

IN THE SESSIONS COURT AT SARAWAK
AT SIBU
SESSIONS COURT ARREST CASE NO: 62-29-2010

Public Prosecutor

Vs

Pendi Pawan

FOUNDATIONS OF DECISION

The accused pleaded guilty to two counts of rape under Section 376(1) of the Penal Code (Act 574) which arraigned:

First Charge:

Bahawa kamu pada 02 Februari 2010, jam lebih kurang 09.40 pagi, bertempat di rumah pekerja Sawmill Kuntai, Bawang Assan, Sibu, di dalam Daerah Sibu, di dalam Negeri Sarawak, telah merogol Inani Lacini (P), Pasport No. B786954, oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 376 (1) Kanun Keseksaan.

Second Charge:

Bahawa kamu pada 02 Februari 2010, jam lebih kurang 10.15 pagi, bertempat di rumah pekerja Sawmill Kuntai, Bawang Assan, Sibu, di dalam Daerah Sibu, di dalam Negeri Sarawak, telah merogol Inani Lacini (P), Pasport No. B786954, oleh yang demikian kamu telah melakukan kesalahan yang boleh di hukum di bawah Seksyen 376 (1) Kanun Keseksaan.

As the accused has appealed against the sentences imposed, I will now set out the reasons for my decision.

Dramatis personae

The accused is a 39-year old Indonesian Bugis national. The complainant is 38-years old and is also an Indonesian Bugis. She is a housewife and her husband is a mandor (overseer) with a sawmill known as Sawmill Kuntai, Bawang Assan, Sibul.

Facts

On 2nd February 2010 at about 9.00 a.m. the accused went to the scene known as Rumah Pekerja Sawmill Kuntai, Bawang Assan, Sibul. He went to the complainant's house. On seeing the complainant's husband standing outside the house, the accused greeted him and enquired his welfare.

The complainant's husband informed the accused that he has been having persistent severe cough for the last two (2) months. On hearing this, the accused informed the complainant's husband, supposing if there was time, he could cure his ailment. Immediately, the complainant's husband replied, if true the accused could treat him and indeed had the knowledge, he requested the accused to treat his ailment. The accused agreed to treat the complainant's husband. Later, the complainant's husband invited the accused into his home and to be seated in the sitting-room. That was the moment the complainant saw the accused. The accused requested to be provided with items like an egg, cash of one ringgit, rice and a packet of cigarettes. The complainant and her husband provided the things as requested. Later the accused was seen reading something to the said items but it was inaudible, only the accused's mouth appeared to be reading something.

At about 9.30 a.m., the complainant's husband went to the sawmill for a while to arrange workers who were working that morning. This is because the complainant's husband is a mandor (overseer) at the said sawmill. About 30 minutes later, the complainant's husband returned home. Accused then handed over an egg and three (3) packages of daun sireh (betel leaf) to the complainant's husband and asked him to place those items inside bushes. The complainant's husband just followed what was instructed by the accused. The complainant's husband went out again to the bushes.

Approximately about 20 minutes later, the complainant's husband returned home again. On reaching home, he saw the complainant lying down on the bed in the bedroom. Swiftly, the accused screamed from the said bedroom, forbidding the complainant's husband from entering the room on the grounds, that the accused was still in the process of making medicine. The complainant's husband just followed the orders from the accused. Approximately about 10 minutes later, only then, did the accused and the complainant comes out of the room. The accused then showed to the complainant's husband a bottle of drinking water and told him to rub his body with that water every morning.

After that, the accused asked the complainant to prepare cooking oil and white pepper. So, the complainant prepared those items that were requested. The accused, later massaged the body of the complainant's husband using the said items. Approximately about 10 minutes massaging the complainant's husband, the accused requested permission to leave. After the accused had left the house, suddenly the complainant cried. So, the complainant's husband asked her what had happened. Only after that, the complainant narrated everything to her husband.

According to the complainant, during the absence of her husband, that is the moment the complainant's husband went out of the house to go to the sawmill at about 9.30 a.m., the accused informed the complainant that in order to fulfil the conditions in treating the ailment of her husband, the accused needed the semen of the complainant, whereby the complainant needed to copulate with him. The accused instructed the complainant to wear sarong, lie on the bed and remove her panties. The accused later went up on the bed and licked the complainant's private part a few times before inserting his private part into the complainant's private part until the complainant discharged mucoid fluid. When the complainant discharged her mucoid fluid, the accused took cotton, wiped the complainant's private part with the said cotton and put the said cotton swab into a bottle of drinking water. After that the accused prepared medicine, using the complainant's mucoid fluid which was kept in the bottle of drinking water, to be rubbed on the body of the complainant's husband. The accused copulated with the complainant twice on the day of the incident. The second copulation occurred, also in the absence of the complainant's husband that is about 10.15 a.m., when he went to the bushes, as instructed by the accused to place an egg and betel leaf.

The complainant agreed to copulate with the accused because she believed the words of the accused that by doing so, it would cure her husband's ailment. But whatever though, the moment the accused left, the complainant suddenly cried and began to regret with what had happened.

On 3.2.2010 at about 3.50 p.m., a police team from the JSJ D4 IPD Sibul headed by Inspector Firdaus arrested the accused at Kilang Papan Jaya Fuda Timur Sdn Bhd, Tg Manis, Sarikei. The reasons for the arrest was informed to the accused and understood by him.

On 6.2.2010 at about 2.50 p.m. an identification parade was held on the accused by the complainant. The result was positive.

Prescribed Punishment

The offence is punishable with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.

Mitigation

In mitigation the accused stated as follows:

“Plea for leniency.

Married with 4 children

My family depends on me to support them.

I will not commit the same mistake again.

I regret for what I did.”

Prosecution’s Submission

The submission was couched in the following words:

“Prosecution prays for a deterrent sentence on the accused.

Although from the facts, it shows the complainant had agreed to have sexual intercourse with the accused on the contention that only by that way; the husband of the complainant could be cured.

Section 375(d) Penal Code applies in this case.

Although the treatment done by the accused was in relation to cure the husband of the accused, she was illiterate and consented in the hope that it would cure her husband.

How an Indonesian could do this to a fellow countryman is unfathomable.

Prosecution prays for deterrent sentence for other would be offenders, especially foreigners and also of public interest.

As Indonesian, he has no previous conviction with Central Criminal Registry.”

My Decision

The following points were at the forefront of my mind, before passing sentence on the accused.

- The accused had acted in a despicable manner taking advantage of an illiterate, naive wife of fellow countryman who had come to this country to earn a living.
- You masqueraded as a medicine man who could cure her husband's ailment of a cough which was persistent for the last two months.
- Public interest must be served in two ways. To deter others who might be tempted to try their lust and also to deter the accused from committing any other crime again or induce him to turn an honest life.
- The offence committed by the accused was serious and that the degree of seriousness must be reflected in the sentence imposed. This case falls within the worst category of offences.
- The two (2) counts of rape are two (2) distinct offences.
- The mode of committing the offence was cloaked in an act of professional medicine man.
- The accused may be a first offender, but that factor does not entitle him to be treated with leniency.
- To my mind, the need to deter others is the public interest must supersede other considerations.
- The public would lose confidence in the courts if lenient sentences are meted out for an offence like this.
- I have carefully considered the circumstances in which the offence was committed and in my view, nothing could mitigate what the accused did.
- If he is old enough to commit an adult offence, then he should be deemed to be old enough to take the consequences.
- This sentence should reflect society's abhorrence to crimes of this nature.

The Sentence

1st Charge: The accused is sentenced to 10 years imprisonment with effect from date of sentence and 9 strokes of the rotan.

2nd Charge: The accused is sentenced to 10 years imprisonment with effect from date of sentence and 9 strokes of the rotan.

The above sentences are to run consecutively.

Factors Considered

Seriousness of the offence

Rape is a serious offence for which a severe punishment is prescribed by law. It would not be out of place to follow the example of Lord Lane CJ in *R v Billam [1986] 1 WLR 349* in citing a passage from the Criminal Law Revision Committee's 15th report on sexual offences in 1984 which was as follows:

“Rape is generally regarded as the most grave of all sexual offences. Rape involves a severe degree of emotional and psychological trauma. It may be described as a violation which in effect obliterated the personality of the victim. Its physical consequences equally are severe: the actual physical harm occasioned by the act of intercourse; associated violence or force and in some cases degradation; after the event, quite apart from the woman’s continuing insecurity, the fear of venereal disease or pregnancy. We do not believe this latter fear should be under-estimated, because abortion would usually be available. This is not a choice open to all women and it is not a welcome consequence of any. Rape is also particularly unpleasant because it involves such intimate proximity between the offender and victim. We also attach importance to the point that the crime of rape involves abuse of an act which can be a fundamental means of expressing love for another, and to which as a society we attach considerable value.....”

Although convictions for rape are by no means rare occurrences, there appears to have been no attempt in Malaysia so far to lay down guidelines as to sentences to impose although it is trite law that sentencing courts must take into consideration public interest which demands that a deterrent sentence be given. The length and severity of sentence in each case is at the discretion of the court and depends on the individual facts of the case.

In fact, Richard Malanjum JC (as His Lordship then was) enumerated aggravating factors in *Hairani bin Sulong v PP [1993] 2 CLJ 79* as follows:

“The crime should in any event be treated as aggravated by any of the following factors:

- (1) violence is used over and above the force necessary to commit the rape;*
- (2) a weapon is used to frighten or wound the victim;*
- (3) the rape is repeated;*
- (4) the rape has been carefully planned;*
- (5) the defendant has previous convictions for rape or other serious offences of a violent or sexual indignities or perversions;*
- (6) the victim is either very old or very young; and*
- (7) the effect on the victim, whether physical or mental, is of special seriousness.*

Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.”

The *modus operandi* of the accused in satisfying his lust on a helpless woman was well devised. First he gained the confidence of the complainant’s husband as a well wisher, then caring for his health, masqueraded as a medicine man who had the panacea for his persistent cough. He made sure that before executing his sexual urge, the coast was clear, i.e. the husband was not around. The accused was in something of a responsible position of trust towards the complainant because he gave the impression that he was the saviour who could cure her husband’s ailment. This factor made violence unnecessary and caused the complainant to be less prepared for the advances of the accused and further made it more difficult for her to defend herself against the accused.

The complainant was the wife of a fellow countryman but the accused still had the audacity to commit such a sin on her.....” *Thou shalt not covet thy neighbour’s wife”*. The relationship between the complainant and the accused prior to the offence was nothing more than a medicine man who had come to cure her husband. This incident has left the complainant with feelings of humiliation, degradation and guilt. This sordid experience has shaken the foundation of the complainant’s life, resulting in her crying after the accused had left the house. The sanctity of a married couple was shattered by the callous act of the accused on the complainant.

The accused was undoubtedly trusted and respected by the complainant and her husband, permitting him into their house. It was a sad and shameful abuse of this trust and respect that allowed him to do what he did to the complainant. Equally it was because of this trust and respect that the complainant submitted to him, persuaded by the accused that what he was doing was right, a rape that was carefully planned before it was executed.

Public interest

In the oft-quoted case of *R v Kenneth John Ball* [1951] 35 Cr. App. R 164, Hilbery J observed that:

“In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition that, if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient or severe.”

In the Singapore case of *Angliss Singapore Pte Ltd v PP* [2006] 4 SLR 653. VK Rajah J, explained that it would be wrong to cite *R v Ball* as authority for the proposition that the public interest should be regarded as a separate and distinct sentencing principle. Rather, Hilbery J was merely expressing the view that in assessing the appropriate sentence, a sentencing judge should apply his mind to whether the sentence is necessary and justified by the public's interest in deterring and preventing criminal conduct, such a concern being encapsulated within the conventional sentencing rationales of general deterrence, specific deterrence, retributivism, rehabilitation and prevention.

In *PP v Ahmad Khairul Fa'ais bin Mat Dahlan & Ors* [2006] 5 MLJ 190, VT Singham J, on one hand, held that public interest and public safety are paramount when compared to the interest of an individual, the offence committed by the accused was serious and that the degree of seriousness must be reflected in the sentence imposed; however, on the other hand, his Lordship opined that the maximum penalty is only intended for cases falling within the worst category of cases, hence, the maximum sentence should not be imposed against the accused as regard must be had to the proportion between the offence, the punishment prescribed by the law, the mitigating plea and any extenuating circumstances which might exist and to be in favour of the accused.

Abdul Wahab Patail J (as his Lordship then was) in *PP v Soh Soo Yang & Anor* [2001] 5 MLJ 356 observed that the court also had to see that the punishment was

fair and just to suit the crime. If the public, including the victims and their dependants, do not feel justice is done according to the crime, respect for and reliance upon the law will be eroded.

In the instant case, the accused was in a position of trust. Though invited by the complainant's husband in good faith, he was an intruder into the complainant's home and deprived the complainant of her liberty for a period of time and committed this heinous crime. What the accused did was indeed despicable and public interest would be best served if the accused was kept longer in person. The clangs of the iron gate of the prison ought to remain in his memory for a long time. His detention for a very substantial period is necessary to protect females from his criminal behaviour. Having gratified his lust, he exited from the scene gracefully by requesting permission to leave, as if nothing had happened.

Considering the circumstances in which this rape was committed, this court is of the view nothing could mitigate what the accused did to the complainant. Rape is a heinous crime which must be severely punished. The complainant would surely have to bear forever the ugly memory of this rape, if not any of the undeserved stigma of a rape.

There are certain standards of behaviour or moral principles which society requires to be observed. One of them is the physical integrity of a human being. To this, a term of imprisonment to offenders of rape would really sustain the sense that the conduct is immoral and without the severe punishment of imprisonment the prevalent morality would change in a permissive direction. The punishment for rape should therefore adequately reflect the revulsion felt by the majority of the citizens and that can only be achieved by keeping the offenders away from the society for a long term by imposing a custodial sentence upon conviction.

This court is of the considered opinion that if he is old enough to commit an adult offence, then he should be deemed to be old enough to take the consequences.

Mitigation

In mitigation, the accused pleaded as follows:

*"Plea for leniency.
Married with 4 children.
My family depends on me to support them.
I will not commit the same mistake again.
I regret for what I did."*

A plea of guilt is a mitigating factor as it saves the victim from a further embarrassment of narrating the sordid event but at times that plea does not influence a sentence, for example in cases where the Court is of the opinion that the offence committed is serious and deterrence must be the prime concern. What severity of sentence ought to be given, will depend on the facts of the case as laid down in *Wong Kai Chuen Philip v PP* [1991] 1 MLJ 321.

This court is of the opinion that the practice of imposing a lenient sentence on an accused by reason of his guilty plea, thus saving time and cost is **ONLY A GENERAL RULE!** Thus, it is not an automatic ritual that a guilty plea on its own, will entitle a right for an accused to receive a lenient sentence. In exercising its discretion, a court can decline to give any credence to such plea.

The accused in this case sought sympathy by claiming that he was remorseful and his family with 4 children would suffer without him. This court could not find sufficient evidence to show that the accused plea of guilt was motivated by remorse, contriteness or regret. In fact, the circumstances surrounding the offence suggest that it was tactfully manipulated and executed. If the accused had the utmost concern for his wife and children, he would not have stooped so low as to commit the offence with someone else's wife.

From the facts of this case itself, deceit was exercised upon an innocent victim; the panacea for the husband's ailment was assured by the accused, who portrayed a medicine man. Little did she know that the accused was a wily fox wearing the proverbial sheep's costume. The accused must have been emboldened in his sortie to satisfy his lusty pursuit, the moment the husband of the complainant left the house. The accused was a rogue and a sex predator.

In *PP v Jessica Lim Lu Ping & Anor* [2004] 2 CLJ 763 it was stated that no golden rule has yet been formulated by the courts in respect of sentencing in criminal cases. There is, however, a general flexible principle that the trial court is free to exercise its discretion, judicially and conscientiously, with regard to the period of incarceration that a convict should undergo. It is customary for the court to give the convict a reduced-sentence for pleading guilty. The court recognises that a plea of guilty disposes of a criminal case with lightning speed; it eases the backlog of undisposed criminal cases and unclogs the courts and prisons of remand-prisoners. A reduced-sentence for pleading guilty encourages the accused to be honest in admitting to the offence he has committed. A discount of between one-quarter and one-third of the sentence that would otherwise have been imposed is usually given.

However, a guilty plea does not necessarily reduce the sentence, as held in the following cases, where the gravity of the offence and the interest of the public outweighed: *Christopher Khoo Ewe Cheng v PP* [1998] 3 CLJ 705; *Ismail Rasid v PP* [1999] 4 CLJ 402 and *Teo Chin Hwa v PP* [2000] 1 CLJ 224.

As such, though the accused pleaded guilty, this was a classic case where the sentence should not be discounted for the purpose of reflecting society's abhorrence to crimes of this nature. His guilty plea cannot be a mitigating factor when effectively no defence to the charge is available to the accused.

On the sentences imposed on the accused, this court is of the considered opinion that the offence of rape under Section 376(1) of the Penal Code, without any aggravating or mitigating factors, in which sexual intercourse with a woman is constituted by penetration against her will, must by its very act contain an element of violence and a sentence of caning of not less than six strokes should normally be imposed in addition to a term of imprisonment. This was the opinion of the court in *Chia Kim Heng Frederick v PP [1992] 1 SLR 361*.

Thus, after taking into consideration the gravity of the offence, public interest, the guilty plea of the accused, all related facts and the exhibits tendered in court, this court deemed fit that the accused be sentenced as follows:

1st Charge: The accused is sentenced to 10 years imprisonment with effect from date of sentence and 9 strokes of the rotan.

2nd Charge: The accused is sentenced to 10 years imprisonment with effect from date of sentence and 9 strokes of the rotan.

The above sentences are to run consecutively.

If at all this court had erred in law, it is only in respect of the lenient sentence meted against the accused.

Dated the 15th April 2010.

signed

(M.RAJALINGAM)

Deputy Registrar

High Court

Sibu