A

Public Prosecutor v Rozita bt Mohamad Ali

B HIGH COURT (SHAH ALAM) — JUDICIAL REVIEW NO 43–20–03 OF 2018
ABDUL MAJID JC
12 APRIL 2018

C *Criminal Procedure — Revision — Sentence — Respondent charged under s 326 of the Penal Code — Respondent pleaded guilty — Respondent convicted and sessions court judge directed that respondent be released on her entering into bond with one surety in sum of RM20,000 — Appellant applied for revision of sentence — Whether s 294(1) of the Criminal Procedure Code ('the CPC') had*
D *ceased to be applicable to serious offence vide Act A1521 — Whether learned sessions court judge had wrongly exercised discretion in opting to s 294(1) of the CPC — Whether deterrent sentence should be imposed — Criminal Procedure Code s 294 — Penal Code s 326*

E The respondent was originally charged with the offence of attempted murder under s 307 of the Penal Code ('the PC') and she claimed trial. However, when the amended charge for voluntarily causing grievous hurt under s 326 of the PC was tendered, the respondent pleaded guilty of the offence. On 17 April 2017, the complainant had written to the attorney general ('the AG')
F expressing her intention not to proceed with the case, nonetheless, the AG rejected the complainant's application. As the respondent pleaded guilty to the charge, the learned sessions court judge ('the SCJ') convicted the respondent and directed that the respondent be released on her entering into a bond with one surety in the sum of RM20,000 for a period of five years. Dissatisfied with
G the sentence imposed, the appellant then filed a notice of appeal. Pending the said appeal, the appellant had filed the present application for revision of the sentence imposed by the learned SCJ premised on the following grounds: (a) s 294(1) of the Criminal Procedure Code ('the CPC') had ceased to be applicable to serious offences vide Act A1521 and the learned SCJ had failed to
H take this fact into consideration; and (b) the learned SCJ had failed to consider: (i) the prosecution had called ten witnesses; (ii) the seriousness of the injuries sustained by the complainant; (iii) the element of public interest; (iv) the image of the country was smeared and the diplomatic relationship between Malaysia and Indonesia was badly affected; and (v) the rampancy of cases involving maid
I abuse. The respondent raised a preliminary objection ie whether a revision was appropriate when the notice of appeal had been filed.

Held, setting aside the order of binding over and substituting it with a sentence of eight years imprisonment with effect from 29 March 2018:

(1) The appellant must choose to proceed with the appeal or revision if both matters were before the court. In the present case, the appellant chose to proceed with the application for revision. Therefore, the court dismissed the preliminary objection (see para 20).

(2) The amendment, vide Act A1521, came into force on 1 March 2017 and Act A1521 made no provision making the amendment retrospective. As this involved criminal law and punishment, the amendment did not apply to any serious offence committed prior to 1 March 2017. To argue otherwise would offends art 7(1) of the Federal Constitution. The offence was committed on 21 December 2016 and if the charge was proven against the respondent, she might suffer the punishment provided under the said provision but at the same time it would be open to the trial court to opt for s 294(1) of the CPC (see paras 23 & 29).

(3) The learned SCJ had wrongly exercised his discretion in opting for s 294(1) of the CPC. Obviously, the fact that the complainant wished not to pursue could not be a factor to be considered (see paras 14 & 36).

(4) The respondent pleaded guilty after ten witnesses took the stand and she chose to claim trial for the earlier charge. Although the respondent pleaded guilty when the charge was amended, this could not be a strong mitigating factor. There was no doubt that the respondent was a first offender, but the gravity and the seriousness of the offence committed would outweigh that mitigating factor. Further, based on the notes of evidence, there was no strong defence as far as the assault was concerned. There was no provocation from the complainant and the respondent's act was deliberate and not impulsive. The court further took judicial notice of the fact that maid abuse was rampant and prevalent. This factor would justify deterrent sentence to be meted out (see paras 34–35, 39 & 41–42).

(5) For an offence of causing grievous hurt, the injuries inflicted were the utmost important factor that would guide the court in assessing sentence. In the present case, out of the eight kinds of hurt designated as grievous hurt enumerated under s 320 of the PC, the hurt sustained by the complainant fell under para (g) — 'fracture or dislocation of a bone'. A fracture caused by an instrument, used as weapon of offence was likely to cause death ie the steel mop rod had satisfied the elements of s 326 of the PC. The complainant was defenceless and traumatic while under employment of the respondent (see paras 52–53).

[Bahasa Malaysia summary

Responden pada asalnya didakwa dengan kesalahan percubaan membunuh di bawah s 307 Kanun Keseksaan ('KK') dan menuntut perbicaraan. Walau bagaimanapun, apabila tuduhan yang dipinda menyebabkan cedera parah dengan sengaja di bawah s 326 KK dimasukkan, responden mengaku bersalah

terhadap kesalahan tersebut. Pada 17 April 2017, pengadu telah menulis kepada peguam negara ('PN') menyatakan niatnya untuk tidak meneruskan dengan kes tersebut, walau bagaimanapun, PN menolak permohonan pengadu. Memandangkan responden mengaku bersalah terhadap kesalahan tersebut, hakim mahkamah sesyen yang bijaksana ('HMS') menyabitkan responden dan mengarahkan bahawa responden dilepaskan apabila jaminan dimasukkan dengan satu jaminan dalam jumlah sebanyak RM20,000 bagi tempoh lima tahun. Tidak puas hati dengan hukuman yang dikenakan, perayu kemudiannya memfailkan notis rayuan. Sementara menunggu rayuan tersebut, perayu telah memfailkan permohonan ini untuk semakan terhadap hukuman yang dikenakan oleh HMS yang bijaksana berdasarkan atas alasan-alasan berikut: (a) s 294(1) Kanun Tatacara Jenayah ('KTJ') telah berhenti untuk beraplikasi kepada kesalahan-kesalahan serius melalui Akta A1521 dan HMS yang bijaksana telah gagal untuk mengambil kira fakta ini dalam pertimbangan; dan (b) HMS yang bijaksana telah gagal untuk mempertimbangkan: (i) pihak pendakwaan telah memanggil sepuluh saksi; (ii) keseriusan kecederaan yang dialami oleh pengadu; (iii) unsur kepentingan awam; (iv) imej negara dicemar dan hubungan diplomatik di antara Malaysia dan Indonesia adalah amat terjejas; dan (v) kes-kes melibatkan penderaan pembantu rumah berleluasa. Responden membangkitkan bantahan awalan iaitu sama ada semakan adalah wajar apabila notis rayuan telah difailkan.

Diputuskan, mengetepikan perintah mengikat dan menggantikannya dengan hukuman lapan tahun penjara berkuat kuasa dari 29 Mac 2018:

(1) Perayu mesti memilih untuk meneruskan dengan rayuan atau semakan jika kedua-dua perkara adalah di hadapan mahkamah. Dalam kes ini, perayu memilih untuk meneruskan dengan permohonan untuk semakan. Oleh itu, mahkamah menolak bantahan awalan (lihat perenggan 20).

(2) Pindaan, melalui Akta A1521, berkuat kuasa pada 1 Mac 2017 dan Akta A1521 tidak membuat peruntukan untuk membuatkan pindaan kebelakangan. Memandangkan ini melibatkan undang-undang jenayah dan hukuman, pindaan tidak diguna pakai kepada mana-mana kesalahan serius yang dilakukan sebelum 1 Mac 2017. Untuk berhujah sebaliknya akan melanggar perkara 7(1) Perlembagaan Persekutuan. Kesalahan yang dilakukan pada 21 Disember 2016 dan jika tuduhan dibuktikan terhadap responden, dia mungkin mengalami hukuman yang diperuntukkan di bawah peruntukan tersebut tetapi pada masa yang sama ia akan terbuka kepada mahkamah perbicaraan untuk memilih untuk s 294(1) KTJ (lihat perenggan 23 & 29).

(3) HMS yang bijaksana telah salah melaksanakan budi bicaranya dalam memilih untuk s 294(1) KTJ. Secara nyata, fakta bahawa pengadu memilih untuk tidak meneruskan tidak boleh menjadi faktor

dipertimbangkan (lihat perenggan 14 & 36).

(4) Responden mengaku bersalah selepas sepuluh saksi memberi keterangan dan dia memilih untuk menuntut perbicaraan bagi tuduhan terdahulu. Walaupun responden mengaku bersalah apabila tuduhan dipinda, ini tidak boleh menjadi faktor pengurangan yang kuat. Jelas tidak dapat diragukan bahawa responden adalah pesalah pertama, tetapi graviti dan keseriusan kesalahan yang dilakukan akan melebihi faktor pengurangan. Selanjutnya, berdasarkan atas nota-nota keterangan, tidak terdapat pembelaan yang kuat tentang serangan. Tidak terdapat provokasi daripada pengadu dan tindakan responden adalah sengaja dan bukan impulsif. Mahkamah selanjutnya mengambil kira notis kehakiman fakta bahawa penderaan pembantu rumah adalah berleluasa dan umum. Faktor ini akan menjustifikasikan hukuman pencegahan dijalankan (lihat perenggan 34–35, 39 & 41–42).

(5) Untuk kesalahan menyebabkan kecederaan yang teruk, kecederaan yang dikenakan adalah faktor yang paling penting yang akan membimbing mahkamah dalam menilai hukuman. Dalam kes ini, daripada lapan jenis kecederaan yang diperuntukkan sebagai kecederan teruk yang disebut di bawah s 320 KK, kecederaan yang ditanggung oleh pengadu terangkum di bawah perenggan (g) — 'fracture or dislocation of a bone'. Patah disebabkan oleh instrumen, digunakan sebagai senjata kesalahan berkemungkinan menyebabkan kematian iaitu batang pengelap keluli telah memuaskan unsur-unsur s 326 KK. Pengadu adalah tidak dipertahankan dan traumatik semasa bekerja dengan responden (lihat perenggan 52–53).]

Notes

For cases on sentence, see 5(2) Mallal's Digest (5th Ed, 2017 Reissue) paras 3972–3983.

Cases referred to

Abdul Kassim bin Idris v PP [2007] 4 MLJ 738, HC (refd)
Anbalagan a/l Murugesu lwn Pendakwa Raya [2013] 9 MLJ 88, HC (refd)
Ang Poh Chuan v PP [1996] 1 SLR 326, HC (refd)
Annantan Subramaniam v PP [2006] MLJU 648; [2007] 8 CLJ 1, HC (refd)
Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534, CA (refd)
Badri bin Abas, Re [1971] 1 MLJ 202 (refd)
Basheer Ahmad Maula Sahul Hameed dan lain-lain lwn Pendakwa Raya [2016] 9 MLJ 549, HC (refd)
Budiman bin Che Mamat v PP [2017] MLJU 1960; [2017] 1 LNS 1936, HC (refd)
Chew Eng Aik lwn Pendakwa Raya [2015] 10 MLJ 799; [2014] 1 LNS 1303, HC (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1; [1997] 4 CLJ 645, FC (refd)

A *Dato' Seri Anwar Ibrahim v PP* [2004] 1 MLJ 497; [2004] 1 CLJ 592, CA (folld)
Hafiz Fathullah v PP [2016] MLJU 773; [2016] 1 LNS 989, HC (refd)
Lee Kian Yap lwn Pendakwa Raya [2015] MLJU 2342; [2015] 1 LNS 152, HC (refd)
B *Liaw Kwai Wah & Anor v PP* [1987] 2 MLJ 69, SC (consd)
Lim Yoon Fah v PP [1971] 1 MLJ 37 (refd)
Magenthiran Allagari lwn Pendakwa Raya [2015] MLJU 2343; [2015] 1 LNS 33, HC (refd)
C *Mazlan Ahmad v Pendakwa Raya* [2016] MLJU 1879; [2016] 1 LNS 205, HC (refd)
Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 1 MLJ 645, CA (refd)
Mok Swee Kok v PP [1994] 3 SLR 140, CA (refd)
D *PP v Kow Ngo* [2009] MLJU 1867; [2010] 5 CLJ 208, HC (refd)
Pegawai Pendakwaraya v Dato' Nallakaruppan a/l Solaimalai [1999] MLJU 74; [1999] 2 CLJ 596, HC (refd)
Pendakwa Raya v Mohamed Danny bin Mohamed Jedi [2018] MLJU 53, CA (refd)
E *Pendakwa Raya v Sangkar a/l Ratnam* [2007] 7 MLJ 353, HC (refd)
Philip Lau Chee Heng v PP [1988] 3 MLJ 107, HC (consd)
PP v Abdul Halim bin Abd Samat [2014] 6 MLJ 144, CA (refd)
PP v Cheah Cheng Eng [1986] 2 MLJ 39, SC (refd)
PP v Chew Jim [1950] 1 MLJ 203 (refd)
F *PP v Fam Kim Hock* [1957] 1 MLJ 20 (refd)
PP v Hun Peng Khai & Ors [1984] 2 MLJ 318 (refd)
PP v Leo Say & Ors [1985] MLJU 2; [1985] CLJ Rep 683, HC (refd)
PP v Leonard Glenn Francis [1989] 2 MLJ 158; [1989] 1 CLJ 972, HC (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
G *PP v Low Kok Wai* [1988] 3 MLJ 123; [1988] 2 CLJ 105, HC (refd)
PP v Muhamad Arif bin Sabri & Ors [2014] 6 MLJ 282, CA (refd)
PP v Muhari bin Mohd Jani & Anor [1996] 3 MLJ 116, HC (consd)
PP v Oo Leng Swee & Ors [1981] 1 MLJ 247, FC (refd)
H *PP v Sathiaseelan a/l Periyasamy & Anor* [2010] 8 MLJ 710, HC (refd)
PP v Tan Eng Hock [1970] 2 MLJ 15 (refd)
PP v Yeong Yin Choy [1976] 2 MLJ 267 (refd)
R v Ball (1951) 35 Cr App Rep 164, CA (refd)
Rosli bin Supardi v PP [2002] 3 MLJ 256; [2002] 3 CLJ 544, CA (refd)
I *Sellvam a/l Sangaralingam & Anor v Pendakwa Raya and another appeal* [2016] MLJU 1298, HC (refd)
Sinnathurai a/l Subramaniam v Pendakwa Raya [2011] MLJU 1511; [2011] 5 CLJ 56, CA (refd)

Legislation referred to

Criminal Procedure Code ss 264(6), 294, 294(1), (6)
Dangerous Drugs Act 1952 s 39B(1)
Federal Constitution arts 7, 7(1), 145(3)
Penal Code ss 307, 320, 320(g), 324, 326

Hanif Khatri (Rozal Azimin, Yazeed Azad and Luqman Mazlan with him) (Shamsuddin & Co) for the appellant.
Mohammad Iskandar (V Shiloshani with him) (Attorney General's Chambers) for the respondent.

Abdul Majid JC:

INTRODUCTION

[1] The accused person was earlier charged with attempted murder under s 307 of the Penal Code ('the PC') and she claimed trial. Based on the record of proceedings on 17 April 2017 the court below was informed that the complainant had written in to the attorney general expressing her intention not to proceed with the case and wanted to withdraw her police report. The case was then postponed to 9 May 2017. On 9 May 2017 the learned deputy public prosecutor ('DPP') informed the court below that the attorney general had rejected the complainant's application and the trial thereafter commenced with the complainant herself being called to take the stand.

[2] After having ten witnesses called the prosecution tendered an amended charge pursuant to a representation submitted by the accused person. The amended charge was one under s 326 of the PC an offence of voluntarily causing grievous hurt by dangerous weapons or means. The amended charge reads as follows:

> Bahawa kamu pada 21/12/2016 antara jam 0700hrs sehingga jam lebih kurang 1200hrs di dalam rumah beralamat No 62, Jalan PJU 7/30, Mutiara Damansara, Damansara, Petaling Jaya, dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan, dengan sengaja telah menyebabkan cedera parah ke atas seorang perempuan warganegara Indonesia yang bernama Suyanti binti Sutrinso, No Passport: B 5682910 dengan menggunakan sebilah pisau berhulu biru, sebatang pengelap lantai, sekaki payung, sebatang rod besi warna biru, sebatang alat mainan kucing dan satu penyangkut baju warna putih yang digunakan sebagai senjata untuk menyerang dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 326 Kanun Keseksaan.

[3] This charge was tendered on 8 January 2018 and the accused person claimed trial but decided to plead guilty after the matter was stood down. The learned sessions court judge thereafter postponed the case to 11 January 2018 and subsequently postponed to 15 February 2018 and finally the continued

hearing of the case was fixed on 14 March 2018.

[4] On 14 March 18 the amended charge was read over and explained to the accused person and she maintained her guilty plea. Thereafter the facts were read and the exhibits were tendered and she admitted to the same. Having satisfied that the accused person understood the nature and consequences of the plea and admitted to the facts and the exhibits tendered, the learned sessions court judge accepted the plea of guilt and entered a conviction and called upon the parties to submit on the sentence.

[5] Both parties referred to their written submissions respectively. In mitigation she advanced the following factors:

(a) married with no children and a full time homemaker;

(b) she cooperated with the police and never failed to attend the hearings;

(c) she regretted her action and remorseful;

(d) the complainant had wanted to withdraw her police report and did not wish to pursue this matter;

(e) she was emotionally distressed;

(f) she had undergone a surgery and attending physiotherapy; and

(g) she had pleaded guilty.

[6] Learned counsel prayed that the accused be placed under a bond of good behaviour under sub-s 294(1) of the Criminal Procedure Code ('the CPC').

[7] In response the learned DPP pressed for a deterrent sentence based on the element of public interest. It was also pointed out that the fact that the complainant did not want to pursue was irrelevant and that the prosecution could still proceed with the case. The learned DPP did address the court below on the amendment to sub-s 264(6) of the CPC.

[8] Having heard the mitigating factors and reply from the prosecution, the learned sessions court judge directed that the accused person be released on her entering into a bond with one surety in the sum of RM20,000 for a period of five years.

[9] On 19 March 2018 the learned DPP wrote in to the High Court seeking a revision over the sentence imposed by the learned sessions court judge on 15 March 2018. The grounds cited in support of the application were briefly as follows:

(a) sub-s 294(1) of the CPC has ceased to be applicable to serious offences

vide Act A1521 and the learned sessions court judge had failed to take this fact into consideration; and

(b) the learned sessions court judge had failed to consider:

(i) the prosecution had called ten witnesses;

(ii) the seriousness of the injuries sustained by the complainant;

(iii) the element of public interest;

(iv) the image of the country is smeared and the diplomatic relationship between Malaysia and Indonesia is badly affected; and

(v) the rampancy of cases involving maid abuse.

[10] Having read Act A1521, I do not think that the amendment would be applicable to this case as the offence was committed on 21 December 2016. Nevertheless, bearing in mind the cases of *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69; *Philip Lau Chee Heng v Public Prosecutor* [1988] 3 MLJ 107; and *Public Prosecutor v Muhari bin Mohd Jani & Anor* [1996] 3 MLJ 116, I could still call for the record of proceedings to look at the correctness or propriety of the sentence. Therefore, I called up for the same to be transmitted. The brief reason stated by the learned sessions court judge in passing the sentence was as follows:

> Jelas kepada mahkamah bahawa berdasarkan kepada keterangan mangsa sendiri sewaktu pemeriksaan balas bahawa mangsa ingin dan telah menarik semula laporan polisnya terhadap OKT. Pegawai penyiasat kes telah merakam percakapan menarik balik beliau walaupun laporan itu tidak dikemukakan ke mahkamah. Keterangan mangsa ini meletakkan mahkamah dalam *dilemma — machinery of justice* telah berputar tetapi dan akan terus berputar sehingga satu penghakiman diputuskan oleh saya. Apabila OKT mengaku salah maka *dynamics* kes tersebut juga berubah dan tidak boleh disamakan dengan kes bicara penuh. Berdasarkan fakta yang amat unik ini maka saya berpuas hati bahawa satu hukuman yang sesuai adalah bond berkelakuan baik untuk tempoh selama lima tahun dengan jaminan sedia ada.

[11] Section 294(1) of the CPC provides 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 behaviour.

[12] The factors to be considered or rather that could trigger the invocation of sub-s 294(1) namely, 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 and nothing else as in *Public Prosecutor v Chew Jim* [1950] 1 MLJ 203 Thomson J (as he then was) said:

> As regards s 294 of the Criminal Procedure Code, that section provides that binding over may be substituted for imprisonment if it appears to the court that such substitution is 'expedient' regard being had to the character, the antecedents, the age, the 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. As I had occasion to observe in Criminal Appeal No 38 of 1949, (see [1949] MLJ 231) 'each individual case must be considered on its merits and *must be examined with a view to ascertaining whether having regard to any of the matters mentioned in s 294 binding over is in all the circumstances of the case expedient.* (Emphasis added.)

[13] An application to withdraw a complaint or police report by a complainant against an accused person to the attorney general is not uncommon in criminal cases. To my mind, legally a police report cannot be withdrawn or revoked but a complainant may appeal to the attorney general not to proceed with the prosecution of the accused person and it is solely the prerogative of the attorney general to institute or decline a prosecution under art 145(3) of the Federal Constitution. This is because once a person decides to lodge a police report against another for a wrong committed by the latter the matter is no longer under the former's control. It is no longer his or her case but a case by the state under the control of the attorney general. A prosecution will ensue if there is sufficient evidence to prove the offence alleged. However, a private prosecution may be taken up by an individual if the attorney general declines to prosecute in cases involving non-seizable offences. It is for this reason to my mind the fact that the complainant wishes not to pursue is not a factor to be considered for the application of sub-s 294(1) of the CPC.

[14] Having read the said provision and the factors provided therein or rather the prerequisites to be satisfied before the court can invoke sub-s 294(1), I am satisfied that the learned sessions court judge had wrongly exercised his discretion in opting for sub-s 294(1) of the CPC. Obviously the fact that the complainant wishes not to pursue cannot be a factor to be considered. Hence, the revision.

[15] On 29 March 2018 all parties were present including the accused person. Learned counsel for the accused raised a preliminary objection ie whether a revision was appropriate when the notice of appeal has been filed. Apparently the prosecution has filed the notice of appeal on 15 March 2018.

The preliminary objection

[16] Learned counsel for the accused submitted that by applying for revision after filing the notice of appeal, the prosecution was abusing the process of the court. According to learned counsel the prosecution must choose whether to proceed with the revision or appeal and they have to withdraw the notice of appeal if they wished to proceed with the appeal. He further argued that a revision cannot be used as a backdoor and would make an appeal redundant. He relied on the case of *Basheer Ahmad Maula Sahul Hameed dan lain-lain lwn Pendakwa Raya* [2016] 9 MLJ 549; *Mok Swee Kok v Public Prosecutor* [1994] 3 SLR 140; and *Ang Poh Chuan v Public Prosecutor* [1996] 1 SLR 326.

[17] In response, the learned DPP undertook to withdraw the notice of appeal and maintain the application for revision. He cited public outcry hence the need to hear this matter urgently. He referred to *Rosli bin Supardi v Public Prosecutor* [2002] 3 MLJ 256; [2002] 3 CLJ 544 where the Court of Appeal revised and enhanced the sentence although there was no appeal by the prosecution.

[18] The cases referred to by learned counsel for the accused person dealt with the issue where once the accused person had pleaded guilty he could only appeal against the sentence imposed — *Basheer Ahmad Maula Sahul Hameed*. However, the appellate court in hearing the appeal could be invited to look at the propriety of the proceedings, for example, the facts tendered in the court below did not satisfy the elements of the offence charged — *Mok Swee Kok*; no notice of appeal was filed by the accused person against the forfeiture order but a petition for revision was filed by an interested party — *Ang Poh Chuan*.

[19] I could not find any judicial pronouncement in these cases that once a notice of appeal is filed, an application for a revision cannot be done. Even in *Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1 MLJ 645 at p 655 Gopal Sri Ram JCA (as he then was) said:

> The second principle of settled law is that, save in exceptional cases and for very good reasons, there can be no resort had by a party to the revisionary jurisdiction of the High Court when the decision complained of is appealable and no appeal has been lodged.

[20] However, I agreed that the prosecution must choose to proceed with the appeal or revision if both matters are before the court. Here, the prosecution chose to proceed with the application for revision. I, therefore dismissed the preliminary objection.

The revision

[21] The learned DPP submitted that the sentence of binding over under sub-s 294(1) of the CPC is illegal and manifestly and grossly inadequate.

Application of sub-s 294(6)

[22] On illegality, the learned DPP contended that as s 294 was amended with the insertion of sub-s 294(6) which came into force on 1 March 2017, an offence under s 326 of the PC being a serious offence is excluded from the application of sub-s 294(1). He submitted that the amendment being procedural, it has retrospective application. In support he cited the case of *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645.

[23] The amendment, vide Act A1521, came into force on 1 March 2017. As this involves criminal law and punishment, I was of the view that the amendment does not apply to any serious offence committed prior to said date. To argue otherwise would, to my mind, offends art 7(1) of the Federal Constitution. The offence was committed on 21 December 2016 and if the charge is proven against her she may suffer the punishment provided under the said provision but at the same time it would be open to the trial court to opt for sub-s 294(1) of the CPC.

[24] Article 7 of the Federal Constitution provides as follows:

> 7 Protection against retrospective criminal laws and repeated trials
>
> (1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and *no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed*.
>
> (2) ... (Emphasis added.)

[25] Prior to 1 March 2017 any accused person irrespective of being convicted of any offence punishable with any punishment would be entitled as of right to be considered to be released on a bond of good behaviour. The insertion of sub-s 294(6) of the CPC has taken this right away or deprived the accused person of her right to be considered to be released on a bond of good behaviour.

[26] In *Public Prosecutor v Hun Peng Khai & Ors* [1984] 2 MLJ 318, the accused persons were charged with trafficking in drugs under s 39B(1) of the Dangerous Drugs Act 1952 and the trial had commenced with one witness being called before the sessions court. At the material time the punishment for trafficking in drugs was either death or life imprisonment. As the accused persons were charged in the sessions court, upon conviction they would only suffer life imprisonment. However, the learned President of the sessions court

who felt bound by the decision of the High Court in Kuantan transferred the case to the High Court as he felt he that had no longer the jurisdiction to try the case owing to the amendment making death penalty a mandatory sentence.

[27] On revision Edgar Joseph Jr J (as he then was) ordered that the trial to continue in the sessions court as the accused persons had a vested interest that the sentence that could be imposed upon them was life imprisonment. If the transfer was allowed the appellant would face only one penalty ie death. This would infringe art 7(1) of the Federal Constitution. At p 326 the learned judge held as follows:

> This brings me to the case of *Public Prosecutor v Mohamed Ismail* [1984] 1 MLJ 134, a prosecution for trafficking in a dangerous drug in contravention of s 39B(1) of the Principal Act, in which I had to consider the question of law, 'what is the material date for determining sentence for offences under section 39B(1), is it the date of offence or date of conviction?' and I concluded, on the authority of the Privy Council case of *Baker & Anor v The Queen* [1975] 3 All ER 55 at pp 57–58, that it is the date of conviction. The effect of this was that prima facie, there being no saving clause in the Amending Act to the effect that this amendment shall not apply to offences committed prior to the date of its coming into force, I held that s 39B(2) is retrospective.
>
> However, so far as such offences were concerned, I was of opinion, fortified by another passage in the judgment of Lord Diplock in *Baker*'s case, at p 61 b–f, that it violates art 7(1) of our Constitution as it subjected such accused persons to greater punishment than was prescribed by law at the time the offence was committed.

[28] The Supreme Court affirmed this decision as reflected in the editorial note. Further in *Public Prosecutor v Cheah Cheng Eng* [1986] 2 MLJ 39 again the Federal Court held that at pp 40–41:

> Cases pending trial prior to the coming into force of the amending Act may still be heard by the sessions court unless of course the public prosecutor should choose to invoke s 41A of the Act which empowers the public prosecutor to require any case in respect of an offence under the Act to be tried by the High Court.

[29] Act A1521 makes no provision making the amendment retrospective. Therefore, it is my considered opinion that sub-s 294(6) of the CPC is only applicable to serious offences committed after 1 March 2017. Notwithstanding the amendment was made to a code of procedure, it touches the substantive right of an accused person. In *Hun Peng Khai* at p 320 the learned judge said:

> It is true that it is not unknown for Parliament to legislate with retrospective effect so that the law of tomorrow becomes the law of yesterday. It is equally true that no one has a vested right in procedure (*Public Prosecutor v Dato Harun Idris* [1977] 1 MLJ 14). However, this rule of construction is subject to the important qualification that where rights are vested in or accrued to a party they are not

affected by a repeal or amendment to statute even if it relates to procedure.

Sentence

[30] With respect to the sentence being manifestly and grossly inadequate the learned DPP submitted that the learned sessions court judge in meting out the sentence failed to consider the followings:

(a) the injuries sustained by the complainant were serious and can lead to death and referred to the case of *Rosli bin Supardi v PP*;

(b) the element of public interest which demands the imposition of a heavy sentence and referred to the cases of *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 and *R v Ball* (1951) 35 Cr App Rep 164;

(c) the gravity of the offence and referred to the case of *Public Prosecutor v Abdul Halim bin Abd Samat* [2014] 6 MLJ 144; and

(d) the offence committed was prevalent and rampant and referred to the cases of *Public Prosecutor v Leonard Glenn Francis* [1989] 2 MLJ 158; [1989] 1 CLJ 972 and *Public Prosecutor v Sathiaseelan a/l Periyasamy & Anor* [2010] 8 MLJ 710.

[31] It was further submitted that the learned sessions court judge had over emphasised on the followings:

(a) the plea of guilt and referred to the cases of *Pendakwa Raya v Sangkar a/l Ratnam* [2007] 7 MLJ 353; *Pegawai Pendakwaraya v Dato' Nallakaruppan a/l Solaimalai* [1999] MLJU 74; [1999] 2 CLJ 596; and *Public Prosecutor v Oo Leng Swee & Ors* [1981] 1 MLJ 247; and

(b) first offender and referred to the case of *Public Prosecutor v Leo Say & Ors* [1985] MLJU 2; [1985] CLJ Rep 683.

[32] The learned DPP pressed for a deterrent sentence and referred to the cases of *Abd Halim Abd Samat* where the Court of Appeal substituted an order of binding over with a sentence of ten years' imprisonment. And in *Rosli bin Supardi* where the Court of Appeal substituted a sentence of six years' imprisonment and three strokes with twelve years' imprisonment and five strokes.

[33] Learned counsel for the accused in response, urged this court to maintain the order of binding over and submitted as follows:

(a) the accused had pleaded guilty and the learned sessions court judge had in fact determined the sentence of nine years' imprisonment if the bond is breached;

(b) sentencing being a matter of discretion the appellate court should be slow in interfering with the sentence imposed by the lower court. Reference was made to *Public Prosecutor v Muhamad Arif bin Sabri & Ors* [2014] 6 MLJ 282;

(c) public interest would be best served if the accused person was induced to turn from criminal ways to honest living and he referred to the case of *Lim Yoon Fah v Public Prosecutor* [1971] 1 MLJ 37 where the court substituted a sentence of thirty months' imprisonment and four strokes with a bond under s 294 for an armed robbery;

(d) the complainant had wanted to withdraw her police report against the accused person and this constituted an extenuating circumstances as provided in sub-s 294(1) of the CPC;

(e) the accused person, aged 44 and a housewife, was not in the category of a criminal;

(f) the accused person was a first offender and pleaded guilty on the day when the charge was amended and he referred to the case of *Public Prosecutor v Yeong Yin Choy* [1976] 2 MLJ 267 where the court affirmed the bond under s 294 for an offence under s 324 of the PC; and

(g) the court ought not to be influenced by the public who displayed their displeasure over the sentence imposed.

Decision

[34] The accused person pleaded guilty after ten witnesses took the stand. The original charge proferred against her was one under s 307 of the PC which carries a maximum term of twenty years' imprisonment. The charge was amended to s 326 of the PC which provides for a similar term of maximum imprisonment and liable to a fine or to whipping. Being a female she cannot be whipped. Hence, there is practically no difference in term of the sentence that could be imposed but she chose to claim trial under the earlier charge. Although she pleaded guilty when the charge was amended I do not think this can be strong mitigating factor. In *Dato' Nallakaruppan Solaimalai* at p 600 Arifin Jaka J had this to say:

> Di dalam kes sekarang OKT telah mengaku salah hanya selepas perbicaraan dijalankan selama dua belas (12) hari dan apabila pertuduhan dipinda. Dari fakta kes ini adalah nyata OKT menukar pendiriannya dan memilih untuk memberi kerjasama dengan pihak polis selepas banyak masa terbuang dan kesusahan kepada saksi yang telah memberi keterangan. Jika kerjasama ini diberikan sebelum OKT dihadapkan ke mahkamah atas pertuduhan yang asal saya percaya pihak Pendakwa Raya mungkin menggunakan budibicaranya untuk mengenakan tuduhan di bawah Akta Senjata Api 1960 terhadap OKT dan tidak menunggu selepas 12 hari

perbicaraan dijalankan. Pengakuan salah yang dibuat oleh OKT di dalam keadaan kes ini tidaklah boleh diterima sebagai satu fakta yang boleh meringankan hukuman.

This statement was approved by the Court of Appeal in *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534 and *Pendakwa Raya v Mohamed Danny bin Mohamed Jedi* [2018] MLJU 53.

[35] I had read the notes of evidence and I do not see any strong defence as far as the assault was concerned. Mohamed Dzaiddin J (as he then was) in *Public Prosecutor v Low Kok Wai* [1988] 3 MLJ 123 at p 124; [1988] 2 CLJ 105 at p 269 had this to say:

> It is a principle of sentencing that whenever possible the court should take into account as a mitigating factor the fact that the accused has pleaded guilty. The extent to which a plea of guilty is a mitigating factor must depend on the facts of each case, and it cannot be a powerful mitigating factor when effectively no defence to the charge was available to the accused.

[36] The fact that the complainant withdrew her police report and did not wish to pursue, to my mind, does not attract the invocation of sub-s 294(1) of the CPC. Learned counsel for the accused contended that it fell within the phrase 'to any extenuating circumstances under which the offence was committed'. I do not agree. In *Public Prosecutor v Fam Kim Hock* [1957] 1 MLJ 20 Buhagiar J did not disturb the sentence of binding over and held as follows:

> The offence is by no means of a trivial nature but the points mentioned in the above section are intended by the legislature to indicate the lines on which the discretion of the court should be exercised. In applying the provisions of s 294 in the present case the learned President took into consideration the fact that the respondent was a first offender, the circumstances under which the offence was committed *and that it was quite clear that the parties themselves would welcome a settlement. The last mentioned point would not in most cases be any reason why a convicted person should not suffer the punishment provided by law but in the particular circumstances of this case where the manager's son (who was the person with whom the respondent had to deal mostly and who for all practical purposes was the manager in Port Swettenham) had almost instructed him to commit irregularities is very relevant in considering whether this was a proper case for the application of s 294*. (Emphasis added.)

[37] So clearly it refers to the time when the offence was committed. Therefore, I do not think it can be extended to event or development that took place subsequent to the commission.

[38] Learned counsel for the accused urged upon me not take into account the public outcry, with respect, I disagree. Suffice for me to refer to the case of *Abd Halim Abd Samat* the Court of Appeal speaking through Raus Sharif PCA (as he then was) said:

> Learned counsel for the accused had urged this court to maintain the binding over order imposed by the courts below. With respect, if we were to accede to his request, *the public will think that the court is putting the interest of criminals above the interest of the public*. That cannot be right. As stated earlier this type of criminal conduct must be dealt with severely by the courts if it is to serve as a warning to other would be offenders. In our judgment, the element of public interest may be best served through the imposition of a custodial sentence given the gravity and other factors surrounding the wrongful act complained of. Surely, causing grievous hurt to a defenceless fellow human being, as in this case, attracts severe punishment under the law. (Emphasis added.)

[39] No doubt she was a first offender but the gravity and the seriousness of the offence committed would outweigh that mitigating factor as pointed out in *Abd Halim Abd Samat* which coincidently dealt with a similar offence. And further the emotional distress which resulted in poor health causing a surgery to be performed and to be followed by physiotherapy is not something that has been in existence before the offence was committed but as a result of the four day remand after she was arrested.

[40] Being 44 years of age she was not young nor old. In *Re Badri bin Abas* [1971] 1 MLJ 202 at p 203 Sharma J held:

> I am of the view that action cannot be taken under s 173A on the ground of the age of the offender alone unless there is placed on the record material to show that by reason of the character, antecedents and the circumstances under which the accused committed the offence, it was expedient to act under that section. There is no such record in this particular case and the age of the accused is also not one where the court could be favourably inclined to exercise its discretion either under s 173A or s 294 of the Criminal Procedure Code, as he is 36 years of age.

To my mind, this view is still good notwithstanding the Act A1274 which came into force on 6 March 2007 making this provision applicable to all offenders instead of adult offenders only.

[41] In *Public Prosecutor v Tan Eng Hock* [1970] 2 MLJ 15 Abdul Aziz J said:

> In fixing sentence, the nature and the circumstances and the degree of deliberation must be taken into account.

From the evidence adduced there was no provocation coming from the complainant and clearly the accused person's act was deliberate and not impulsive.

[42] The learned DPP contended that maid abuse was rampant and prevalent and I have no reason to disagree as I can take judicial notice of this fact. Cases of this nature often being widely reported. This factor would justify deterrent sentence to be meted out. In *Sinnathurai a/l Subramaniam v*

Pendakwa Raya [2011] MLJU 1511; [2011] 5 CLJ 56 the Court of Appeal at p 64 (CLJ) speaking through Ahmad Maarop JCA (as he then was) stated as follows:

> The learned judge also took into account the prevalence of offences of homicide which he observed was given wide media coverage. Again I do not think he had fallen into error. He was entitled to take judicial notice of the prevalence of such offences.

[43] Keeping in the forefront of my mind all the authorities aforesaid, I shall now examine some cases of similar offence with regard to sentencing:

(a) *Rosli bin Supardi* the Court of Appeal substituted the sentence of six years' imprisonment and three strokes with twelve years' imprisonment and five strokes. The appellant claimed trial and convicted. He was a first offender. The victim's throat was cut several times;

(b) *Annantan Subramaniam v Public Prosecutor* [2006] MLJU 648; [2007] 8 CLJ 1 the High Court maintained the sentence of eight years and eight strokes. The appellant aged 20, pleaded guilty and a first offender. The weapon used was a rambo knife. The victim was stabbed in her abdomen and her throat was cut after the appellant raped her. All in all the appellant suffered twenty years imprisonment as the sentence for s 326 was made to run concurrently with the twenty years' imprisonment for rape;

(c) *Abdul Kassim bin Idris v Public Prosecutor* [2007] 4 MLJ 738 the High Court affirmed the sentence of fifteen years' imprisonment and three stokes. The appellant 39, claimed trial and convicted. The weapon used was a pair of scissors. The victim suffered stab wounds and cut wound at the neck region and the abdominal region and death was caused to the child in her womb;

(d) *PP v Kow Ngo* [2009] MLJU 1867; [2010] 5 CLJ 208 the High Court enhanced the sentence of one-day imprisonment and fine RM1,500 to five years' imprisonment. The respondent aged 62, pleaded guilty and a first offender. Acid was used to hurt the victim;

(e) *Anbalagan a/l Murugesu lwn Pendakwa Raya* [2013] 9 MLJ 88 the High Court affirmed the sentence of eight years' imprisonment. The appellant pleaded guilty after the first witness testified. The weapons used were an iron rod, iron, bottle and bowl. The victim suffered various internal injuries and was in coma for twelve days;

(f) *Chew Eng Aik lwn Pendakwa Raya* [2015] 10 MLJ 799; [2014] 1 LNS 1303 the High Court affirmed the sentence of seven years' imprisonment. The appellant was a first offender, claimed trial and convicted. The weapon used was a parang. The victim suffered multiple

wounds and received treatment for wound exploration haemostasis and primary suture of multiple deep lacerations wounds over extremities, under general anaesthesia;

(g) *Abd Halim Abd Samat* the Court of Appeal substituted a binding over order under sub-s 294(1) with a sentence of ten years' imprisonment. The respondent aged 45 and pleaded guilty and a first offender. The weapon used in the commission of the offence was a parang. The injuries sustained were multiple lacerations on the victim's head, right ear, right forearm and hand. The most proximal wound at the right forearm was deep cutting the muscles and the ulna bone causing an open fracture;

(h) *Magenthiran Allagari lwn Pendakwa Raya* [2015] MLJU 2343; [2015] 1 LNS 33 the High Court affirmed the sentence of twelve years' imprisonment. The appellant was a first offender, claimed trial and convicted. The weapon used was a parang. The victim's left arm was almost severed and fractured his left arm and leg;

(i) *Lee Kian Yap lwn Pendakwa Raya* [2015] MLJU 2342; [2015] 1 LNS 152 the High Court affirmed the sentence of six years' imprisonment and three strokes. He was a first offender, claimed trial and convicted. The weapon used was a knife. He suffered stab wounds on the abdomen left side of the chest and at his back;

(j) *Hafiz Fathullah v Public Prosecutor* [2016] MLJU 773; [2016] 1 LNS 989 the High Court affirmed the sentence of fifteen years' imprisonment and eight strokes. The appellant pleaded guilty and a first offender. The weapon used was a pen knife. The victim suffered multiple injuries and had 100 stitches all over her body. She also underwent a surgical operation on her left arm in order to repair the damaged and cut muscles;

(k) *Mazlan Ahmad v Pendakwa Raya* [2016] MLJU 1879; [2016] 1 LNS 205 the High Court affirmed the sentence of seven years' imprisonment and five strokes. The appellant pleaded guilty and a first offender. The weapon used was a parang. The victim suffered injuries at the back of his neck, broke his spine and brain haemorrhage;

(l) *Sellvam a/l Sangaralingam & Anor v Pendakwa Raya and another appeal* [2016] MLJU 1298 the High Court enhanced the sentence of eight years' imprisonment to eleven years and four strokes. The appellants claimed trial and were convicted. The weapons used were parang. The victim suffered multiple injuries and fractures; and

(m) *Budiman bin Che Mamat v Public Prosecutor* [2017] MLJU 1960; [2017] 1 LNS 1936 the High Court affirmed the eight years' imprisonment and one stroke. The appellant aged 30, pleaded guilty and a first offender. The weapon used was 'besi kuku kambing'. The

victim's both arms were fractured and his ear was almost ripped off.

[44] The sentences meted out differed from one case to another depending on various factors discussed in the judgments. But they were all for deterrent sentence in view of the seriousness of the offence with the element of public interest being the foremost consideration. Factors like first offender and pleading guilty apparently did not really find favour with the courts in cases of this nature.

[45] The complainant came all the way from Medan, Indonesia seeking for a job to earn an honest living. She commenced her employment on 8 December 2016 as a maid or servant to the accused but certainly not as a slave. According to her, she was asked to look after the seventeen cats and take care of the house. Roughly about a week later the accused started to abuse her and that happened everyday thereafter.

[46] She told the court below that she was kicked, assaulted with a cloth's hanger, book, an umbrella, a steel mop rod and a kitchen knife. According to her the accused hit her head with the umbrella and the steel mop rod and she identified the bent steel mop rod as the instrument that was used by the accused person to hit her head.

[47] She bolted on 21 December 2016 and was found by the drain in a state of semi-consciousness within the same housing area by a security guard. She was then taken to a private clinic by one of the neighbours. According to the private practioner (SP2) she was bleeding on the side of her neck and at the back of her head. Her eyes were completely swollen and closed and bruises on her body.

[48] The police was summoned and took her to University of Malaya Medical Centre. According to the doctor who saw her (SP5) her face was swollen and her entire body was quite swollen too. She could hardly open her eyes due to swelling and bruises were detected. They were as follows:

(a) multiple bruises of varying ages over her shoulder, chest wall, upper limbs, lower limbs and back;

(b) multiple abrasions on her right lower chest and over the scalp; and

(c) her entire face was swollen with bilateral periorbital hematoma, swelling of the entire neck, bilateral upper limbs and hands and ear.

SP5 further testified however that there was no immediate life threatening injuries.

[49] The complainant was then examined by SP6 the Consultant Neuro Surgeon who testified that the CT scan of the head revealed a punctuate haemorrhage in the front part of the brain which was most often caused by external blow or a hard knock and fractures involving the facial bone primarily the maxillary and zygomatic bone. These injuries corresponded with the evidence of the complainant based on her description of the incident. She said:

Soalan: 1 rod besi bengkok dengan pemegang warna biru, ini apa boleh cam?

Jawapan: Ia digunakan untuk pukul kepala saya.

TPR: Pohon tender.

Mahk: ID3.

Soalan: Ini datang dari mana?

Jawapan: Pemegang mop di rumah itu.

Soalan: Memang begini keadaannya?

Jawapan: Tidak.

Soalan: Jadi bagaimana?

Jawapan: Setelah dipukul saya ia jadi seperti itu.

Mahk: Bengkok.

[50] CT scan of the lungs revealed lung contusion due to blunt trauma. SP6 testified further that based on the clinical and CT scan findings he decided that it was a mild head injury and placed the complainant on observation for 48 hours particularly because of the punctuate haemorrhage fearing that the bleed could expand.

[51] Under cross-examination he confirmed that there was no bleeding expansion and she was stable after 48 hours. As for the facial fractures, SP6 said the surgeon had decided on conservative management and the orthopedic decided that there was no further management because she did not have significant fractures. She was discharged on 25 January 2017 ie about four days later.

[52] For an offence of causing grievous hurt, to my mind, the injuries inflicted are the utmost important factor that would guide the court in assessing the sentence. In this case out of the eight kinds of hurt designated as grievous enumerated under s 320 of the Penal Code the hurt sustained by the complainant falls under para (g) — 'fracture or dislocation of a bone'. Based on SP6's evidence, there was no necessity to intervene surgically as far as the fractures were concerned. In other words, the fractures were minimal and would heal by itself.

[53] Be that as it may, a fracture caused by an instrument which, used as a weapon of offence, is likely to cause death ie the steel mop rod has satisfied the elements of s 326. The complainant was defenceless and traumatic while under employment of the accused person. Having considered all the surrounding factors, the order of binding over is set aside and is substituted with a sentence of eight years' imprisonment with effect from 29 March 2018.

Stay of execution

[54] Learned counsel for the accused sought to stay the execution of the sentence pending appeal. He argued that there was a point of law involved to justify the stay namely, whether the wishes of the complainant not to pursue can be an extenuating circumstance under which the offence was committed — one of the prerequisites under sub-s 294(1) of the CPC. In *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2004] 1 MLJ 497; [2004] 1 CLJ 592 Pajan Singh Gill FCJ at p 509 (MLJ); p 606 (CLJ) had this to say:

> Incidentally, difficult point of law has not been considered as sufficient to 'demonstrate special or exceptional circumstances of the kind which would lead to a grant of bail' (see: *Hanson v Director of Public Prosecutor*).

Based on the above authority the application for a stay was refused.

Order of binding over set aside and substituted with sentence of eight years imprisonment with effect from 29 March 2018.

Reported by Dzulqarnain Ab Fatar