IN THE MAGISTRATE COURT IN KAJANG

IN THE STATE OF SELANGOR

CRIMINAL CASE NO. BH-83-1010-08/2021

PUBLIC PROSECUTOR

v.

WANG JIANQUAN

(Chinese National)

GROUNDS OF JUDGMENT

EXORDIUM

1) Wang Jianquan ("the accused) was arraigned before this Court on 26.8.2021, and for the unavailability of the Chinese interpreter, the case was adjourned to 3.9.2021. He was released on bail.

2) On 3.9.2021, the charge was read to the accused person in Mandarin by the Court Interpreter Miss Cher Fong Jiuan, whereupon the accused person pleaded guilty. After hearing submission by the learned Deputy Public Prosecutor Puan Nurul Afiqah Abdul Ghaffar and Puan Wang Hui Yee (the defence counsel), this Court found the accused person guilty as charged and convicted him of the same and sentenced the

accused person to one-month imprisonment to take effect from the date of his arrest **and** RM8000 fine, in default of payment two months imprisonment. The defence counsel prompted this Court for an order for stay of execution of the sentence, and upon hearing both sides, I dismissed the oral application. Now I state my reasons.

THE CHARGE

3) The charge, as stated earlier, was read in Mandarin to the accused person. The charge in its original language reads:

> Bahawa kamu dengan niat bersama-sama pada 09/08/2021 jam lebih kurang 8.15 malam beralamat di no 1 Jalan Residence 3, 1080 Residence, 43000 Kajang dalam daerah Hulu Langat, dalam Negeri Selangor Darul Ehsan adalah pihak kepada suatu pakatjahat jenayah telah terlibat dalam pakat jenayah tersebut, telah bersetuju sesama kamu untuk melakukan suatu perbuatan yang salah di sisi undang-undang iaitu memperdaya mangsa dalam "love scam" dan mengugut mangsa menggunakan rakaman video lucah mangsa, yang bertentangan dengan seksyen 420 Kanun Keseksaan. Oleh yang demikian, kamu bersama-sama telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 120B(2) Kanun Keseksaan dibaca bersama seksyen 34 Kanun yang sama.
>
> Hukuman:- penjara tidak lebih daripada 6 bulan, atau dengan denda atau dengan kedua-duanya.

4) The accused person pleaded guilty and understood the nature and consequences of his plea.

5) Before I embark any further, while the accused person was the only person charged in this case, I notice the charge embodies the element of common intention under s. 34 of Penal Code. Nonetheless, I direct my mind to the observation of the Court of Appeal in ***Msimanga Lesaly v. PP [2005] 1 CLJ 398***, where Gopal Sri Ram JCA observed:

> *Taking the first ground, it is important to recall that the appellant was initially charged with another person. Accordingly, the charge carried in it the allegation that the two accused had acted in furtherance of a common intention under s. 34 of the Penal Code. Once the co-accused was acquitted at the close of the prosecution's case, the allegation of common intention fell to the ground. The charge had to be amended to reflect the fact that the appellant had solely trafficked in the drug in question. It was.* ***But the wording in the charge was not so perfectly amended as to rid itself of all references to the element of the appellant having acted with another person. That in our view does not render the charge bad. For, it is well settled law that s. 34 of the Penal Code does not create a substantive offence but is merely a rule of evidence to infer joint responsibility for a criminal act performed by a plurality of persons****…*

FACTS OF THE CASE

6) The facts of the case (P1) were read to the accused person and admitted to. The facts revealed that on 9.8.2021, a police party raided a premise at no 1, Jalan Residence 3, 1080 Residence, 43000 Kajang, Selangor. Nine Malaysian citizens and two Chinese nationals (one of whom was the accused person) were arrested and investigated. All of them were suspects in love scam activities, deceiving Chinese nationals. The following items were seized:

   i) RM1500 cash.
   ii) 1 unit Asus laptop
   iii) 62 units of cell phones
   iv) 1 exercise book containing “script of conversation” used against the victims.
   v) 1 gate remote control, 2 keys.

7) The investigation revealed that the phone belonged to one of the arrestees, Lim Lie Fei (B8), contained her semi-nude photos, which were sent to the potential victims by the rest of the arrestees (including the accused person). The arrestees would first communicate with the victims. Then Lim Lie Fei (B8) would make a video call to the victims and lured them into exposing themselves (literally – by exposing their

private part). The video calls were recorded and used to extort monies from the victims. Refusal to accede to their request was at the peril of the obscene videos and photos being revealed to the victim's family members. These photos of victims exposing their private part could be seen in exhibit P15 .

8) The prosecution also tendered the following exhibits, and the photos shown were admitted to by the accused person:

P2 – arrest report

P3 – Hand over list

P4 – 5 pages of transcription of conversation

P5 – 16 photos of the seized items (collectively marked)

P6 – 6 photos of the scene of the arrest. (collectively marked)

MITIGATION

9) The defence counsel, in her mitigation submission, pointed out that the accused person aged 29 years old, married with two kids and providing for his family. His plea of guilty saved time and cost, and the learned counsel referred to the case of ***Zaidon Sharif***. This was his first conviction, and the learned counsel brought to the attention of this

Court the case of ***Raja Izzuddin Shah*** for consideration. The accused person was remorseful, and thus, she sought a lenient fine.

SUBMISSION BY THE DEPUTY PUBLIC PROSECUTOR

10) The learned Deputy urged this Court to impose imprisonment as a lesson to the accused person so he will not succumb himself to scamming people in a love scam activity any further. The learned Deputy invited this Court to consider the fact that the scam involved the use of obscene material against the victims in weighing the appropriate sentence against the accused person.

ANALYSIS

11) Azmi J in the case of ***Public Prosecutor v. Jafa bin Daud [1981] 1 LNS 28; [1981] 1 MLJ 315***, held that the Court must pass sentence not only as provided by the punishable section, but also based on established judicial principles:

> *A sentence according to law means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles. In assessing sentence, one of the main factors to be considered is whether the convicted person is a first offender. It is for this purpose that before passing sentence, a Magistrate is*

required to call for evidence or information regarding the background, antecedent and character of the accused.

12) Thus, in deciding the sentence, I consider the following factors and principles:

S. 120B OF THE PENAL CODE

13) Section 120B (1) & (2) of the Penal Code reads:

(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for a term of two years or upwards shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Subject to subsection (3), whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment for a term not exceeding six months or with fine or with both.

PLEA OF GUILTY

14) Whether a person is a hardened criminal or not, a plea of guilty should be treated as a mitigating factor. It not only saves the country the great expense of a lengthy trial but also saves time and

inconvenience for many, particularly the witnesses (per Suffian LP in ***Sau Soo Kim v PP [1975] 2 MLJ 137***). As submitted by the defence counsel, it is an accepted rule of practice that an accused should be given credit of discount for pleading guilty (per Augustine Paul in ***Zaidon Sharif v. Public Prosecutor [1996] 4 CLJ 441***).

15) It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence (per Mohd Azmi SCJ in ***Mohd Abdullah Ang Swee Kang v. PP PP [1987] 2 CLJ 405; [1987] CLJ 209 (Rep); [1988] 1 MLJ 167***).

16) Nonetheless, I also bear in mind the words of Dzaiddin J (as His Lordship then was) in ***PP v. Low Kok Wai [1988] 3 MLJ 123*** where his Lordship, in quoting Archbald, 42nd Edn. para. 4-480 *citing* ***R. v. Davis [1980] 2 Cr App R (S) 168***, held

> *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****.*

FIRST OFFENDER

17) On another note, in the same case of ***Zaidon Sharif v. Public Prosecutor (supra)***, it was held that "*in assessing sentences, one of the main factors to be considered is whether the convicted person is a first offender. Before passing sentence, the Court is required to call for evidence of information on the background, antecedent, and character of the convict. Such facts will form the basis upon which the adequacy or otherwise of the sentence can be reviewed on appeal*". But this must be read in the context of ***Chan Sit Hoong v. Public Prosecutor [1975] 1 MLJ 261*** where it was held by Ajaib Singh J :

> *A first offender, be on a drug charge or some other criminal charge, should be dealt with by the imposition of a fine or by placing him under bond or probation, but* ***he should be kept away from prison unless there are, in the public interest, strong reasons for ordering a term of imprisonment, such as the gravity of the offence itself and the manner in which it is committed****....*

18) In the present case, the offence concerns conspiracy to cheat. The manner the offence was committed was horrendous. The victims were lured and deceived into exposing their private parts, which was captured and used as a bargaining chip to extort money, leaving the victim with the only other option of perpetual embarrassment facing

their own family members. It is inhuman, gross and short of dignity. Scaling the plea of guilty as well as being a first offender against the manner of the offence was committed does not tip the scale in favour of the accused person. For what he had done, his plea for leniency reminds me the Shakespeare's Merchant of Venice – "*Let none presume to wear an undeserved dignity*".

OF RAJA IZZUDDIN SHAH v PP [1978] 1 LNS 165

19) The learned defence counsel submitted that the state of remorseful shown by the accused should be considered in his favour and relied on the case of ***Raja Izzuddin Shah v PP (supra)***. I distinguish that case from the present case on its facts. I am also reminded by the observation of Hashim Yeop Sani J in the case of ***PP v Loo Choon Fatt [1976] 1 LNS 102*** (who happened to be the same judge presiding over the appeal in ***Raja Izzuddin Shah (supra)***):

> *In respect of sentencing there can be only general guidelines**. No two cases can have exactly the same facts to the minutest detail. Facts do differ from case to case and ultimately each case has to be decided on its own merits**. In practice sentences do differ not only from case to case but also from Court to Court. All things being equal these variations are inevitable if only because of the human element involved. But, of course, there must be limits to permissible variations.*

20) The case of ***Raja Izzuddin Shah (supra)*** concerns a prince committing an offence under s. 324 of Penal Code for hurting a policeman and was bound over under s. 294 of Criminal Procedure Code while the present case is one under s. 120B of the Penal Code. Both cases are peculiar and should be scrutinised on their own facts.

PUBLIC INTEREST AND ONLINE SCAM ACTIVITY

21) Public interest shall at all times take precedence over the interest of the accused person. In ***Loo Choon Fatt (supra),*** reference was made to the case of ***Rex v. Kenneth John Ball 35 Cr App R 164***:

> *One of the main considerations in the assessment of sentence is of course the question of public interest. On this point I need only quote a passage from the judgment of Hilbery J. in* ***Rex v. Kenneth John Ball 35 Cr App R 164*** *as follows –*
>
> > *In deciding the appropriate sentence a court should always be guided by certain considerations.* ***The first and foremost is the public interest.***

22) I remind myself that "*(T)he public interest element is a bare shell. It is shaped and coloured by the facts of the case, by the surrounding circumstances that compelled the Court to take into account before sentencing and, more importantly, by the mores of a particular society*"

(per Abdul Malik Ishak, JCA in ***Sinnathurai Subramaniam v. PP [2011] 5 CLJ 56***).

23) I take judicial notice of the prevalence of online scam-related activity in Malaysia. Statistics issued by CyberSecurity Malaysia show that online fraud has continued to be the highest reported incidents totalling 7774 reports in 2019, 5123 reports in 2018, and 3821 reports in 2017, compared to other incidents, i.e. cyber harassment, intrusion attempt, denial of service, vulnerabilities report, content-related, spam, malicious code and intrusion.[1] In 2020, out of 8366 online incident cases reported, 6048 were online fraud cases.[2]

24) In each sentence passed by this Court, the following reminder in ***PP v Loo Choon Fatt (supra)*** never slips my mind:

> ***Presidents and Magistrates are often inclined quite naturally to be oversympathetic to the accused****. This is a normal psychological reaction to the situation in which the lonely accused is seen facing an array of witnesses with authority. The mitigation submitted by a convicted person will also normally bring up problems of family hardship and the other usual problems of living. In*

[1] bin Abd Rahman, M. R. (2020). Online Scammers and Their Mules in Malaysia. *Jurnal Undang-undang dan Masyarakat*, *26*, 65-72.

[2] Reported Incidents based on General Incident Classification Statistics. http://www.mycert.org.my/ retrieved on 14 March 2021

*such a situation the Courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach**. The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused**. Lord Goddard LCJ in Rex v. Grondkowski [1946] 1 All ER 560, 561 offered some good advice when he said:*

> *The Judge must consider the interests of justice as well as the interests of the prisoners. **It is too often nowadays thought, or seems to be thought that the interests of justice means only the interests of the prisoners.***

OBJECTIVE OF SENTENCING

25) There are four objectives of sentencing, succinctly stated by Lawton LJ in the case of ***R v. Sargeant (supra)*****,** i.e. retribution, deterrence, prevention and rehabilitation. In ***Leken @ Delem Ak Gerik (m) v. Public Prosecutor [2007] 8 CLJ 158,*** Hamid Sultan J added another one – "just desert".

26) Of all five objectives, retribution, deterrence, and prevention come to my mind, considering the peculiar facts of this case. In ***Leken @ Delem Ak Gerik (m) v. Public (supra),*** Hamid Sultan J described the aforesaid three objectives as follows:

(i) Deterrence - A deterrent sentence aims both to deter the individual offender from committing offences in the future and to deter potential offenders from committing crime.

(iii) Prevention - A preventive sentence is naturally an incapacitative sentence as it aims to directly prevent the offender from committing further crimes against other members of society.

(iv) Retribution - Retribution demands that the sentence imposed reflects the degree of revulsion which society feels towards the conduct of the offender.

27) The sentence in my view should be deterrent and the correct message needs to be sent, not only to the accused person but to all of the people of this realm, for whoever has the intention to do the same, to put such plan to halt brusquely (see ***PP v Wong Chak Heng [1985] 1 CLJ 375*** and ***Reg. v. Sargeant [1974] 60 Cr App R 74***). The accused person should also be prevented from carrying out his insolent, immoral as well as illegal activity any further, and as retribution, the accused person should also have the taste of his own medicine.

28) In ***R v. Markwick [1953] 37 Cr App R 125***, Lord Goddard CJ opined: “persons of means should not be given the opportunity of

buying their way out of prison". I do not see paying a fine and be let scot-free to be appropriate for this case. I find myself in agreement with the learned Deputy that imprisonment should be imposed.

29) It is my considered view in attempt to echo the aforesaid three objectives, the best measure to prevent the accused person from committing similar offence, and to deter him as well as others of the same, is by imposing an imprisonment sentence. As for retribution, he should be accordingly fined.

30) I take heed of the reminder given by Hamid Sultan J (as His Lordship then was) in ***Hossain v PP [2008] 7 CLJ 560***

> *The above salient observation of HRH is one which the prosecution need to memorise at all times when appearing before the appellate court and not argue that "**it is not just because the statute provides for the fine, the court should not impose imprisonment instead**." I will say that if parliament deems it fit that it may be fine or imprisonment or both, **the court has a duty to consider first a fine for 1st offenders and not imprisonment. However, if imprisonment is intended to be imposed, the court must state its ground why fine was not imposed in particula**r. Courts do not have a general power to act arbitrarily on issues of sentencing in a manner to make the provisions of fine otiose and award imprisonment to 1st offenders when that is not the*

intention of parliament. ***Further, such imprisonment may also affect public purse and that may be a relevant consideration to be taken into account, when parliament says fine (deterrence plus it is a revenue) or imprisonment (deterrence but liability to the public). The question of revenue and liability to the public must be balanced on the whole in public interest to ensure that such offenders are deterred****. Parliament has entrusted it to the court to decide what will be appropriate when it enacts provision for fine or imprisonment.*

31) I also take judicial notice that a foreign citizen, upon conviction and being imprisoned, will be referred to the Immigration Department to be processed accordingly with the most likely outcome that the person will be deported back. Long imprisonment sentence would affect the public purse and does not work in favour of public interest. Thus I am of the opinion that a moderate imprisonment term with a fine would be in the best interest of the public (and the public purse too).

32) For reasons adumbrated aforesaid, I pass the sentence of one-month imprisonment to take effect from the date of arrest and RM8000 fine, in default of payment two months imprisonment.

STAY OF EXECUTION

33) Upon the pronouncement of the sentence, the learned defence counsel applied for a stay of the execution of the sentence. She advanced three reasons, which I summarize as follows:

a) a notice of appeal will be lodged against the decision passed (without any mention against conviction or sentence or both);
b) The accused person, after being arraigned on 26.8.2021, was released on bail until 3.9.2021. He had displayed his willingness to come to the Court and showed a track record of not absconding.
c) In the event stay is not allowed, it will render the appeal academic.

34) The learned Deputy vehemently opposed the application and submitted:

a) The presumption of innocent had no longer applied;
b) The defence counsel had not stated any special circumstances to justify such stay order to be made.
c) A stay will only lead to “justice delayed is justice denied”.

DECISION ON STAY OF EXECUTION OF THE SENTENCE

35) I refer to s. 311 of Criminal Procedure Code which reads:

> *Except in the case of a sentence of whipping (the execution of which shall be stayed pending appeal), no appeal shall operate as a stay of execution, but the Court below or a Judge may stay execution on any judgment, order, conviction or sentence pending appeal, on such terms as to security for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the judgment, order, conviction or sentence as to the Court below or to the Judge may seem reasonable.*

36) It is explicit from the aforesaid section that an appeal, by itself, shall not operate as a stay of execution (save for a sentence of whipping).

37) I also direct my mind (as transpired in the minute of proceeding) to three cases. The first case is the decision of the Court of Appeal in ***KWK (A Child) v. Public Prosecutor [2003] 4 CLJ 5***, which states that the Court must consider the existence of special circumstances before granting stay (as correctly pointed out by the learned Deputy):

> *As the grant of a stay is only an exception to the general rule there must be special or exceptional circumstances before the discretion can be exercised in favour of an applicant.*

38) The second case is the case ***PP v. Kamal Hisham Ja'afar [2016] 1 CLJ 303,*** which stated that the Court could consider the possibility of absconding in deciding whether the grant stay or not. In the present case before me, the possibility is quite imminent as the accused person is a foreign citizen.

39) The third case is ***Mohd Noor Yunus & Ors v. PP [2000] 5 CLJ 168***. I bear in mind the following reminder given by Abdul Wahab Patail J in that case:

> *Returning to the subject of a stay of execution,s. 311 specifically states that an appeal shall not operate as a stay of execution. It is left to the discretion of the court. At first instance it is at the discretion of the trial court. Superficially it would appear that a court having convicted an offender, would be unlikely to grant a stay of execution of the sentence. In actual fact, in the great preponderance of cases, the courts have granted a stay, mainly of sentences of imprisonment.* ***In most cases no reasons have been recorded for the grant of the stay. One is left with the distinct conclusion that the court is concerned to avoid the impression it is affected by the fact it has convicted the offender, and at the same time is expressing its humble deference to the appellate court. Such a lenient, indulgent or easygoing approach lays open the discretion under s. 311 to exploitation and abuse of the process convicted offenders who choose to delay their just punishment. In many cases the opportunity was taken to abscond****. The judicious exercise of the discretion under s. 311*

requires that the court must consider whether in its view the appeal is frivolous and vexatious, the conviction and sentence is plain and obvious, and the application is therefore an abuse of the process. If so, it must refuse the application for a stay.

40) To sum up, an appeal is not an automatic reason for the Court to grant a stay. For the present case, there are no exceptional circumstances advanced by the defence counsel. There is also a possibility of the accused person absconding. For these reasons, the reasonable sequitur would be an order of dismissal of the application for a stay of execution of the sentence.

And I so order.

Dated 3 September 2021

Signed

MUHAMMAD NOOR FIRDAUS BIN ROSLI

Magistrate

Magistrate Court (1) Kajang

Selangor Darul Ehsan.

FOR THE PROSECUTION

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