circumstances, it is appropriate to impose caning for Yap's offences which are punishable

under s 376A(3). In determining the appropriate number of strokes to be imposed, I note that the Districts Courts have imposed a range of three to five strokes for an offence punishable under s 376A(3).

97 Taking into account the nature of the sexual abuse and the aggravating factors in the present case, I am of the view that the following number of strokes of the cane are appropriate:

(a) six strokes for each offence of anal intercourse, punishable under s 376A(3); and

(b) four strokes for the offence of receiving fellatio, punishable under s 376A(3).

Conclusion

98 In light of the above considerations, and considering the entirety of the circumstances, I sentence the accused, Yap Weng Wah, as follows:

(a) Ten years' imprisonment and six strokes of the cane on each of the ten charges of anal intercourse, for which he has been convicted under s 376A(1)(*a*) of the Penal Code, punishable under s 376A(3) (*ie*, the sixth charge, 12th charge, 19th charge, 26th charge, 31st charge, 36th charge, 41st charge, 48th charge, 52nd charge, and 75th charge).

(b) Eight years' imprisonment and four strokes of the cane on the charge of receiving fellatio from an 11-year-old boy, for which he has been convicted under s 376A(1)(*a*) of the Penal Code, punishable under s 376A(3) (the 13th charge).

(c) Five years' imprisonment on the charge of performing fellatio on a 15-year-old boy, for which he has been convicted under s 376A(1)(*c*) of the Penal Code, punishable under s 376A(2) (the 28th charge).

99 The sentence of imprisonment for the sixth charge is to start from 8 September 2012, which is the date of Yap's remand.

100 The sentences of imprisonment for the sixth, 12th and 19th charges are to run consecutively.

101 The sentences of imprisonment for the remainder of the charges for which Yap has been convicted are to run concurrently with the sentence of imprisonment for the sixth charge.

102 The aggregate sentence of imprisonment is 30 years.

103 Yap will receive only 24 strokes of the cane, the maximum permitted under s 328(6) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

104 The remaining 64 charges have been taken into consideration for the purpose of sentencing.

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