Sentencing Intellectually Disabled Young Offenders:
***Public Prosecutor v ASR* [2019] SGCA 16**

I. Executive Summary

In *Public Prosecutor v ASR* [2019] SGCA 16, the Court of Appeal ("CA") discussed the appropriate sentencing approach for a young offender, the respondent, who committed serious crimes, including aggravated rape and sexual assault by penetration on an intellectually disabled young girl, but who was also himself intellectually disabled, with a mental age of between eight and ten. The respondent was 14 years old when he committed the offences in question. When he was convicted in 2017, he was about 16 ½ years old. He was nearly 18 years old at the time of sentencing, in 2018.

In sentencing the respondent, the High Court ("HC") was faced with two alternatives: sentencing him to (i) over eight years' imprisonment and at least 12 strokes of the cane; or (ii) reformative training, for which the maximum period of detention was three years from the date of sentencing. The HC chose the latter sentencing option, i.e. reformative training.

On appeal by the Prosecution, the CA considered five broad issues: (i) the extent of the respondent's intellectual disability; (ii) the applicability to the respondent of section 83 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"), which provides a complete defence to criminal liability if an offender is between seven and 12, and lacked the maturity to understand the nature and consequence of his conduct at the time of offending; (iii) the appropriate sentencing framework for intellectually disabled young offenders convicted of serious offences; (iv) whether rehabilitation should remain the dominant sentencing consideration in such cases; and (v) whether, in light of the applicable sentencing objectives, reformative training was the appropriate sentencing option.

In brief, the CA found that: (i) the respondent's intellectual functioning was seriously impaired, and there was a causal link between his low IQ and his commission of the offences, which reduced his culpability; (ii) section 83 referred to chronological age and did not include the concept of "mental age"; (iii) the two-step framework for sentencing young offenders for serious offences articulated in *Public Prosecutor v Mohammad Al-Ansari bin Basri* [2008] 1 SLR(R) 449 ("*Al-Ansari*") was suitable for sentencing intellectually disabled young offenders convicted of serious offences; (iv) the respondent's state of mind at the time of his offences, as well as his youth, made rehabilitation the dominant sentencing objective, and this was not displaced by other sentencing objectives; and (v) reformative training was the only sentencing option that could be justified as a matter of principle, and was a proportionate sentence. Accordingly, the CA upheld the sentence imposed by the HC.

II. Material Facts

In June 2013, when the respondent was 13, he and his friends burgled a flat and stole a number of household items with a total value of $41. He was given only a stern warning, on condition that he not reoffend within the next 12 months. But in July 2014, he was arrested for theft and housebreaking, and was remanded at the Singapore Boys' Home pending the investigation of those offences. He was subsequently released on bail towards the end of July 2014. In September 2014, he appropriated a friend's skateboard, and in October 2014, he grabbed the buttocks of a 21-year-old girl. He was charged with criminal breach of trust and outrage of modesty. At this point, there were six charges pending against him. He was arrested, and later released on bail again.

In November 2014, the respondent committed the offences in issue. At the time, he was a student at a school for children with special needs. On the day in question, he spotted the victim – a 16-

year-old intellectually disabled girl who was his schoolmate, although they did not know each other. He tailed her to the block of flats where she lived, hiding from her until she entered the lift, whereupon he hurried into the lift after her. When she exited the lift, he followed her and said "Baby, I love you." When she did not respond to his statement, he pushed her against the parapet. Afraid, she froze. He then hugged and kissed her, placed his hand inside her bra and felt her breasts, pulled down her underwear and inserted a finger into her vagina. She felt pain. When she tried to flee, he restrained her, saying that he would take out his knife. He then pushed her to the floor and inserted his penis into her vagina. Again, the victim felt pain. He next found a 15-cm long comb in her belongings and inserted it into her vagina. He had no reason to believe that she consented to his actions, but decided to have his way because, in his own words, he "felt horny". He then said, "Bye bye", and left the scene.

The victim returned to her flat and began to cry. Her family brought her to make a police report. Two days later, the respondent was arrested. His bail was revoked and he was again remanded at the Singapore Boys' Home. He was charged with two counts of sexual assault by penetration under section 376(2)(*a*) of the Penal Code, which is punishable under section 376(3), and one count of aggravated rape under section 375(1)(*a*) read with section 375(3)(*a*)(ii) of the Penal Code.

In April 2015, all ten charges were laid against the respondent in the Youth Court. He had been assessed by the Institute of Mental Health to have an IQ score of 61, and a mental age of between eight and ten at the time of his offences. He pleaded guilty to the aggravated rape and sexual assault offences, with the other offences from June 2013 also taken into consideration for sentencing.

III. Issues on Appeal

A. Extent of the offender's intellectual disability

The CA began its analysis with the first of the five broad issues it had identified, namely, the extent of the respondent's intellectual disability. This in turn raised three issues: (i) the significance of the respondent's IQ score; (ii) the significance of his mental age; and (iii) the degree to which his intellectual disability affected his ability to control his impulses.

IQ score. The CA agreed with the HC that at the time of the offences, the respondent functioned in the "extremely low range of intelligence", based on his overall assessed IQ score of 61. Moreover, he scored equal to or better than just 0.5% of his same-aged peers in terms of cognitive ability – verbal comprehension, perceptual reasoning, working memory and processing speed.

Mental age. The CA held it was meaningful to consider that the respondent had a mental age of between eight and ten at the time of his offences, which would then affect its assessment of his culpability. This was because the concept of mental age, in the CA's view, was a useful heuristic tool for sentencing purposes, although it had to be understood in the context of the respondent's life experiences.

The concept of "*mental age*" was an estimate of what a person of a certain chronological age would usually be capable of achieving, in terms of verbal comprehension, perceptual reasoning, working memory, and processing speed. However, mental age did not take into account a person's life experiences. Therefore, all other things being equal, the older a person, the less probative value his mental age would have. Thus where a child was 12 at the time of his offences and was assessed to have a mental age of between eight and ten years old at that time, it was unlikely that his life experiences would have overtaken his mental age to such an extent that his mental age had to be substantially discounted, or even disregarded altogether. His situation was different from that of e.g., a 40-year-old man with a mental age of eight, but who had held down a job for years.

Here, there was no evidence that the respondent's mental age (of between eight and ten) was not a reasonably accurate estimate of his cognitive ability at the time of offending. He was only 14 then, and there was no evidence that he had accumulated life experiences or participated in activities which suggested he was more mature than his mental age indicated. As to his prior offences, they were relatively minor, and the evidence suggested he had simply participated in those acts under the bad influence of his friends, some of whom were aged above 30 and had criminal records.

Ability to control impulses. Finally, the CA found that the respondent's intellectual disability impaired his ability to control his impulses. The Prosecution's expert witness also accepted this fact. This was relevant to the court's assessment of the respondent's culpability; indeed, the courts had consistently recognised this kind of causal link – between an impairment of the mind and the commission of criminal offences – as attracting mitigating weight. The respondent's culpability was therefore attenuated (i.e. reduced).

B. Section 83 of the Penal Code

Section 83 states that "[n]othing is an offence which is done by a child above 7 years of age and under 12, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion." The CA agreed with the Prosecution that the word "age" there did not include the concept of mental age. As a result, the respondent, who was above 12 at the time of his offences, was not entitled to rely on the provision.

The CA explained that the concept of mental age had not yet been developed at the time the Penal Code was adopted (in 1872). Nor did the ordinary meaning of the word "age" in section 83 logically extend to the concept of "mental age": the former was a measure of time, whereas the latter was a measure of a person's cognitive ability. The CA also noted that it would be odd if section 83 could be relied upon by a 40-year-old with a mental age of between seven and 12, because such a person would be an "adult", and not a "child" (as specified in section 83). Therefore, "age" in section 83 did not refer to mental age.

The CA disagreed with the respondent's argument that this reading of section 83 meant that section 83 violated Articles 12(1) and 9(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint). Article 12(1) provides that "All persons are equal before the law and entitled to the equal protection to the law." The test for whether a provision is consistent with an individual's right to equal protection under Article 12(1) is known as the "reasonable classification" test. This test requires that the classification prescribed by the provision be based on an intelligible differentia, and that the differentia bear a rational relation to the object sought to be achieved by the provision. Here, the differentia is chronological age, i.e. being above seven years and under 12. The object sought to be achieved was to excuse young children from criminal liability, as they are likely to have very low culpability for their offences due to their incomplete intellectual development, and also to protect them from the harshness of the criminal justice system. Thus this differentia was a reasonable criterion for delineating the class of persons to whom section 83 protections should apply.

Article 9(1) provides that "No person shall be deprived of his life or personal liberty save in accordance with law." The question then was whether section 83 counted as "law" within the meaning of Article 9(1). There were two ways of showing that a provision was not law: first, by arguing that it was inconsistent with a higher law in Singapore (and was therefore not law); and second, by showing that it was so arbitrary and absurd that it did not constitute "law" under Article 9(1). The respondent did not pursue the first line of argument. The second involved an inquiry that was similar to that under Article 12(1). Given the CA's conclusion that section 83 was consistent with Article 12(1), the CA found no merit to the Article 9(1) challenge against section 83.

C. The appropriate sentencing framework

The CA next considered the appropriate sentencing framework for intellectually disabled young offenders convicted of serious offences. It first made two observations. *One*: in sentencing a young offender for a serious offence, the court has a relatively wide range of sentencing options to choose from (including probation and reformative training; and any punishment for which the offence provides). Therefore, in every such case, the court has to decide which sentence is the most appropriate. This contrasts with cases involving adult offenders, where the court imposes an appropriate sentence within the statutorily prescribed range of punishments. *Two*: rehabilitation is presumed to be the dominant sentencing objective for young offenders unless otherwise shown. This is due to: young offenders' generally lower culpability due to their immaturity; their enhanced prospects of rehabilitation; society's interest in rehabilitating them; and the recognition that the prison environment may have a corrupting influence on young offenders. This second feature naturally influences the first feature, in the sense that if rehabilitation is the dominant sentencing objective, then the choice of sentencing option must be guided by that objective.

The CA then stated that the two-step framework articulated in *Al-Ansari* was built on a recognition of this logical relationship. This two-step framework consists of (i) considering whether rehabilitation ought to be the dominant sentencing objective, and then (ii) choosing the appropriate sentencing option in the light of the answer at the first step. This framework also applied to intellectually disabled young offenders convicted of serious offences.

The Prosecution's argument the rehabilitation was not the dominant sentencing objective because that the respondent was too intellectually disabled to undergo reformative training was, in the CA's view, inconsistent with the logic of the *Al-Ansari* two-step framework. The question whether it was *desirable* that an offender be rehabilitated must be conceptually distinguished from the question of whether he was *suitable* for reformative training. It was the *former*, not the latter, which determined whether rehabilitation should be the dominant sentencing consideration. Here, the respondent's suitability for reformative training indicated only whether he was suitable to undergo a specific form of rehabilitation; it did not indicate whether he should be rehabilitated at all (in the sense that it would be in society's best interests that rehabilitation be the controlling sentencing objective). This is the issue at the first step of the *Al-Ansari* two-step framework. If rehabilitation were established as the dominant sentencing consideration under the first step, then regardless of challenges in its implementation, the court would have to choose a sentencing option that gave effect to it. Any concern that conditions do not exist to make rehabilitative sentencing options viable should be assessed only under the *second* step of the *Al-Ansari* framework.

This meant that the Prosecution had to provide *positive* reasons why sentencing considerations other than rehabilitation were dominant.

D. Whether rehabilitation should remain the dominant sentencing objective (i.e. applying the first step of the Al-Ansari framework)

Whether rehabilitation was displaced as the dominant sentencing consideration in this case turned principally on the respondent's state of mind at the time of his offence. This state of mind would shed light on his culpability, the kind of offender he is, and his risk of reoffending. The CA held that the offender's state of mind at that time made it clear that deterrence was of reduced significance. Although it indicated that he posed a high risk of reoffending, his youth and his mental impairment pointed to rehabilitation, and not incapacitation, as the preferred crime prevention objective. The gravity of his offences was significantly attenuated by his reduced culpability.

State of mind. The CA noted that an intellectual disability was a permanent condition (as opposed to a psychiatric disorder which may manifest episodically). His disability alone was thus a *prima*

facie reason[1] to regard his culpability as reduced, as he would not understand the world around him as well as the average person of his chronological age. Hence, he should be considered as *prima facie* belonging to a class of offenders who should be treated less severely. Additionally, the causal link between his intellectual disability and his offending acts was a specific means by which his intellectual disability reduced his culpability, as it affected his control over his offending impulses.

Furthermore, there was no evidence that the respondent understood at the time of his offences that what he had done to the victim was legally wrong, or that he deliberately broke the law when he raped and sexually assaulted her. Although he had been arrested and charged for outrage of modesty one month before the sexual offences in question, he was not convicted on this charge. Thus it could not be concluded that he knew he broke the law. There was also no evidence as to what he registered from the experience of being arrested: his low IQ might have impeded his appreciating and remembering the accusation. While he knew that what he had done to the victim was morally wrong, the CA stated that he did not appear to have "even begun to understand the depravity of his conduct, the degradation and trauma suffered by the victim, and the consequences for the both of them." A psychiatric report concluded that he "did not appreciate the legal wrongfulness of his act[s] because of his mental retardation (defect in the mind) and lack of appropriate prior instructions concerning consensual sex". Indeed, he appeared to regard the wrongfulness of his actions as arising from the fact that he had disobeyed his mother.

Thus the CA considered that the respondent's culpability for his offences was substantially reduced. Coupled with his youth, this placed the focus on rehabilitation as the dominant sentencing objective. Rehabilitation was the preferred tool for discouraging young offenders from future offending because such offenders are, by reason of their youth, more amenable to reform, and society would benefit considerably from their rehabilitation.

Rehabilitation as dominant sentencing objective. Rehabilitation was not displaced by any other sentencing objective as the dominant sentencing objective. The other possible objectives were deterrence, incapacitation, and retribution. However, the CA held that *deterrence* carried minimal weight. It was based on the cognitive normalcy of both the offender in question and the potential offenders sought to be deterred. It also assumed that the offender could weigh the consequences before committing an offence. Here, the respondent was not cognitively normal, and did not fully understand the gravity of his offending conduct.

The CA disagreed with the Prosecution that incapacitation was to be preferred to rehabilitation as the appropriate sentencing objective in this case, for the purpose of preventing future crime. The Prosecution wrongly stated that the court was engaged in a "risk assessment" exercise, because this failed to engage the specific principles justifying the importance of rehabilitating young offenders: (i) rehabilitation as the dominant sentencing consideration for the offender by default; and (ii) the need for proportionate sentencing.

As to *retribution*, it did not easily lend itself to being treated as a dominant sentencing objective. The principle of retribution simply holds that the punishment imposed should reflect the degree of harm caused by the offence, and the offender's culpability in committing it. Thus the greater the degree of either, the more severe the punishment should be. It was possible for retribution to be "displaced" as a sentencing consideration to some degree, where the court was satisfied that the punishment should not correspond completely to the offender's culpability and the harm caused. For example, a sentence potentially less severe than what the offender deserves may be imposed because of his strong rehabilitative prospects. And where outcome-focused sentencing objectives are particularly compelling, it is critical to apply with special rigour the totality principle, which is

[1] Meaning, generally, sufficient to establish a fact as correct, in the absence of evidence to the contrary.

"a manifestation of the requirement of proportionality that runs through the gamut of sentencing decisions".[2] This would assist the court in striking the proper balance between retributive and outcome-focused sentencing considerations, to ensure that "the punishment fits the crime".

E. Whether reformative training was the appropriate sentencing option (i.e. applying the second step of the Al-Ansari framework)

There were three sentencing options available in law for the respondent: probation; reformative training; and imprisonment with caning. Under the last option, due to the nature and number of his offences, the court would have had to sentence the respondent to more than eight years' imprisonment and at least 12 strokes of the cane. The Prosecution further proposed a sentence of between 15 and 18 years' imprisonment and at least 15 strokes of the cane.

The CA agreed with the HC that probation was inappropriate, as it would not sufficiently recognise the seriousness of the respondent's offences. With his risk of recidivism (or re-offending), probation would also not provide the structured environment that would be needed to manage that risk. The CA also agreed with the HC that imprisonment with caning was also precluded as a matter of principle, as it was not an option which gave primary effect to rehabilitation as a sentencing consideration. Caning was also well established as a deterrent punishment, and deterrence had a minimal role to play in this case. While the Prosecution argued that the respondent could also receive customised rehabilitative treatment in prison, it failed to address why the offender could not receive the same in reformative training. Both regimes were run by the Singapore Prisons Service, after all.

Finally, the CA addressed the Prosecution's argument that even customised reformative training would not be suitable for the respondent given that reformative training would still be carried out using the same content as that designed for people of normal intelligence. The Prosecution argued that the respondent lacked the ability to understand what had caused him to commit his offences, or to understand what he needed to do in order not to re-offend. Rejecting this argument, the CA observed that the Prosecution's arguments emphasised precisely why the respondent's culpability should be viewed as significantly diminished in the circumstances. This also highlighted the potential injustice and inequality that would arise if the benefits of reformative training were to be denied to intellectually disabled offenders, who seemed to have particular need for such training.

The CA also stressed that the court's task was not to identify the best form of rehabilitation. That customised measures would be imperfect was only to be expected, and did not lead to the conclusion that no such measures were worth pursuing if they were the only option which the court had. Moreover, there was no justification under the law as to why a suitable programme should not exist for someone like the offender. In any case, the evidence suggested that the respondent, though having an intellectual disability, was not wholly devoid of cognition and was capable of reasoning at a very basic level. That, combined with the progress he was recorded to have made at the Singapore Boys' Home, showed he had some capacity for rehabilitation.

Lastly, the CA stated that the sentence sought by the Prosecution – between 15 and 18 years' imprisonment and at least 15 strokes of the cane – would, in any event, have been disproportionate. That sentence was based on sentencing frameworks which were not crafted with offenders like the respondent in mind. The Prosecution's proposed sentence also failed to account for the respondent's reduced culpability due to his intellectual disability.

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[2] The totality principle requires that the aggregate sentence imposed on the offender: (i) should not be substantially above the normal level of sentences for the most serious of the individual offences committed; and (ii) must not be crushing or out of step with the offender's past record and future prospects.

The CA also considered that the proposed sentence violated both limbs of the totality principle. For the *first limb*: the normal range of sentences for the offence would have been between eight and ten years' imprisonment, and at least 12 strokes of the cane. Thus the Prosecution's proposed sentence was more than the usual range of sentences imposed for the most serious of the respondent's offences, and was disproportionate. For the *second limb*: the proposed sentence would also not be in keeping with his past record and future prospects. It would have been a dramatic leap from any punishment received for his early juvenile offending, and there was no reason to believe that it would result in his rehabilitation. In contrast, reformative training was a proportionate sentence.

Finally, the CA stated that it was, in the end, faced with a choice between imposing a term of between 15 and 18 years' imprisonment and at least 15 strokes of the cane, and imposing a term of incarceration at a reformative training centre of up to three years. Limitations in the sentencing regime were no justification for disproportionate sentencing. There were only two options presented, and if both were sub-optimal, then reformative training was the less imperfect and only principled option. This was especially since the respondent had already been incarcerated for almost four years.

IV. Legal Implications

With this decision, the CA has clarified certain aspects of sentencing intellectually disabled young offenders. First, rehabilitation is still presumed to be the dominant sentencing objective for young offenders unless otherwise shown, including for intellectually disabled young offenders. Moreover, the CA will also consider the mental age (as opposed to chronological age) of the offender for sentencing purposes.

The CA has also clarified that the *Al-Ansari* two-step framework will also apply to cases of intellectually disabled young offenders. Where there is a question as to whether conditions exist to make rehabilitative sentencing options viable, this is generally to be considered only under the second step of the *Al-Ansari* framework (and not the first).

This case also highlights limitations in sentencing options for intellectually disabled young offenders. In this case, the CA could find reformative training suitable as the offender had shown he was not wholly devoid of cognition, was capable of reasoning at a very basic level, and had made progress at the Singapore Boy's Home. However, this still leaves open the question of what sentencing options would have been available for a young offender who was significantly more severely intellectually disabled.

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