IN THE GENERAL DIVISION OF THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 78

Magistrate's Appeal No 9868 of 2020/01

Between

Yap Lee Kok

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Appeals]
[Criminal Law] — [Statutory offences] — [Penal Code] — [Sexual penetration of minor under 16]

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v
Public Prosecutor

[2021] SGHC 78

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6, 7 April 2021

7 April 2021 Judgment reserved.

Vincent Hoong J:

Introduction

1 In the court below, the appellant pleaded guilty to two counts of sexual penetration of a minor under s 376A(1)(*a*), punishable under s 376A(2) of the Penal Code (Cap 224, 2008 Rev Ed). He consented to three other charges being taken into consideration ("TIC charge(s)") for sentencing which involved offences under s 376A(1)(*a*) (one count each of penile-oral and penile-vaginal penetration) and s 292(1)(*a*) of the Penal Code. At the time of the offences, the victim was 14 years old while the appellant was 55 years old. The District Judge ("DJ") imposed 12 months' and 18 months' imprisonment for proceeded charges involving penile-oral penetration and penile-vaginal penetration respectively. Both sentences were ordered to run concurrently, producing a global sentence of 18 months' imprisonment.

2 In this case, the appellant used a Facebook account with the moniker "Peter Teo" to befriend females. In an Institute of Mental Health Letter of 21 July 2020 ("the 21 July IMH Letter") annexed to his mitigation plea in the court below ("the Mitigation Plea"), the appellant also admits to having "pursued sexual relations with females he met over the internet" in the past.[1]

3 Sometime in January 2019, the appellant added the victim as a friend on Facebook. After the victim accepted his friend request, the two began chatting on the Facebook Messenger app. In the course of their conversation, the appellant discovered that the victim was 14 going on 15 and a virgin. The appellant lied to the victim that he was "about 40 years old",[2] initiated conversations of a sexual nature and transmitted eight photographs of his penis to the victim.[3] These photographs form the basis of the TIC charge for the transmission of obscene images under s 292(1)(*a*) of the Penal Code (*ie*, MAC-903180-2020). In return for these obscene images, the appellant procured photographs of the victim's breasts and vagina. The appellant then broached the topic of having the victim try to fellate him. Even when the victim did not respond, he suggested that they should met up "for a 'blowjob'" and "kept repeating the request and offering to drive the minor to school after their meeting" until the victim eventually agreed.[4]

4 On 4 February 2019, at or about 6.00am, the appellant met the victim at the ground floor lift lobby of the multi-storey carpark at 669 Jurong West Street 64 ("the Carpark"). Prior to their meeting, the accused instructed the victim not

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1 ROP at p 157, [2].

2 SOF at [7].

3 ROP at p 16.

4 SOF at [8].

to wear her shorts or panties under her school uniform. The victim complied with these instructions. The appellant brought the victim to his multi-purpose vehicle ("MPV") ("the Vehicle") parked on the sixth floor of the Carpark. It is inside the Vehicle where the appellant penetrated the victim's mouth and vagina, twice each, over a span of approximately 40 minutes.[5] The proceeded charges concern the first instance of penile-oral penetration and the second instance of penile-vaginal penetration.[6] The two TIC charges concerning s 376A(1)(*a*) of the Penal Code cover the remaining instances of oral and vaginal penetration which occurred that day.

5 The appellant now appeals against his sentence for the second proceeded charge involving penile-vaginal penetration ("the Second Proceeded Charge") on three main grounds: (a) that disproportionate weight was placed on the aggravating factors in this case; (b), that the DJ placed insufficient weight on certain mitigating factors; and (c), that the sentence imposed is manifestly excessive in light of relevant precedents. In view of these arguments, the appellant seeks a sentence of not more than 14 months' imprisonment.

6 I will consider each of the appellant's arguments in turn.

Presence of aggravating factors

7 First, I reject the submission that the aggravating factors were accorded disproportionate weight.

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5 ROP at pp 6 and 7.

6 ROP at p 4.

Use of the internet

8 In my view, the DJ was entitled to regard the appellant's use of the internet to contact the victim as an aggravating factor. Befriending the victim through the internet was not an aggravating factor on the particular facts of *AQW v PP* [2015] 4 SLR 150 ("*AQW*") because there was nothing to suggest that the appellant in that case had "used the Internet with the intent of committing the offence" (*AQW* at [60]).

9 In contrast, the appellant in this case used the internet with the intention of committing sexual offences. In the Statement of Facts ("SOF"), the appellant admits to using a Facebook account with the moniker "Peter Teo" to look for females to befriend.[7] Once the victim accepted his friend request, the appellant used the Facebook Messenger app to: (a) initiate conversations of a sexual nature (including asking her to fellate him); and (b) send lewd photographs and procure the same from the victim. In the 21 July IMH Letter, the appellant also admits to pursuing "sexual relations with females he met over the internet."[8] I take this opportunity to signal the court's contempt for such predatory behaviour in the digital realm and accordingly find that general deterrence is a dominant consideration in this case.

10 I am also satisfied that the DJ was entitled to regard the falsity of the appellant's Facebook moniker as an aggravating factor. The usage of a false moniker, when seen alongside the appellant lying about his true age to the victim and meeting her in a multi-storey carpark instead of his home, reveals an intention to "conceal [his] identity and avoid detection" (*AQW* at [61]). Such intention is not displaced by the fact that the appellant's car, where the offences

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7 SOF at [6].

8 ROP at p 157, [2].

were committed, bore a licence plate number or that the appellant drove the victim to school. The appellant may have regarded the likelihood of the victim recalling his licence plate number, or being noticed by her peers, as being negligible. In this case, the appellant's speedy arrest is also a testament to the efficacy of our law enforcement agencies, and should not be credited to the appellant.

Premeditation and persistence

11 As regards premeditation, I uphold the DJ's finding that the offence involving vaginal penetration was premeditated. The court in *Ng Jun Xian v PP* [2017] 3 SLR 933 at [42] held that the offences of sexual assault by digital penetration of the vagina and attempted rape were committed with "some degree of premeditation and planning" as the accused "at the very least…had sought to set the stage by sending the victim to the hotel…and …took the opportunity when it presented itself to commit the sexual assault". Even if the appellant did not specifically intend to commit vaginal penetration *before* the meeting, he had deliberately set the stage for such an opportunity to arise by making repeated advances on the victim, arranging to meet the victim in the early hours of the morning and offering to send her to school so as to coax her into meeting him. When the opportunity presented itself, he penetrated the victim's vagina *twice* within a span of 40 minutes.

12 Further, while I agree that sexual grooming is not a distinct aggravating factor from premeditation (*Ng Kean Meng Terence v PP* [2017] 2 SLR 449 ("*Terence Ng*") at [44(c)]), it still enhances the degree of premeditation in this case. As such, the weight accorded to the evidence of sexual grooming is not so disproportionate as to invite appellate intervention.

13 As to whether he had acted with persistence, the appellant denies this on the basis of evidence raised in the Mitigation Plea in the court below. Namely, he claims that he did not press the matter when the victim cancelled their meeting two days prior to the agreed date and that it was the victim who broached the topic of meeting again.[9] However, even if I accept the appellant's evidence in his Mitigation Plea, I am not prepared to disturb the DJ's finding. The SOF clearly reveals that the appellant made repeated advances despite being initially rebuffed: when the victim failed to respond to the appellant's invitation to "try" fellating him, the appellant proceeded to ask if she wanted to "meet" and repeated this latter request notwithstanding the victim's refusals.[10]

14 At this juncture, it is convenient for me to address the respondent's submission that some of the appellant's arguments involve victim-blaming and thus demonstrate his lack of remorse. The appellant's arguments in question are that: (a) the victim initiated sexual intimacy after having originally said that she was unable to meet the appellant (see [13] above); and (b) that the victim expected more than simply penile-oral penetration given that she showed up without panties ("the Impugned Arguments").[11]

15 However, I am not minded to hold the Impugned Arguments against the appellant. The type of arguments which drew the court's criticism in *GCM v PP and another appeal* [2021] SGHC 18 ("*GCM*") at [91]–[95] were those that attacked the victim's character and/or morality. Insofar as the Impugned Arguments go to the issues of the victim's consent and/or the appellant's persistence in persuading the victim to meet him, the appellant is entitled to make his case.

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9 ROP at pp 147 and 148, [15] and [16].

10 SOF at [7] and [8].

11 Respondent's submissions at [67]–[69].

Fear and emotional harm

16 Finally, in relation to the degree of fear and emotional harm inflicted on the victim, the DJ rightfully highlighted the appellant's failure to use a condom and the attendant risk of an unwanted pregnancy as being aggravating (*PP v Lee Ah Choy* [2016] 4 SLR 1300 at [50]). This factor distinguishes the present case from some precedents such as *PP v Len Teck Guan* DAC-936149-2017 & Ors and underscores the importance of retribution as a sentencing consideration (*GCM* at [59]).

Other aggravating factors

17 For completeness, I should also address the following points raised by the parties.

18 First, it is unclear whether the DJ regarded the age disparity of the appellant and victim as an aggravating factor.[12] Insofar as he did, I do not regard the weight placed on it to be so disproportionate as to render the sentence manifestly excessive. The age disparity forms part of the backdrop against which the sentence must be decided. In any case, *AQW* at [24] does not shut out the possibility of the age disparity carrying some weight as an aggravating factor.

19 Second, the SOF does not bear out the victim's consent to vaginal penetration. In fact, she was "under the impression that she was meeting the [appellant] *only* to [fellate him]" [emphasis added].[13] The absence of such consent aggravates the severity of the appellant's criminal conduct (*Terence Ng* at [44(f)] and [45(b)]).

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12 GD at [17]; ROP at pp 66 and 67.

13 SOF at [8].

Appropriate weight was given to mitigating factors

20 Furthermore, I am satisfied that the DJ placed appropriate weight on the mitigating factors when sentencing the appellant. These include the fact that he pleaded guilty and is a first-time offender.[14]

21 However, I dismiss the appellant's contention that his pornography addiction and major depressive disorder carry mitigating weight. For one, the 21 July IMH Letter does not explicitly diagnose the appellant with a pornography addiction at the time of the offences.[15] Additionally, there is no evidence of a causal or contributory link between the appellant's major depressive disorder and the commission of the offences.

22 Additionally, the appellant submits that rehabilitation is a relevant consideration, although not displacing the primacy of deterrence. He points to the fact that he voluntarily attended 18 counselling sessions at IMH, to seek help for problems "in relation to pornography and meeting females that he befriended over the internet", from the time he was released on police bail until his sentencing by the DJ.[16]

23 I accept that the appellant's efforts are indicative of his resolve to change and that rehabilitation therefore factors into the sentencing equation. However, the depravity of the present offences entrenches deterrence and retribution as paramount considerations. In the final analysis, the sentence imposed must reflect the deplorable nature of the appellant's assault on the innocence of the victim.

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14 GD at [11]; ROP at p 62.

15 ROP at p 157.

16 ROP at p 157, [1]; Appellant's submissions at [3].

Sentence not manifestly excessive in light of sentencing precedents

24 The court in *AQW* (at [41]) held that the starting point for an offence under s 376A of the Penal Code involving penile-oral penetration of a minor who is 14 years old or above, and absent any pressure or abuse of trust, is ten to 12 months' imprisonment. It bears noting that the charge in *AQW* was under s 376A(2) of the Penal Code. As penile-vaginal penetration is a graver violation than penile-oral penetration (*Pram Nair v PP* [2017] 2 SLR 1015 at [152]; *BPH v PP and another appeal* [2019] 2 SLR 764 at [62]), the starting position in this case should be in the region of 14–16 months' imprisonment.

25 Bearing *AQW* in mind, and after accounting for the differences in aggravating and mitigating factors in the relevant precedents, I find that the sentence imposed by the DJ is not manifestly excessive. I address some of the more salient precedents raised by the appellant.

26 First, in *GCM*, the appellant also received 18 months' imprisonment under s 376A(3) of the Penal Code for penile-vaginal penetration of minor who was 13 years old at the material time. The statutory maximum imprisonment term in s 376A(3) was twice that in s 376A(2). There were two other proceeded charges under s 376A(3) and eight TIC charges; the global sentence imposed was 33 months' imprisonment. Briefly, the appellant and victim in that case, 22 and 13 years old at the material time respectively, were alumni of a school group at their primary school. They became acquainted when helping out with the school group and exchanged handphone numbers. They subsequently corresponded via Instagram messages and the appellant performed the sexual offences in his home and at his university hostel room on three occasions over two weeks (at [83]). Certain aggravating factors in *GCM* – the victim's vulnerability due to her young age and familial circumstances and the existence of *some* pressure exerted by the appellant (at [56]–[58]) – did not present in the

immediate case. The victim in that case also tendered a victim impact statement (at [69]–[71]).

27 Having compared the circumstances of each case in totality, I accept that the offence in *GCM* involving penile-vaginal penetration is more aggravated. However, Aedit Abdullah J stressed that the aggregate sentence imposed in *GCM* "may be said to be on the lower end" and ultimately refrained from imposing a sentence beyond that sought by the Prosecution (at [89]). Considering this alongside the starting position in this case (formulated from *AQW*; see [24] above), the present sentence, while on the high side, does not cross the threshold of being manifestly excessive. The abuse of the internet is also an aggravating factor which does not arise in *GCM*.

28 Next, the appellant submits that 18 months' imprisonment is manifestly excessive in light of *PP v Chen Yongzhao Ashton* DAC-913178-2018 & Ors ("*Ashton*") and *Zahier Hilmi Bin Zulkifli* DAC-935028-2017 & Ors ("*Zahier*").

29 In *Ashton*, the male offender created a Facebook profile, masquerading as a female, with the intention of chatting with other girls about sex. The offender (around 26 years old at the material time) added the victim (14 years old at the material time) on Facebook and the two began conversing. The offender arranged to meet the victim in real life by claiming that a "friend" of his (*ie*, himself) was interested in the victim.[17] For the charge involving vaginal penetration, the victim agreed to fellate and have intercourse with the offender on the condition that he paid her some money. The victim's family was experiencing financial difficulties at that time. The offender agreed to pay her $80, met up with the victim and penetrated her vagina with his penis; he wore a

[17] RBOA at p 114, [7].

condom while doing so.[18] 14 months' imprisonment was imposed for this charge under s 376A(2) of the Penal Code; the same individual sentence was handed down for the remaining two proceeded charges under s 376A(2) (penile-oral penetration) and s 376A(3) (penile-oral penetration). There were also three TIC charges and the offender received 28 months' imprisonment in total.

30 Upon close consideration, however, *Ashton* can be distinguished from the present case in two respects. First, the victim in *Ashton* had consented to vaginal intercourse, whereas the victim at present did not. Second, the offender in *Ashton* had used a condom. This would ameliorate, in relative terms, the trauma visited upon the victim in that case.

31 In *Zahier*, the offender had befriended the victim (15 years old at the material time) through the instant messaging application "Kik". Their conversations revolved around sexual topics, including sharing their fetishes and communicating while masturbating.[19] Eventually, the offender and victim met up in person. In respect of the charge involving penile-vaginal penetration, this was committed at the offender's home and without a condom. Subsequently, on two separate occasions, he penetrated the victim's vagina digitally and penetrated her mouth with his penis; these form the bases of the remaining two of three proceeded charges. The following imprisonment terms were imposed: 14 months' imprisonment for penile-vaginal penetration, 12 months' imprisonment for penile-oral penetration and 10 months' imprisonment for digital-vaginal penetration. The global sentence imposed was 24 months' imprisonment; there were nine other TIC charges.

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18 RBOA at p 115, [14]–[16].

19 RBOA at pp 274 and 275, [6] and [7].

32 Notwithstanding the greater number of TIC charges and the longer period of offending in *Zahier* (*ie*, spanning several weeks),[20] I am not persuaded to disturb the DJ's sentence. It is clear to me that there was no deception involved in the commission of the offences in *Zahier*. None of the precautions, which the appellant took in the present case took to conceal his identity, are borne out in *Zahier*. In fact, just like in *AQW* (at [57]), the offender had invited the victim into his home.[21] Consequently, the degree of exploitation of the victim in this case is more severe.

33 For completeness, I also make brief mention of the following cases. In *PP v Qiu Shuihua* [2015] 3 SLR 949 ("*Qiu*"), the appellant received 10 months' imprisonment for penile-vaginal penetration under s 376A(1)(*a*) of the Penal Code. However, the court in *Qiu* did not have the benefit of the decision in *AQW*, which clarified that the starting point for less serious assaults involving fellatio is *already* 10–12 months' imprisonment (see [24] above). As such, *Qiu* is not determinative in this case.

34 Finally, in *PP v Ahmad Jumaidi Bin Salleh* DAC-920837-2019 & Ors ("*Ahmad*"), 12 months' imprisonment was imposed for an offence of penile-vaginal penetration under s 376A(2) of the Penal Code. The offender in *Ahmad* befriended the victim on Instagram and the two engaged in consensual intercourse after consuming methamphetamine together.[22] The other proceeded charge in *Ahmad* was for drug consumption and there was one TIC charge under s 376A(2) of the Penal Code. Considering the provision of consent in *Ahmad* and that 12 months' imprisonment for penile-vaginal penetration is out of step with *AQW* (see [24] above), I am not minded to overturn the DJ on this basis.

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20 RBOA at pp 275 and 276.

21 RBOA at p 275, [8].

22 RBOA at p 103, [6].

35 In these premises, the sentence of 18 months' imprisonment for the Second Proceeded Charge, and hence the global sentence, is not manifestly excessive.

Conclusion

36 For these reasons, I dismiss the appellant's appeal against his sentence.

Vincent Hoong
Judge of the High Court

Chooi Jing Yen (Eugene Thuraisingam LLP) for the appellant;
Tan Zhi Hao and Nicholas Lim (Attorney-General's Chambers) for the respondent.