DALAM MAHKAMAH RAYUAN MALAYSIA

RAYUAN JENAYAH NO: M-09-227-10-2011

ANTARA

NOR AFIZAL BIN AZIZAN ...PERAYU

DAN

PENDAKWA RAYA ...RESPONDEN

(DALAM MAHKAMAH TINGGI MALAYA DI MELAKA
RAYUAN JENAYAH NO. MT 1 42-29-07-2011)

ANTARA

PENDAKWA RAYA ... PERAYU

DAN

NOR AFIZAL BIN AZIZAN ... RESPONDEN

CORAM: RAUS SHARIF, PCA
K.N SEGARA, JCA
AZHAR MA'AH,JCA

JUDGMENT OF THE COURT

1. The appellant was charged before the Malacca Sessions Court for an offence under section 376 of the Penal Code. The offence was said to have been committed on 5 July 2010, between 12.30 am till 5.00 am in room 225, Tingkat 2, King's Hotel, Malacca. The victim was 13 years and 4 months old.

2. On 5 July 2011, the appellant pleaded guilty to the charge. The learned Sessions Court Judge (SCJ), after hearing the parties, placed the appellant on a bond in the sum of RM25, 000.00 for good behavior for a period of 5 years under section 294 of the Criminal Procedure Code (CPC).

3. The prosecution, being dissatisfied with the sentence, appealed to the Malacca High Court. The learned Judicial Commissioner (JC) allowed the appeal and substituted the sentence with an imprisonment term of 5 years. Dissatisfied, the appellant lodged an appeal to the Court of Appeal and pending the appeal the appellant was granted a stay of execution.

4. We heard the appeal on 8 August 2012. After hearing the parties, we allowed the appeal. We set-aside the sentence passed by the learned JC and reinstated the sentence as ordered by the learned SCJ. We now give our reasons.

5. At the hearing before us, En. Hisham Teh Poh Teik, learned counsel for the appellant argued that the learned JC was wrong in disturbing the sentence as ordered by the learned SCJ. He submitted that the learned JC had misdirected himself, when he failed to recognise that the learned SCJ had acted correctly when he exercised his discretion to sentence the appellant the way he did.

6. The learned Deputy Public Prosecutor strongly argued otherwise. She submitted that the order of the learned SCJ does not take into consideration the element of public interest as the sentence meted out does not reflect the gravity of the offence to show public disapproval and condemnation. The learned Deputy Prosecutor further submitted that the sentence meted out failed to serve as a warning and will not have a deterrence effect in combating crime of this nature.

7. Sentencing is one of the most difficult part of the work of a judge. We can imagine the situation faced by the learned SCJ as well as the learned JC in dealing with this particular case. Here is a case, where a 19 years old boy together with 13 years and 4 months old girl around midnight on 5 July 2010 "checked-in" to a hotel to be together for a night. They had consensual sex. The next morning the boy sent the girl back home. The girl did not complaint to anybody. The matter only came to light on 19 July 2010 when the girl's father happened to read the girl's diary, where she had indicated that she had sex with the appellant. Despite her repeated denial to her father

on the truth of what she had stated in her diary, her father lodged a police report against the appellant on 27 July 2010.

8. Upon being made known of the police report lodged against him, the appellant surrendered himself to the police. The appellant was eventually charged in the Malacca Sessions Court. Subsequently, after the prosecution had called the first witness i.e the father of the victim, the appellant decided to plead guilty to the charge. In his mitigation the court was informed that the appellant was a first offender. There was no conceivable force, duress or premeditation on the part of the appellant when committing the act. It was a consensual sex. The court was also informed that the appellant is an accomplished sportsman: a bowler who has achieved many successes in the sport. The appellant was also supporting his family, as both the parents are unemployed.

9. The offence committed by the appellant was that of statutory rape, i.e an offence of having sex outside marriage with a female person under the age of sixteen with or without her consent. Thus, the question is what would be the appropriate sentence that should be imposed against the appellant. Section 376 of the Penal Code provides that "whoever commits rape shall be punished with imprisonment for a term which may extend to twenty years and shall also be liable to whipping". However as stated earlier, the learned SCJ decided not to impose the punishment as provided by section 376 of the Penal Code but instead resorted to the provisions of section 294 of the CPC which reads as follows:

294. First offenders.

(1) When any person has been convicted of any offence before any Court if it appears to the Court that regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed it is expedient that the offender be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties and during such period as the Court may direct to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behavior.

10. In invoking the provisions of section 294 of the CPC the learned SCJ was guided by the following court decisions:

(a) the case of **Abdul Karim v Regina [1954] 1 LNS 3**, which, inter alia, says that in matter of punishment:

> *"... the particular offence and the particular offender, are the concern of the court, whose business is to decide what*

punishment is merited upon the facts of the individual case within the limits the legislative has provided ..."

(b) the case of **Mohamad Arfah Jasmi v PP [2008] 7 CLJ 836**, where the High Court recognized that " ... rape among teenagers is a social problem and must be addressed though religious and/or moral education by parents and authorities and imprisonment of offender will only add to further social problem".

11. The learned SCJ also sought guidance from the case of **PP v Yeong Lim Choy [1976] 1 LNS 119** on the pre conditions to be satisfied when resorting to section 294 of the CPC and went on to consider the following:-

(a) that though he is free on bond the conviction is a registered offence and can be taken into consideration in future offences;

(b) the appellant was 19 years old at the time of the offence and 20 years old at the time of his plea;

(c) that there was consent between the parties; and

(d) that the appellant had pleaded guilty and was remorseful.

12. The learned SCJ also took cognizance of the recent decisions by both the Malacca High Court and Muar High Court on section 294 of the CPC. In his judgment he said:-

"Mahkamah in juga telah menimbangkan nas duluan di mana bagi kesalahan yang sama yang melibatkan rogol bawah 16 tahun secara suka sama suka, Mahkamah ada menjatuhkan hukuman bon berkelakuan baik di bawah seksyen 294 KAJ. Dalam kes yang tidak dilaporkan iaitu ***Dalam Mahkamah Tinggi Melaka, Rayuan Jenayah No: 42H-3-2011, Pendakwa Raya v Yeo Tian Su*** *dan* ***Rayuan Jenayah No: 42H-91-2010 Pendakwa Raya v Muhammad Irwan bin Zakariah****, pendakwaan tidak meneruskan rayuannya terhadap hukuman yang dijatuhkan oleh Mahkamah ini dan dapatlah disimpulkan pendakwaan berpuas hati dengan hukuman yang dijatuhkan di bawah seksyen 294 Kanun Acara Jenayah. Mahkamah ini juga merujuk kes yang tidak dilaporkan iaitu* ***Dalam Mahkamah Tinggi Muar, Rayuan Jenayah No: 42A-C-7-2010, Gan Heng Kwang v Pendakwa Raya*** *di mana hukuman penjara 7 tahun telah diketepikan oleh YA Dato' Ahmad bin Haji Asnawi H dan digantikan dengan hukuman bon jaminan berkelakuan baik di bawah seksyen 294 Kanun Acara Jenayah selama 3 tahun dengan wang jaminan sebanyak RM10,000.00 dengan seorang penjamin."*

13. Lastly, the learned SCJ was fully aware and he made it known to the appellant that based on **Jayanthan v PP [1973] 1 LNS 56** in the event the appellant fails to observe the conditions of the bond he would be arrested and dealt forthwith for the original offence.

14. The learned JC in setting aside the sentence imposed by the learned SCJ was primarily concerned with the element of public interest. In his judgment, he said as follows:-

"Dalam konteks kes ini saya berpendapat bahawa Tuan Hakim Mahkamah Sesyen telah khilaf apabila lebih memberatkan kepentingan OKT daripada kepentingan awam berdasarkan alasan-alasan berikut:-

i) OKT berumur 20 tahun semasa pengakuan salah direkodkan. Kesalahan di bawah s 376 Kanun Keseksaan adalah serius. Justeru hukuman yang bersesuaian adalah hukuman penjara. (Rujuk kes PP v Loo Choon Fatt [1976] 2 MLJ 256, PP v Yap Huat Heng [1985] 2 MLJ 414, Koey Teng Soon & Anor v PP [2000] 2 AMR 1357, [2000] 2 MLJ 129, PP v Sharithan a/l Pachemuthu [1999] 4 AMR 4619, [2000] 2 MLJ 368).

ii) Mangsa berumur 13 tahun semasa kejadian. Pada umur sebegini mangsa belum dapat membezakan antara baik dan buruk untuk masa hadapannya. Sebagai seorang yang dikategorikan di bawah definisi kanak-kanak, kehidupannya lebih ke arah fantasi jika dibandingkan dengan realiti.

iii) OKT mengambil kesempatan sebagai seorang ahli sukan bowling yang berjasa kepada negeri dan dikenali ramai untuk menggoda mangsa. Menjadi seorang yang terkenal bukanlah bermakna OKT diberikan lesen untuk melakukan jenayah dengan sewenang-wenangnya (Lai Kim Hon & Ors v PP [1981] 1 MLJ 84, PP v Vijaya Ray [1981] 1 MLJ 43).

iv) Kesalahan pertama tidak memadai untuk mendapat pengurangan hukuman (rujuk kes PP v Khairuddin [1982] 1 MLJ 331, Bhandulananda Jayatilake v PP [1982] 1 MLJ 83).

v) Walaupun tiada statistik dikemukakan bagi kes-kes rogol yang melibatkan remaja, namun kekerapan kesalahan ini

hampir setiap hari dilaporkan dalam media cetak. Jika hukuman ringan diberikan maka sudah tentunya ianya tidak akan membantu mencegah berbagai kesalahan yang melibatkan remaja. (Rujuk kes Ismail bin Rasid v PP [1999] 4 CLJ 402; [1999] 4 AMR 4541, PP v Yeoh Eng Khuan [1976] 1 ML 238).

Berdasarkan alasan-alasan di atas saya berpendapat bahawa mitigasi OKT tidak memenuhi prasayarat yang digariskan dalam kes PP v Yeong Lim Choy [1976] 1 LNS 119 untuk membolehkan seksyen 294 KPJ diguna pakai. Justeru, saya memutuskan untuk mengetepikan perintah BON berkelakuan baik dengan jaminan RM25,000.00 tanpa cagaran dan seorang penjamin bagi tempoh lima (5) tahun di bawah seksyen 294 KPJ dan digantikan dengan hukuman 5 tahun dari tarikh hari ini."

15. The issue before us was whether the learned JC was right in interfering with the sentence passed by the learned SCJ. It is trite that an appellate court, in this case the High Court, "should be slow to interfere or disturb with a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. And the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principle in the assessment of the sentence".(See **Public Prosecutor v Mohamed Nor & Ors (1985) 2 MLJ 200)**

16. In the instant case, we are of the view that the learned JC was wrong to interfere with the sentence imposed by the learned SCJ. Upon perusing the grounds of judgment of the learned SCJ we found

that he had applied the correct principles in making the orders under section 294 of the CPC. He took into consideration all relevant factors including the element of public interest, the fact that it was consensual, that the offender had pleaded guilty and was extremely remorseful of what he had done, that he was a youthful offender and the fact that it was a registrable offence.

17. As stated earlier, the learned JC in substituting the sentence with 5 years imprisonment was concerned that cases of statutory rape involving teenagers are common occurrence. According to him, if a light sentence is imposed, it will not have a deterrent effect in combating crime of this nature. We are equally concerned, especially in this case where the victim at the time of the offence was only 13 years and 4 months of age. But the appellant was not very much older than the victim. Both were teenagers. They both made a mistake in engaging in premarital sex. No doubt, the appellant had committed an offence, but should custodial sentence be the only safeguard into ensuring similar offences of consensual sex among teenagers will not happen?

18. In this aspect we are inclined to agree with what was expressed by Hamid Sultan Abu Backer JC (as he then was) in **PP v Mohamad Arfah Jasmi (2008) 7 CLJ 836 t**hat the safeguard into ensuring similar offences of consensual sex among teenagers will not happen starts at home and in school. At home where parents should impose discipline and religious knowledge to ensure that teenagers would not put themselves in situation which will bring about this kind of offence and in school where sex education can be taught so that both girls

and boys are aware of the dire consequences of engaging in premarital sex.

19. The next question is must all these teenagers who commit similar offence as the appellant be punished with imprisonment? It is a well accepted principle of sentencing that young offenders, wherever possible and depending on the nature of the offences committed, should be kept out of prison, especially when there are other adequate means of dealing with them. Bellamy J in **Tukiran bin Taib v Public Prosecutor [1955] 21 MLJ 24**, held that:

> *"it is desirable that young offenders, that is, offenders between the ages of 17 and 21, who are also first offenders should be kept out of prison, if possible".*

The pronouncement made by Bellamy J in **Tukiran Bin Taib v Public Prosecutor (supra)**, albeit made in 1955 has become the guiding principle for courts in exercising its discretion when assessing the appropriate sentence for young offenders. There is plethora of authorities stemming from our courts against sending young and/or first offenders to the prison. (**see Teoh Ah Kow v PP (1961) 2 MLJ 75; PP v Tan King Hua (1966) 1 MLJ 115; Lim Yoon Fah v PP (1970) 1 LNS 66; PP v Yeong Yin Choy (1976) 1 LNS 119; Teo Siew Peng & 4 Ors v PP (1985) 2 MLJ 125; PP v Mohamed Nor & Ors (1985) 1 LNS 25; PP v Lim Hong Chin (1994) 1 CLJ 79 and Lai Sing Ming v PP(1995) 1 LNS 106; and Winston Rajah @ Ben v PP (1998) 1 LNS 54.**

20. In the instant appeal, the appellant is not only a young offender, but also a first offender and considering the nature of the offence and how it was committed and the other extenuating circumstances, the learned SCJ was right in exercising his discretion in not sentencing the appellant to prison but instead subjected him to an order under section 294 of the CPC.

21. At this juncture, we would like to clarify the misconception on the applicability of section 294 of the CPC. We would like to point out that the orders made under section 294 of the CPC do not exonerate the person of the offence that he had committed. The person is infact convicted of the offence and the conviction will be recorded and will form part of the person's criminal record and will remain there for the rest of that person's life. The effect of such an order was clearly spelled out in the case of **Jayanthan v Public Prosecutor (1973) 1 LNS 56,** wherein Ong Hock Sim FJ held that:

> *"this section vests the Court before which a person is convicted with power to suspend sentence for such period as the Court may direct, and, if the offender behaves himself during such period, he would escape punishment for his offence. If he fails to observe the conditions of his bond, he would be liable to be apprehended and dealt with for his original offence".*

22. Thus, in the instant case, the appellant was in effect given a suspended prison sentence. He has to behave himself for a period of 5 years. If he behaves himself during the 5 years period, he would escape punishment for his offence. But if he fails to observe the conditions of his bond, he will then be arrested and dealt with for the original offence of rape. Like the learned SCJ, we are hopeful that the suspended sentence would give the appellant another chance in life and that he will "turn over a new leaf". If the order of the suspended prison sentence has the effect of rehabilitating him, then public interest has indeed been served and best served.

23. For completeness, we would like to add a proviso to our decision: that whatever sentence to be imposed on this type of cases must be based on the facts of each individual case. Each case depends on its own facts and it is neither feasible nor desirable to attempt to lay down any fixed sentence that is meant to govern this type of cases. Therefore, these observations made by this court should not be misconstrued as intending to have blanket application or applying to all cases involving young offenders charged with the similar offence as the appellant herein.

24. In the present case, if the appellant had been older, or he had used force, coercion or violence on the victim, or he had tricked the victim into submitting to him or he had not cooperated with the police and he had not shown any remorse to his act or there is no guarantee that he will not be committing the same offence in the future, we would not have any hesitation, as we have done in many other cases of similar nature, to impose a lengthy custodial sentence. But before us

is a young boy who was extremely remorseful for what he had done and had thrown himself to the mercy of the court by pleading guilty to the charge.

25. The learned SCJ, based on the facts and circumstances of the case, instead of sentencing the appellant at once to any punishment, directed him to be placed on a bond under section 294 of the CPC. The learned JC disagreed, but the mere fact that he wanted to pass a different sentence provides no reason for him to interfere, when it is clear that the learned SCJ had applied the correct principles in the assessment of the sentence.

26. It is for the above stated reasons we allow the appellant's appeal. Consequently, the orders made by the learned JC were set aside and we reinstated the orders made by the learned SCJ.

Dated this 27th day of August 2012.

Raus Sharif
President
Court of Appeal Malaysia

Counsel for the appellant: Hisham Teh Poh Teik

Solicitors for the appellant: Tetuan Hisham Teh Poh Teik

Counsel for the respondent: Nadia Tajuddin, DPP

Solicitors for the respondent: Attorney General's Chambers