

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 266

Criminal Case No 38 of 2020

Between

Public Prosecutor

And

BUS

EX TEMPORE JUDGMENT

[Criminal Law] — [Offences] — [Rape] — [Sexual assault by penetration]
[Criminal Procedure and Sentencing] — [Sentencing]

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Public Prosecutor

v

BUS

[2020] SGHC 266

High Court — Criminal Case No 38 of 2020
Tan Siong Thye J
3 December 2020

3 December 2020

Tan Siong Thye J:

Introduction

1 The accused is [BUS], a 48-year-old male Singaporean. He has pleaded guilty to a charge of sexual assault by penetration (“the Charge”), which is an offence under s 376(2)(a) of the Penal Code (Cap 224, 2008 Rev Ed) (“Penal Code”), punishable under s 376(3) of the same. The charge reads as follows:

That you, [BUS],

between the night of 6 July 2018 and the morning of 7 July 2018, at [address redacted], Singapore, did sexually penetrate, with your finger, the vagina of [the victim], a 14-year-old female born on [date redacted], without her consent, and you have thereby committed an offence under section 376(2)(a) and punishable under section 376(3) of the Penal Code (Cap 224, 2008 Rev Ed).

The facts

2 The victim is the accused's niece, who was 14 years old at the time of the offence. At the material time, the victim lived with her grandaunt. Prior to this arrangement she had lived with her grandparents who took her in after her parents' divorce when she was very young.¹

3 The victim shared a close relationship with the accused's daughters, who were around her age. On some weekends, she stayed over at the accused's home ("the Flat"). When the victim slept over at the Flat, she usually slept on a mattress in the only bedroom in the Flat with two of the accused's daughters. The accused, his wife, and their son slept in the living room of the Flat.²

4 The accused provided the victim with pocket money and ensured that she attended school regularly. When the accused brought his children out for gatherings, he also brought the victim along as well. The accused also bought food for the victim and treated her like his own child. The victim liked and respected the accused as an uncle.³

Facts relating to the Charge

5 On the night of 6 July 2018, the victim stayed over at the Flat as the victim's father was getting re-married and she was invited to stay over so that they could attend as a family. That night, as the bedroom was in a mess, only one of the accused's daughters slept in the bedroom. The accused's other daughter and the victim slept on a blanket in the living room. The accused, his

¹ Statement of Facts ("SOF"), at para 3.

² SOF, at paras 3–4.

³ SOF, at para 3.

wife, and their son slept on another blanket in the same living room. The accused's daughter was between the accused and the victim when the victim went to sleep. Sometime in the course of the night, the accused moved to be beside the victim, with his daughter on the other side.⁴

6 In the middle of the night, without the victim's consent, the accused started to massage her and this woke her. The victim shifted her body to lie flat on her back, and the accused came on top of her. The victim opened her eyes and saw that it was the accused. The accused kissed her on her right cheek. The victim then went back to sleep as she thought that the accused had only meant to kiss her goodnight.⁵

7 Subsequently, the victim was awoken by a pain in her vagina. She opened her eyes and saw that the accused had placed his right hand into her shorts and underwear through the waist band and was sexually penetrating her vagina with his finger. This was done without her consent. Feeling afraid, the victim did not say anything and shut her eyes, pretending to be asleep. Unbeknownst to her, the accused had seen the victim open her eyes as he was penetrating her, but no consent was obtained from her.⁶ After the accused withdrew his finger from the victim's vagina, he lifted her shirt with his other hand and touched her breasts without asking for her consent. The accused then sucked on the victim's nipples without asking for her consent.⁷

⁴ SOF, at para 5.

⁵ SOF, at para 6.

⁶ SOF, at para 7.

⁷ SOF, at para 8.

8 A few minutes later, while the victim still pretended to be asleep, the accused sexually penetrated the victim's vagina with his finger a second time, and moved his finger in and out of her vagina. The accused then withdrew his finger.⁸

9 A few minutes later, while the victim continued to pretend to be asleep, the accused sexually penetrated the victim's vagina with his finger a third time, moving his finger in and out of her vagina. He also touched her breasts, and kissed the victim on the lips before going back to bed. The total duration of the penetration lasted several minutes.⁹ At all material times, the victim did not consent to any of the sexual acts performed on her by the accused.¹⁰

Events following the commission of the offence

10 On 15 August 2018, the victim informed her teacher that the accused had "fingered her". On 27 August 2018, the victim met with the school counsellor and was brought for a medical assessment at a hospital. The victim was subsequently removed from her grandaunt's house and placed in a voluntary welfare home.¹¹

11 On 27 August 2018, the accused was arrested by the police. The moment the police officers approached the accused and asked him if he knew the victim, the accused apologised and admitted to "fingering her vagina".¹²

⁸ SOF, at para 9.

⁹ SOF, at para 10.

¹⁰ SOF, at para 11.

¹¹ SOF, at para 13.

¹² SOF, at para 14.

The accused's plea of guilt

12 The accused has pleaded guilty to the Charge and he also admitted to the Statement of Facts without qualification. The accused's counsel confirmed that the accused understood the nature and consequences of his plea, and intended to admit to the offence without qualification. Accordingly, I convict the accused on the Charge.

13 The accused has also consented to a similar charge being taken into consideration for the purpose of sentencing ("the TIC Charge"). The charge to be taken into consideration reads as follows:

That you, [BUS],

...

on 28 July 2018, sometime in the afternoon, at [address redacted], Singapore, did sexually penetrate, with your finger, the vagina of [the victim], a 14-year-old female born on [date redacted], without her consent, and you have thereby committed an offence under section 376(2)(a) and punishable under section 376(3) of the Penal Code (Cap 224, 2008 Rev Ed).

The statutorily prescribed sentence and sentencing guidelines***The sentencing framework***

14 Pursuant to s 376(3) of the Penal Code, the prescribed punishment for the Charge is imprisonment for a term which may extend to 20 years, with the accused also being liable to fine or caning.

15 It is not disputed that the applicable sentencing framework is that set out by the Court of Appeal in *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015

(“*Pram Nair*”).¹³ The sentencing framework is as follows: the court must (a) identify the number of offence-specific aggravating factors in a case, (b) determine, based on the number and intensity of the aggravating factors, which of three sentencing bands the case falls under, (c) identify where precisely within the sentencing band the case falls in order to derive an indicative starting sentence, and (d) adjust that indicative sentence to reflect the presence of any offender-specific aggravating and mitigating factors (*Pram Nair* at [119], citing *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 (“*Terence Ng*”) at [73]). In considering the number and intensity of the aggravating factors, the court is “guided not only by the number of offence-specific aggravating factors but also the seriousness of the particular factor *vis-à-vis* the offence committed” (see *Public Prosecutor v BMF* [2019] SGHC 227 (“*BMF*”) at [22]).

16 The sentencing bands are as follows (see *Pram Nair* at [122] and [159]; *Public Prosecutor v BMU* [2020] SGHC 231 (“*BMU*”) at [45]):

Band	Condition	Sentencing range
1	Cases with no offence-specific aggravating factors or where the factors are only present to a very limited extent	Seven to ten years’ imprisonment and four strokes of the cane
2	Cases with two or more offence-specific aggravating factors	Ten to 15 years’ imprisonment and eight strokes of the cane

¹³ Prosecution’s Address on Sentence (“PAS”), at paras 3–4; Defence’s Plea in Mitigation (“DPM”) at paras 13–14.

3	Extremely serious cases due to the number and intensity of the aggravating factors	15 to 20 years' imprisonment and 12 strokes of the cane
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The Prosecution's address on sentence

17 The Prosecution submits that the accused should be sentenced to 12 years' imprisonment and eight strokes of the cane.¹⁴ The Prosecution raises three offence-specific factors:

- (a) the accused's abuse of position and betrayal of trust;
- (b) the victim's young age and vulnerability, arising partly from the fact that she was asleep when the accused first inserted his finger into her vagina; and
- (c) the significant psychological harm caused to the victim.

Based on these factors, the Prosecution submits that the appropriate starting point is a sentence in the upper end of Band 2, specifically, 13 years' imprisonment and 8 strokes of the cane.¹⁵

18 As regards the offender-specific factors, the Prosecution submits that the accused's absence of antecedents is a neutral factor and should not be given mitigating effect. However, the Prosecution accepts that the accused's timeous plea of guilt should be given mitigating effect, given that it indicates his remorse and he had thereby spared the victim from having to testify in court.¹⁶ As regards

¹⁴ PAS, at para 2.

¹⁵ PAS, at paras 5 and 17.

¹⁶ PAS, at paras 18–19.

the aggravating offender-specific factors, the Prosecution submits that the TIC Charge, which is of a similar nature as the Charge and against the same victim, would ordinarily warrant an uplift in the sentence. The Prosecution also highlights that the sexual penetration in this case was sustained and highly intrusive.¹⁷

19 Taking all of this into account, the Prosecution submits that its proposed sentence of 12 years' imprisonment and eight strokes of the cane is fair.¹⁸

The Defence's plea in mitigation

20 The Defence submits that the accused should be sentenced to between eight and ten years' imprisonment and eight strokes of the cane.¹⁹ As regards the offence-specific factors, the Defence submits that there are two in the present case: (a) the accused's abuse of his position; and (b) the victim's young age and thus, her vulnerability.²⁰

21 However, the Defence disagrees with the Prosecution's submissions in two regards. First, the Defence submits that the factor raised by the Prosecution set out at [17(c)] above is not an applicable factor because the harm caused to the victim is not outside of that which may be expected from the commission of this type of offence. Secondly, the Defence submits that in respect of the factor raised by the Prosecution set out at [17(b)] above, the victim was not vulnerable

¹⁷ PAS, at para 20.

¹⁸ PAS, at para 21.

¹⁹ DPM, at para 12.

²⁰ DPM, at para 20.

by virtue of her having been asleep at the relevant time.²¹ In light of the two offence-specific factors, the Defence submits that the appropriate starting point is a sentence of between ten and 12 years' imprisonment and eight strokes of the cane.

22 As regards the offender-specific factors, the Defence raises two mitigating factors: (a) the accused's timeous plea of guilt;²² and (b) the accused's clean record showing that the commission of such an offence was "extremely uncharacteristic" of the accused.²³ Thus, the Defence submits that the court should adjust the starting sentence downwards to arrive at a sentence of less than ten years' imprisonment and eight strokes of the cane, thereby bringing the sentence to the higher end of Band 1.²⁴

My decision

Offence-specific factors and other aggravating factors

Abuse of position and breach of trust

23 Clearly, the accused had abused his position as a quasi-parental figure to the victim. This factor was explained by the Court of Appeal in *Terence Ng* ([15] *supra*) at [44(b)] as follows:

Abuse of position and breach of trust: This concerns cases where the offender is in a position of responsibility towards the victim ... When such an offender commits rape, there is a dual wrong: not only has he committed a serious crime, he has also violated

²¹ DPM, at para 21.

²² DPM, at para 43.

²³ DPM, at para 46.

²⁴ DPM, at paras 16 and 51.

the trust placed in him by society and by the victim. [emphasis in original]

24 In this case, it is not disputed that the accused was in a quasi-parental position *vis-à-vis* the victim. He is not only the victim's uncle, he took care of her welfare and well-being, and treated her like his own child. The fact that the victim's own parents had divorced and she was living with her grandaunt brings even more to the fore the responsibility that the accused took up in relation to the victim. It is also not disputed that he abused such a position.²⁵ It is notable that at the time the offence was committed, the victim had been staying at the accused's Flat, as she had done on several prior occasions. In other words, it was the accused's relationship of responsibility and trust with the victim that gave him the opportunity and access to offend.²⁶

25 In this regard, I disagree with the distinction that the Defence has attempted to draw between cases which attributed "particular significance" to this factor and cases where this factor "was not given especial value".²⁷ No such distinction can be gleaned from the cases themselves. To the contrary, the Court of Appeal in *BPH v Public Prosecutor and another appeal* [2019] 2 SLR 764 ("*BPH*") (relied upon by the Defence as falling into the latter category of cases not giving especial value to this factor) observed at [67] that:

It is a tragic irony, as in most other cases of abuse of trust, that [the accused's] position of authority and trust in relation to [the victim] afforded him the opportunity to offend ... That further shows why such abuse of trust is so abominable. The safe haven is turned into a danger zone.

²⁵ DPM, at para 28.

²⁶ PAS, at para 8.

²⁷ DPM, at paras 25–26.

Young and vulnerable victim

26 The second aggravating feature is the young age and vulnerability of the victim. While the Prosecution and the Defence agree that this is a relevant factor, the areas of disagreement are (a) whether the victim can be considered vulnerable by virtue of having been asleep when the accused first inserted his finger into her vagina; and (b) the implications of the victim being just above the threshold age set out in s 376(4)(a) of the Penal Code. I shall address these two points in turn.

27 The accused took advantage of the victim when she was asleep. When the accused first inserted his finger into the victim's vagina, she felt pain and was awoken. She opened her eyes and saw the accused. The accused also noticed she had been awoken as he saw her opening her eyes. This did not stop him and he continued inserting his finger into her vagina, molested and fondled her breasts and kissed her lips. The victim was too shocked and afraid to respond or resist the accused's perverse sexual advances.

28 I turn now to the implications of the victim's age. At the time of the offence, the victim was 14 years old. Thus, the offence fell outside the scope of ss 376(4)(b) and 376(4)(c) of the Penal Code, which applies to offences committed "against a person below 14 years of age". The Defence submits that while the victim was young, the fact that she was 14 years old means that this factor should apply with lower intensity.²⁸

29 With respect, I am unable to agree with this submission. It is correct that in analysing the effect of the victim's age on her vulnerability, the intensity of

²⁸ DPM, at para 34.

this factor will vary depending on the precise age of the victim. In my view, however, the application of this principle points to the opposite conclusion from that contended by the Defence. In my view, the victim was especially vulnerable *because* she was 14 years old at the time of the offence. It bears emphasis that she was *just above* the threshold age provided in ss 376(4)(b) and 376(4)(c) of the Penal Code. The Defence sought to rely on Valerie Thean J’s observations in *BMF* ([15] *supra*) at [31] that the victim being “materially younger than the stipulated age ceiling of 14 ... shows that the victim was especially vulnerable within the class of victims of 14 years and younger”.²⁹ However, this is of little assistance to the Defence. It is clear that Thean J was assessing the victim’s vulnerability relative to the class of victims falling within the scope of ss 376(4)(b) and 376(4)(c) of the Penal Code (*ie*, below 14 years of age). However, that is not the appropriate comparison in this case. As the victim in this case does not fall within ss 376(4)(b) and 376(4)(c) of the Penal Code, the court should have regard to the *entire class* of “young victims”. On that basis, given that she was only 14 years old at the time of the offence, the victim in this case falls on the more vulnerable side of the spectrum. The accused should consider himself fortunate that the victim was just over 14 years old. If these offences had been committed a few months earlier when the victim was below 14 years old the accused would have faced the more severe statutorily prescribed punishment of a minimum of eight years’ imprisonment and a maximum of 20 years’ imprisonment with mandatory caning of not less than 12 strokes.

²⁹ DPM, at para 31.

Psychological harm caused to victim

30 Finally, I turn to the psychological harm caused to the victim, which the Prosecution contends is another relevant offence-specific factor. Victims of such crime will sustain some kind of psychological harm. It varies from victim to victim and this also depends on the aggravating features of each case. As Dedar Singh Gill J observed in *BMU* ([15] *supra*) at [39], the “deleterious effects of the offence on the victim had already been built into the serious nature of the offence and the criminal sanctions that follow”. Therefore, in order for this factor to apply, the harm must be to an extent that is “beyond that that is usually associated with the offences in question” (see *Public Prosecutor v BQW* [2018] SGHC 136 at [43]), otherwise, this would be “giving that harm double weight” (see *Public Prosecutor v BMR* [2019] 3 SLR 270 at [32]).

31 In this case, it is evident that the accused’s criminal acts have resulted in substantial harm to the victim, not just in those several long minutes during which the offence was committed, but also in the aftermath of the incident. The victim has experienced emotional turmoil, nightmares, deterioration in familial relationships and loss of motivation.³⁰ She has had to suffer for the accused’s actions, and the severe consequences that the accused’s acts have had (and continue to have) on her cannot be understated. However, as appalling as these consequences are, they do not rise above that associated with the offence of sexual assault by penetration. As such, I do not consider such harm an applicable offence-specific factor.

³⁰ PAS, at paras 13–16.

TIC charge

32 I turn now to the presence of the TIC Charge, which I consider to be an aggravating factor. As the Court of Appeal observed in *Terence Ng* ([15] *supra*) at [64(a)], while “a court is not bound to increase a sentence merely because there are TIC offences, it will normally do so where the TIC offences are of a similar nature”. In this case, the TIC Charge is not only similar to the Charge, it is for the exact same offence as the Charge. In other words, the accused *repeated* his offence some three weeks after the first incident. The victim was forced to undergo the same traumatic experience. In my view, this warrants an uplift in the accused’s sentence.

Indicative starting sentence

33 In *BPH* ([25] *supra*), the Court of Appeal similarly identified the twin offence-specific factors of abuse of trust and vulnerability. Based on this, the Court of Appeal at [69] concluded that the case “fell at least in the middle of Band 2”. Given the presence of the same two factors in this case and the TIC Charge, I find that an appropriate starting point is 12 years’ imprisonment and eight strokes of the cane, which is in the middle of Band 2.

*Mitigating factors**Accused’s plea of guilt*

34 I shall now deal with the mitigating factors. The Prosecution acknowledges that the accused’s timeous plea of guilt has mitigating effect.³¹ The rationale underlying such mitigating effect is three-fold: (a) the plea of guilt

³¹ PAS, at para 19.

can be a subjective expression of genuine remorse and contrition; (b) the plea of guilt spares the victim the ordeal of having to testify, thereby saving the victim the horror of having to re-live the incident; and (c) the plea of guilt saves the resources of the State which would otherwise have been expended if there was a trial (see *Regina v Millberry* [2003] 1 WLR 546, cited with approval by the Court of Appeal in *Terence Ng* ([15] *supra*) at [66] and [71]). In this case, I find that an appropriate discount should be given for the fact that the accused entered a timeous plea of guilt. A generous discount would not be appropriate as the accused had committed very serious and heinous offences against his very young niece.

Accused is a first time offender

35 As regards the accused's clean record and lack of antecedents, this is not a mitigating factor but simply a neutral factor.³² This has been made clear by the Court of Appeal, who observed in *BPH* ([25] *supra*) at [85] that:

We consider the absence of antecedents to be a neutral factor. The presence of related antecedents is an aggravating factor which would justify an enhanced sentence on the ground of specific deterrence. The lack of antecedents is no more than the absence of an aggravating factor, which is not mitigating but neutral in the sentencing process: *Edwin s/o Suse Nathen v PP* [2013] 4 SLR 1139 at [24].

36 Having regard to the above offender-specific factors and the aggravating features of the case, I have to balance these factors against the accused's mitigation. In arriving at the appropriate sentence I am of the view that the indicative starting sentence of 12 years' imprisonment and eight strokes of the

³² PAS, at para 18.

cane should be adjusted downwards to 11 years' imprisonment and eight strokes of the cane.

Time spent by the accused in remand

37 Section 318(4) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) provides that:

Where an offender has been remanded in custody, or remanded in a psychiatric institution ... a court must consider directing that a sentence of imprisonment ... which is to be imposed for that offence, is to take effect on a date earlier than the date the sentence is passed.

38 The court may take into account the time spent by the accused in remand even if there has been an intervening period during which the accused was released on bail (see *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 at [86], citing *Public Prosecutor v Sivanantha a/l Danabala* [2015] 4 SLR 585).

39 In this case, the accused was remanded in custody for questioning between 28 August 2018 and 5 September 2018. He was also sent to Changi Prison Complex Medical Centre for psychiatric assessment between 5 September 2018 and 25 September 2018. This amounts to a total of four weeks in remand.³³ Accordingly, I find that the accused's sentence should be reduced by four weeks to take into account the time he spent in remand.

Summary of findings

40 In summary, my findings on sentence are as follows:

³³ DPM, at para 53.

(a) Based on the offence-specific factors and the aggravating features in this case, an appropriate indicative starting sentence is 12 years' imprisonment and eight strokes of the cane, which is in the middle of Band 2. My analysis of the offence-specific factors is as follows:

(i) The accused abused his position of responsibility and breached the trust reposed in him. He stood in a quasi-parental position *vis-à-vis* the victim, and it was the accused's relationship of responsibility and trust with the victim that gave him the opportunity and access to offend against the victim.

(ii) The victim was a young and vulnerable victim as she was only 14 years old at the time the offence was committed. The fact that the victim was just above the threshold age provided in ss 376(4)(b) and 376(4)(c) of the Penal Code shows that she was especially vulnerable relative to the general class of "young" victims.

(iii) While the accused's criminal acts have undoubtedly resulted in substantial and severe harm to the victim, such harm does not rise above that associated with the offence of sexual assault by penetration. That does not mean that the court has marginalised or downplayed the trauma suffered by the victim. Rather, it is the unfortunate reality that such level of trauma is often experienced by victims of sexual assault by penetration.

(b) In view of the accused's mitigating factors, particularly his timeous plea of guilt and his genuine remorse, balanced against the aggravating factors, the indicative starting sentence of 12 years'

imprisonment and eight strokes of the cane should be adjusted downwards to 11 years' imprisonment and eight strokes of the cane. The accused's custodial sentence is to be further reduced by four weeks to take into account the time he spent in remand before he was released on bail.

Conclusion

41 For the reasons set out above, I sentence the accused to ten years and 11 months' imprisonment, and eight strokes of the cane.

42 The accused is a sole breadwinner with three young children. His long incarceration will undoubtedly cause undue hardship to members of his immediate family who are innocent of the crimes that he had committed but his family members have to suffer the collateral harm. I urge the Prosecution and the Singapore Prison Services to assist the accused's family wherever possible while the accused is punished for his crimes.

Tan Siong Thye
Judge

Gail Wong and Sheryl Yeo (Attorney-General's Chambers) for the
Prosecution;
Vigneesh s/o Nainar and Sadhana Devi d/o Daevnrd Rai (Law
Society Pro Bono Services) for the accused.