IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 18

Magistrate's Appeal No 9040 of 2020/01

Between

GCM

… *Appellant*

And

Public Prosecutor

… *Respondent*

Magistrate's Appeal No 9040 of 2020/02

Between

Public Prosecutor

… *Appellant*

And

GCM

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Adult offenders] — [Extremely strong propensity for reform]
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25 January 2021 Judgment reserved.

Aedit Abdullah J:

Introduction

1 These are cross-appeals by the Prosecution and the accused in respect of the aggregate sentence of 24 months' imprisonment imposed by the District Judge ("DJ") after the accused had pleaded guilty to three proceeded charges under s 376A(3) of the Penal Code (Cap 224, 2008 Rev Ed) (the "Penal Code") for sexual penetration of a minor under 14 years of age. Eight other charges were taken into consideration for the purposes of sentencing. The Prosecution had sought a sentence of 33 months' imprisonment, while counsel for the accused had argued that a probation report should be ordered.

Factual background

2 The accused pleaded guilty on 6 January 2020 to the following charges:

(a) DAC 926957/2018: that the accused, on 25 April 2017, at his residence, did digitally penetrate the vagina of the victim, who was 13 years old at the material time, thereby committing an offence under s 376A(1)(*b*) of the Penal Code and punishable under s 376A(3) of the Penal Code (the "First Proceeded Charge");

(b) DAC 926960/2018: that the accused, on 29 April 2017, at his university hostel, did penetrate the mouth of the victim, who was 13 years old at the material time, with his penis, thereby committing an offence under s 376A(1)(*a*) of the Penal Code and punishable under s 376A(3) of the Penal Code (the "Second Proceeded Charge"); and

(c) DAC 926962/2018: that the accused, on 5 May 2017, at his residence, did penetrate the vagina of the victim, who was 13 years old at the material time, with his penis, thereby committing an offence under s 376A(1)(*a*) of the Penal Code and punishable under s 376A(3) of the Penal Code (the "Third Proceeded Charge").

What is apparent from the proceeded charges is twofold: that the accused had committed offences under s 376A of the Penal Code on three separate occasions, and that he had engaged in digital, oral, and then penile penetration.

3 The eight charges taken into consideration for the purposes of sentencing comprised four charges under s 376A of the Penal Code for orally (two charges) and digitally penetrating (two charges) the same victim over the three occasions outlined above, and four other charges for (a) the transmission of obscene images under s 292(*a*) of the Penal Code; (b) the sexual exploitation of a child under s 7(*b*) of the Children and Young Persons Act (Cap 38, 2001 Rev Ed) ("CYPA"); and (c) two charges under the Films Act (Cap 107, 1998

Rev Ed) ("Films Act") for the accused's possession of 19 obscene or uncertified films.

4 I now turn to the facts as set out in the Statement of Facts, which the accused admitted to without qualification.[1] I do not propose to fully reproduce the Statement of Facts here, and only outline the salient points.

5 The victim was, at the material time in 2017, 13 years old. She was a secondary school student at the time. The accused was, at the material time, 22 years old, and was a student in university at that time. The victim became acquainted with the accused sometime in early-April 2017. Both the accused and victim were alumni from a school group at their primary school. The victim returned to her *alma mater* once or twice a week to help with the group. During one such session, she was introduced to the accused by a fellow student. The accused explained that he had also been from the group previously, and was there to help out. The accused informed the victim that he was a student at university, while the victim shared that she was a Secondary 2 student. The accused and victim exchanged handphone numbers.

6 Thereafter, a few days prior to 25 April 2017, the accused contacted the victim for the first time, via Instagram messages. The accused and victim exchanged correspondence, and the accused called the victim at about midnight. They spoke for four hours, and in the course of their conversation, they started talking about sex. The accused told the victim about his previous sexual experiences. At the end of the conversation, the accused asked the victim if she wanted to meet up. He suggested that they could hang out. Thinking that the

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1 Record of Proceedings ("ROP") at p 17 *et seq*.

accused was interested in her and that they might get into a relationship, the victim agreed to meet the accused on 25 April 2017. However, the relationship never materialised.

7 In the course of their conversations before they met on 25 April 2017, the victim and accused also shared their respective dates of birth with each other. The accused was aware of the victim's age at the material time. The accused also told the victim that he had exchanged nude photos with other girls in the past, and asked to do the same with her. To facilitate this, he requested that she download an application called "Telegram", and forwarded a photograph of his erect penis to the victim. He then asked her to reciprocate by sending a nude photograph of herself. The victim complied with the accused's request.

8 Subsequently, the accused requested that the victim make her way to a bus stop after school in the afternoon of 25 April 2017. The victim complied. The accused then met the victim at the bus stop and brought her back to his residence. He brought her into his room, where the parties subsequently kissed and undressed themselves. While both of them were naked on the bed, the accused began rubbing the victim's vagina and penetrated her vagina with his finger repeatedly. Shortly thereafter, the victim stroked his penis with her hand. The accused also persuaded the victim to fellate him, and she again complied. Parties then showered, got dressed, and the victim left while the accused remained at his residence. These acts on 25 April 2017 formed the basis for, *inter alia*, the First Proceeded Charge.

9 After their meeting on 25 April 2017, the accused continued to stay in touch with the victim, with the parties continuing to exchange messages. On 29 April 2017, in the afternoon, the accused invited the victim to come over to his university hostel room. The victim made her way to the accused's hostel room.

At all material times, the accused and victim were alone in the hostel room. Whilst there, they started to watch the movie "Fifty Shades of Grey". When a sex scene in the movie started, the parties started to kiss each other. They undressed themselves and the accused began rubbing the victim's vagina area before digitally penetrating her vagina. The victim also masturbated the accused. Shortly thereafter, the accused penetrated the victim's mouth with his penis and moved his penis in and out of her mouth. Thereafter, both parties cleaned themselves up and chatted for a while in the hostel room before going their separate ways. These acts on 29 April 2017 formed the basis for, *inter alia*, the Second Proceeded Charge.

10 The parties continued to chat with each other over WhatsApp for the next few days, while the victim was at a school camp. They arranged to meet at the accused's residence again after the victim's camp ended. On 5 May 2017, in the afternoon, the victim made her way to a mall near the accused's residence, where she met the accused. After purchasing some groceries, the accused took the victim back to his residence. The victim and accused had lunch in the accused's room, after which the accused asked the victim to massage him. The accused took off all his clothing apart from his underwear, and the victim proceeded to massage his back. Thereafter, the accused turned the victim over such that she lay on her back. He mounted her and started to kiss her. The parties then undressed themselves completely, and the accused began digitally penetrating the victim's vagina. After doing so for a while, the accused asked the victim whether he could penetrate her vagina with his penis. The victim indicated that she was still a virgin and that she was not comfortable with having sexual intercourse at this point. However, the victim eventually relented, presumably after further persuasion from the accused. The accused then penetrated the victim's vagina with his penis. He did not wear a condom. Shortly

afterwards, the victim asked the accused to stop as she was in pain because of the intercourse.

11 Shortly thereafter, the accused requested that the victim masturbate and fellate him. She complied with his requests. Parties then washed up and the victim left the accused's residence thereafter. These events of 5 May 2017 formed the basis for the Third Proceeded Charge.

12 After the aforementioned events on 5 May, the accused informed the victim that he was going to start working as a relief teacher at her school. The parties stopped seeing each other thereafter. They did not meet up privately again after 5 May 2017. After the accused started working at the victim's school and began teaching her class, the victim confided in her friends that she had had sex with the accused and regretted it. Sometime in July 2017, the victim confided in her form teacher about what had happened with the accused. The victim's parents were informed, and a police report was subsequently made.

13 After the police report was made, the accused was confronted by his head of department and the school principal. He denied the allegations that he had had sexual relations with the victim, and was suspended from his job as a relief teacher. The accused subsequently deactivated his Instagram account and deleted all of the chats and photographs with the victim.

14 It was only later in the course of investigations that the accused eventually admitted to his acts with the victim.

The decision below

15 Before the DJ, the Prosecution sought a sentence of 15 months' imprisonment for each of the First and Second Proceeded Charges, and a

sentence of 18 months' imprisonment for the Third Proceeded Charge. The Prosecution argued that the sentences for the First and Third Proceeded Charges should be run consecutively, for an aggregate sentence of 33 months. By contrast, counsel for the accused indicated in mitigation that the Court ought to call for a pre-sentence report to ascertain the suitability of the accused for probation.

16 The DJ's full grounds of decision are set out at *Public Prosecutor v GCM* [2020] SGDC 101 (the "GD"). The DJ took the view that deterrence was the dominant sentencing principle on the facts given the seriousness of the offences, and that probation was not sufficient to meet the objectives of sentencing in this case. The DJ noted that while the accused was untraced, he had committed multiple offences in an exploitative manner over several occasions. Moreover, while the accused was a young adult, he was still an adult, and the case could not be characterised as merely being the "false steps of youth": GD at [10]. The accused was the one who had broached the topic of exchanging nude photos, and had asked the victim to download the Telegram application for him to send her a photo of his erect penis. The accused had also persuaded the victim to send him nude photos of herself. Moreover, it was the accused who had persuaded the victim to fellate him on 25 April 2017, and he had also been the one who had initiated other forms of sexual conduct on other occasions. The DJ thus took the view that probation was not appropriate on the instant facts.

17 That said, the DJ was also not convinced that a sentence of 33 months' imprisonment as sought by the Prosecution was warranted. He took the view that the Prosecution had placed an over-emphasis on the Victim Impact Statement ("VIS"), which he suggested instead showed that the victim was "not as traumatized as portrayed by the DPP". Specifically, he took the view that the

flashbacks suffered by the victim "were not of any traumatic nature and not as frequent or debilitating as the DPP might suggest". Further, the DJ agreed with the submissions of the Defence that there existed positive rehabilitative factors in favour of the accused, and that the sentence of imprisonment should thus not be longer than necessary to serve its deterrent effect in order to avoid delaying the accused's reintegration back into the community: GD at [21].

18 Applying the framework set out in *AQW v Public Prosecutor* [2015] 4 SLR 150 ("*AQW*"), the DJ placed emphasis on the vulnerability of the minor, as well as on the degree of exploitation of the minor, both of which were said in *AQW* to be the key considerations for sentencing under s 376A of the Penal Code.

19 The DJ further indicated that he found the case of *Public Prosecutor v Tan Li De* DAC 945219/2016 and others (1 March 2017) ("*Tan Li De*") to be of application to the instant facts. In that case, the offender was 22 years old, while the victim was 13 years old. The offender was sentenced to a total imprisonment of 23 months for three proceeded charges, with 12 further charges taken into consideration for the purposes of sentencing. The DJ also referred to *Public Prosecutor v Qiu Shuihua* [2015] 3 SLR 949 ("*Qiu Shuihua*"), where Chao Hick Tin JA enhanced the sentence for one charge of penile-vaginal penetration under s 376A(2) of the Penal Code to ten months' imprisonment, while leaving the punishment ordered by the District Judge for an instance of digital-vaginal penetration under s 376A(2) of the Penal Code undisturbed at two months' imprisonment. The DJ also expressed cognizance that the offences in *Qiu Shuihua* were under s 376A(2) of the Penal Code, which has a lower maximum sentence than that prescribed under s 376A(3).

20 For the reasons outlined above, the DJ imposed an aggregate sentence of 24 months' imprisonment. As previously mentioned, both the accused and Prosecution appealed.

The parties' arguments

The accused's case

21 The crux of the accused's case on appeal was that the DJ had erred in not ordering a probation suitability report given (a) the accused's age; (b) his good rehabilitative prospects; (c) his genuine remorse; and (d) the fact that his rehabilitative prospects outweighed the countervailing considerations in favour of a sentence of incarceration. The accused's stable home environment, supportive parents, immersion in religious life and contributions thereto, and his alleged desire to change were all relied on to substantiate those bases.

22 The accused also adduced several reference letters from a variety of sources to highlight his prospects for the future and in support of his general good character. These included letters from, *inter alia*, the senior pastor at his church, the youth pastor at his church, the mission pastor on a mission trip the accused had previously attended, the parent of a student he had previously tutored, the director of an overseas organisation with which the accused had previously volunteered at, the company at which he had completed an internship, and even his neighbour. These letters varyingly described the accused as "enthusiastic and [liking] to think out of the box", "of good capability on learning and net-working", "very obedient to his parents … and never miss a church service every Sunday", and stated that he would be able to

"apply the lessons learnt from this experience and be resolute not to repeat it".[2] I discuss these letters in further detail below at [42].

23 My attention was also drawn to the fact that the accused had completed his university degree, having been an undergraduate at the time of the offences. Overall, the accused's grades would allow him to graduate with a third class honours degree. However, he had recently been informed by his university that it has decided to, at least temporarily, withhold his degree certificate.[3] Specifically, the university is investigating the matter arising from these charges and may decide to take disciplinary action. The university has further informed the accused that it will not decide on the matter until the conclusion of this appeal. Accordingly, the accused expressed concern that the university may revoke his degree, and that if he is not awarded the degree, "he would be a diploma holder and, despite his academic excellence, he will not be able to find employment that will allow him to sustain himself and his family in the years to come".[4] I say more about this at [49] below.

24 Accordingly, the accused contends that calling for a probation pre-sentence report would be more appropriate to his offending behaviour and rehabilitative prospects.

The Prosecution's case

25 The Prosecution argues that the DJ had correctly decided that probation was an inadequate and inappropriate sentence. However, it goes on to argue that

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2 See, *inter alia*, Tab-J to the Mitigation Plea.

3 See Exhibit D-1.

4 Accused's Written Submissions ("AWS") at [43].

the DJ fell into error in determining the length of the custodial sentence to be imposed. To that end, the Prosecution contends that the DJ failed to:

(a) properly apply the *AQW* ([18] *supra*) sentencing benchmark;

(b) give adequate weight to the aggravating factors, and in particular the impact the offences had on the victim;

(c) give adequate weight to the sentencing principles of deterrence and retribution, while giving undue weight to rehabilitation; and

(d) properly apply the relevant sentencing precedents.

26 The Prosecution thus argues for an uplift in sentence to an aggregate term of 33 months' imprisonment.

Analysis

The dominant sentencing principle on the facts

27 The bulk of the accused's written submissions on appeal centred on his argument that the dominant sentencing principle on the facts ought to be rehabilitation, and that he ought therefore to have a probation pre-sentence report called for to determine his suitability for probation. It is not in contention that the DJ had the power to make a probation order under s 5(1) of the Probation of Offenders Act (Cap 252, 1985 Rev Ed). Rather, the central question was whether probation was appropriate as a sentencing option given the entirety of the circumstances.

28 The accused rightly conceded from the outset that there is no presumption in relation to adult offenders that rehabilitation is the dominant sentencing consideration: *Public Prosecutor v Lim Cheng Ji Alvin* [2017] 5 SLR

671 ("*Alvin Lim*") at [7]. This explains, at least in part, why it is the exception rather than the norm for adult offenders to be sentenced to probation: *Public Prosecutor v Lim Chee Yin Jordon* [2018] 4 SLR 1294 at [34]. I note the observation at [34] of *A Karthik v Public Prosecutor* [2018] 5 SLR 1289 ("*A Karthik*") that:

> In contrast, the presumption that the dominant sentencing consideration is rehabilitation *does* not apply to adult offenders, that is to say, offenders who are above the age of 21. Instead, rehabilitation would only be regarded as the operative consideration when sentencing adult offenders if the particular offender concerned "*demonstrates an extremely strong propensity for reform and/or there are exceptional circumstances warranting the grant of probation*" …
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> [Emphasis original, references omitted]

29 The case run by the accused then proceeded on the basis that he "demonstrates an extremely strong propensity for reform". No argument was made on whether or not there are exceptional circumstances warranting the grant of probation, and it accordingly does not appear to form part of the accused's case.

30 Turning then to the question of whether the accused demonstrates an extremely strong propensity for reform, the accused regarded the decision of *Public Prosecutor v Siow Kai Yuan Terence* [2020] 4 SLR 1412 ("*Terence Siow*") as the appropriate starting point for the analysis. *Terence Siow* was decided after the accused had been convicted and sentenced, and the DJ thus did not have the benefit of the reasoning in that judgment at the material time. The Prosecution did not contest the applicability of *Terence Siow*, and sought to rely on it as well.

31 In *Terence Siow*, a multi-factorial approach focusing more on the traits of the offender rather than the aspects of the offence was adopted for

determining whether or not an offender had an extremely strong propensity for reform. At [55], the Court set out a three-limbed framework for evaluating whether a particular offender has demonstrated an extremely strong propensity for reform ("the *Terence Siow* framework"):

> (a) First, the court should consider whether the offender has demonstrated a positive desire to change since the commission of the offence(s) (the "first limb").
>
> (b) Second, the court should consider whether there are conditions in the offender's life that are conducive to helping him turn over a new leaf (the "second limb").
>
> (c) If, after considering the first two limbs, the court comes to a provisional view that the offender has demonstrated an extremely strong propensity for reform, the court should then consider, in light of the risk factors presented, whether there are reasons to revisit the finding of such a high capacity for reform (the "third limb").

32 If the Court then comes to the view that the accused had demonstrated an extremely strong propensity for reform, the next step would be to consider if this can be "diminished or even eclipsed by such considerations as deterrence or retribution where the circumstances warrant": *Public Prosecutor v Koh Wen Jie Boaz* [2016] 1 SLR 334 ("*Boaz Koh*") at [30]; *Terence Siow* at [52]. As outlined in *Boaz Koh* at [30], this might arise in cases where the offence is serious, the harm caused severe, the offender hardened and recalcitrant, and/or where the conditions do not exist to make rehabilitative sentencing options viable.

The first limb of the Terence Siow framework

33 Under the first limb, the court examines the offender's own resolve to change, as gleaned from evidence of his remorse and the trajectory of his rehabilitative progress between the time of offending and sentencing: *Terence Siow* at [56]. A number of non-exhaustive factors are relevant in this regard:

(a) Evidence of genuine remorse, which may take the form of (i) a plea of guilt which evinces the offender's efforts to own up to his mistakes and to minimise further harm to the victim; (ii) acknowledgment of the seriousness of the offence and its implications, including by co-operating fully with the police and admitting guilt from the outset; and/or (iii) full and frank disclosure of criminal activities beyond the offences for which the offender is charged;

(b) Taking active steps post-offence to leave errant ways behind;

(c) Compliance with and amenability to rehabilitative measures;

(d) Not having re-offended since the offence; and

(e) The index offence(s) being "out of character".

34 I now take these factors in turn. First, the accused argues that there is substantial evidence of genuine remorse in that he (a) entered his plea of guilt at the earliest possible opportunity; and (b) also acknowledged the seriousness of the offences and their implications. It was further argued, given the observations made in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [69], that a plea of guilt in the context of sexual crimes helps ensure that the trauma suffered by the victim need not be amplified by having the victim recount the incident in court. Counsel for the accused also drew my attention to

the accused's cautioned statement in relation to one of his charges, where he stated that:[5]

> I would also like to apologise to my parents for adding a huge burden onto their shoulders. I ask for forgiveness and promise that I will not commit an indecent act till marriage.
>
> … I apologise for my misdeeds and will not commit the same offences again.

35 I had some difficulty with the notion that the accused's remorse was as substantial and genuine as had been argued. There are a number of reasons for this:

(a) First, as was set out in the Statement of Facts which the accused admitted to without qualification, the accused initially lied and denied the allegations that he had had improper sexual relations with the victim when confronted by his head of department and the school principal. Rather, he only admitted to what he had done "subsequently", in the course of police investigations. It is thus clear that when confronted with his actions even over two months after having sex with the victim, the accused's first instinct was to deny responsibility. Thus, the instant facts are readily distinguishable from those in *Public Prosecutor v Justin Heng Zheng Hao* [2012] SGDC 219, which was applied at [56(a)(ii)] of *Terence Siow* ([30] *supra*), and in which the offender had co-operated fully with the police and admitted his guilt from the very outset.

(b) Second, the accused deleted all of the chats and photographs he had with the victim after having been confronted by his head of department and the school principal. This was ostensibly because he

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5 ROP at p 288.

"did not want to risk them being circulated on the internet", but I note it also had the effect of shrouding the accused's precise acts with subterfuge and uncertainty. While the plea in mitigation asserts that the parties had "discussed and decided to delete their chat history on all platforms", I was not prepared to accept this assertion without more, particularly given that no evidence either way was provided for such an assertion. In any event, this submission was inconsistent with the Statement of Facts, which states that the chats were deleted because the accused did not want to risk them being circulated on the internet. I emphasise that this deleting of files and photos was done more than two months after having sex with the victim – two months during which the accused would have had ample time to consider whether what he had done was right or wrong.

(c) Third, I noted with some concern the manner in which the accused's plea in mitigation sought to cast aspersions on and shift blame onto the victim. Some of the more egregious passages include claims that the victim had been the one who asked the accused about his sexual experiences, and had herself told the accused that "she had boyfriends and *friends with benefits* and that she had sexual experiences with them before" (emphasis original).[6] Remarkably, the accused's plea in mitigation went on to allege that "[a]fter the victim agreed to be *friends-with-benefits* with another boy, it was revealed to [the accused] that the [v]ictim had kept a list of penis sizes of boys she has been with" (emphasis in original]. In the "Defence's Response to Victim Impact Report", the accused's reply to the VIS relied upon by the Prosecution,

6 ROP at p 217, at [37].

> further such observations abound. The victim is described as "desperately want[ing] to meet [the accused]" and as "the one who initiated the move to advance their relationship to a more intimate level". She is also described as having "removed her clothes herself, and want[ing] to have sex with [the accused]". Further, the accused asserts that "the Complainant's ill repute cannot be attributed to the particular incident with [the accused]". In fact, the victim's "peers had also known that she had sexual relations with other partners prior to [the accused]". The victim is also described as having "always [been] a bad student". All of these descriptors are in contradistinction to the manner in which the accused is described as having had a "chaste relationship" with the victim.[7] Setting aside the obvious and glaring inconsistency between the lurid and scurrilous manner the plea in mitigation and its accompanying documents have described the victim, and the notion of a "chaste relationship", I could not but conclude that the nature of the accused's supposed remorse was more than somewhat undermined by what can only be described as a blatant and unapologetic attempt, at least at first instance, to foist responsibility on a 13-year-old.

I cannot therefore conclude that the accused did in fact demonstrate evidence of genuine remorse for the purposes of the first limb of the *Terence Siow* framework.

36 The second factor to consider under the first limb of the *Terence Siow* framework is whether the offender has taken active steps post-offence to leave his/her errant ways behind. As observed at [56(b)] of *Terence Siow*,

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7 ROP at p 40, at [2(f)].

"[c]ontrition, in and of itself, is insufficient to signify real change". Rather, some change in behaviour from before the offence to after the offence should be demonstrated. In *Praveen s/o Kirshnan v Public Prosecutor* [2018] 3 SLR 1300 ("*Praveen*") at [44], it was observed that the offender had a "good change of attitude", completing a higher proportion of his assignments and improving his school attendance after the offence. As outlined by the Court at [46], the offender in *Praveen* also channelled his energy into productive endeavours, attending counselling and teaching younger children at the Singapore Indian Development Association ("SINDA") youth programme. Such developments and changes in behaviour on the part of the offender went towards evidencing the second factor of whether or not the offender has taken active steps post-offence to leave his/her errant ways behind.

37 In contrast to the situation in *Praveen*, there was little evidence placed before me of any demonstrable change in the accused's behaviour even after the commission of the offences. Most of the protective factors – the accused's family support, his support from church and religious ministers, and his academic striving – all applied in the same way both before and after the offences. I simply did not see evidence of a substantive change between his behaviour before and after the offending conduct. There were several expressions of contrition, but nothing was pointed out to me as a concrete step taken by the accused after the offences. Even in the accused's submissions on this point before me, most of the arguments on this point centred around how the accused's "commitment to excelling in his university course is an indication of his willingness to take charge of his own reform".[8] To that end, the accused relied on a testimonial dated 27 November 2018 by one of his lecturers, where

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8 AWS at [44].

the said lecturer expressed that he had been "impressed by both [the accused's] attitude and his critical thinking", and that the accused had been "placed into the 83rd percentile for my class".

38 I had some difficulty with this contention. First, while I accept that a commitment to doing well academically can go towards showing a desire to take active steps post-offence to leave one's errant ways behind, there was no direct nexus between academic achievement and turning away from crime. Unlike the offender in *Praveen*, it was not apparent to me that the accused was engaged in a sustained counselling programme, nor did it appear that the accused had commenced certain volunteer activities as an outlet for his behaviour. Second, it is not entirely clear to me that the accused's academic achievement reflected a change in the accused's behaviour before and after the offence. The accused appears, from the documents he has himself adduced, to have performed fairly well academically even prior to the offending behaviour. Third, and perhaps most significantly, the accused's argument in his written submissions on appeal that his "commitment to excelling in his university course is an indication of his willingness to take charge of his own reform" is at odds with the Defence's own position at first instance. Before the DJ, the accused had relied on a supplementary mitigation plea in which it was alleged that the case had "affected [the accused] badly and over the last few years he struggled through his course with this in mind".[9] It was further alleged that "[i]f not for this case he would have obtained much better results" than the third class honours he was awarded.[10] I could not help but be concerned by the fact that the central basis upon which the accused sought to make out that he had taken active

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9 ROP at p 419.

10 ROP at pp 419 to 426.

steps post-offence to leave his errant ways behind was itself undermined by his own arguments at first instance. Put simply, I was not entirely satisfied that the evidence placed before me demonstrated the taking of "active steps" post-offence by the accused to leave his errant ways behind.

39 Turning to the third factor which falls to be considered under the first limb of the *Terence Siow* framework, the accused alleges in his written submissions on appeal that "[t]here is no reason to doubt that [the accused] is amenable to rehabilitative measures". Amenability to rehabilitative measures does suggest that the offender is desirous of and committed to reform, but I note that the cases cited at [56(c)] of *Terence Siow* ([30] *supra*) on this point illustrate that something more than mere assertions of amenability is required. In *Praveen* at [55], the Court made reference to the offender in that case having "by and large, abided by his trial probation conditions while he was out on bail". Similarly, in *GCO v Public Prosecutor* [2019] 3 SLR 1402 ("*GCO*") at [42], the Court observed that the appellant had in fact complied with his counselling and psychiatric treatment schedules. In the cases highlighted, therefore, something which went beyond a mere assertion of amenability was demonstrated. However, no such instances were drawn to my attention on the instant facts. Beyond the accused's assertions that he would be amenable to such measures, there was nothing which demonstrated such amenability. Once again, the Court's observation at [56(b)] of *Terence Siow* that "[c]ontrition, in and of itself, is insufficient to signify real change" is apropos. It is active steps that demonstrate that an offender is willing to take charge of his own reform.

40 The fourth factor considered under the aegis of the first limb in the *Terence Siow* framework is whether or not the offender has re-offended since his offence. That an offender has not re-offended since his arrest may also point towards his desire to change: *Terence Siow* at [56(d)]. I accept that the accused

had not re-offended in the period between his commission of the acts underpinning the Third Proceeded Charge on 5 May 2017, and his sentencing on 11 February 2020. The intervening period of three years crime-free was not insubstantial, even if the accused's claim that it was "twice the length of time in *A Karthik*" was something of an exaggeration given the intervening period in *A Karthik* ([28] *supra*) was five years.[11] In any event, I note that this point should not be overstated: Anyone who re-offends while under the spotlight of the criminal justice system and with sentencing hanging over him demonstrates a remarkable level of either recalcitrance or disregard for legal authority. Re-offending in that context would thus be a highly significant aggravating factor, while the effect of not having re-offended should not be given undue weight.

41 The final factor I turn to consider under the first limb of the *Terence Siow* framework is whether or not the index offences were out of character for the accused. In this regard, I accept that the accused is wholly untraced, though I note the observation in *Terence Siow* at [56(e)] that "the significance of this factor varies from case to case", and that "[i]t ought not to be treated as a factor pointing towards the offender's propensity for reform as a matter of course". As observed in *Alvin Lim* ([28] *supra*) at [20], if an offender has previously engaged in criminal conduct, even if he has not been charged, the lack of a court antecedent plainly would not suggest that the index offence is a one-off aberration. In this regard, three considerations stand out on the facts of this case:

(a) First, [4] of the Statement of Facts which the accused admitted to clearly states that the accused "shared about his previous sexual experiences" with the victim. This is not determinative in itself because

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[11] AWS at [48].

no information is provided as to the age of the accused's previous partners, but I note [5] of the Statement of Facts, where the accused conceded that he had "told the victim that he had exchanged nude photos with other girls in the past and asked to do the same with her". This behaviour illustrates that, the accused's protestations to the contrary notwithstanding, his engagement in sexual acts and the exchanging of nude photographs was not a one-off aberration.

(b) Second, and in any event, I note that the accused had admitted to multiple instances of offences punishable under s 376A(3) of the Penal Code on three separate occasions – 25 April 2017, 29 April 2017, and 5 May 2017. It does not lie in his mouth therefore to assert that the acts were "one-off" or an "aberration".

(c) Third, the panoply of offences committed, along with the escalation and progression of those offences, illustrates a sustained progression of acts commencing with talking about sex, progressing to the exchange of nude photos, escalating to various sexual acts on two occasions, and finally culminating in penile-vaginal penetration without a condom on 5 May 2017. While I am mindful in this regard of not placing too much weight on offence-specific factors at the first stage of the *Terence Siow* framework, the accused's conduct leading up to and in the commission of the offences is no doubt relevant in determining whether those offences can genuinely be said to be aberrations.

42 At this juncture, I pause to deal with the references the accused sought to rely on to illustrate his general good character (see [22] above). As I outlined above, a number of testimonials was placed before the DJ to illustrate that the

offences are "far-removed from his fundamental character traits".[12] I am mindful that the weight to be placed on these testimonials should be carefully calibrated:

(a) First, several of the testimonials referred to had been prepared in a professional context, and did not have any direct nexus with the accused's offending behaviour. These included, *inter alia*, references from the accused's National Service unit, the company with which he did an internship, and the parent of a student he had previously given private tuition to. Because the content of those testimonials was largely given in a professional context, I was mindful that they could not be unthinkingly applied to a broader contextualisation of the accused's general character. As was observed at [75(e)] of *Terence Siow*, there may be two sides of one's character which can coexist, and an offender may be able to step well outside the boundaries of acceptable behaviour notwithstanding the "studious, successful and seemingly well-functioning outward persona" he portrays. Accordingly, I was mindful to see the work and school-related testimonials in that context, and placed highly limited weight on how much light they were able to shed on the accused's general character.

(b) Second, in relation to the accused's testimonials which outlined volunteer work he had carried out overseas, I did not see how that work had any bearing on his capacity for reform. As observed by the Court in *Stansilas Fabian Kester v Public Prosecutor* [2017] 5 SLR 755 at [102(d)], "[a]ny offender who urges the court that his past record bears well on his potential for rehabilitation will have to demonstrate the

12 AWS at [51].

connection between his record and his capacity and willingness for reform, if this is to have any bearing". In any event, it was observed at [102(c)] that such reliance on an offender's past record would, even if any connection between the record and the offender's capacity and willingness for reform be made out, only carry "modest weight" and "can be displaced where other sentencing objectives assume greater importance".

(c) Third, and somewhat concerningly, I noted that the majority of the testimonials adduced appear to have been solicited without informing the authors of the testimonials about the context in which those testimonials would be used. In one testimonial, the author states that "[w]e have no hesitation recommending [the accused] to any future employer", while another, in the context of the accused's work as a private tutor, provided that the author was "convinced that [the accused] will take your child to greater heights if given the chance".[13] Another author even expressly "hope[d] this testimonial will attest to [the accused's] excellent command of English".[14] The vast majority of the testimonials relied on post-dated the offending behaviour, being dated from around June to August 2018. However, it was only in a mere two or three of the testimonials provided that it appeared that any indication had been given to the authors as to the charges faced by the accused and what he had done.[15] I was somewhat concerned by this. On the most benign interpretation, such behaviour of not informing the vast majority

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13 ROP at pp 428 and 429.

14 ROP at p 432.

15 ROP from p 284 to p 286.

> of testimonial authors about the true nature of the testimonial and the context in which it would be used would render those testimonials of limited utility in illustrating the accused's conduct, especially given that the testimonials were sought after he had already been charged. On a more sinister reading of the facts, not disclosing the true nature of why the testimonials were sought suggested that the accused was not necessarily being forthright about his wrongdoing, which might go towards the genuine nature of his remorse, and his acceptance of having done wrong. On the facts, I underscore that genuine remorse should include full and frank disclosure as opposed to plucking testimonials out of context and denying their authors knowledge of what they will actually be used for.

Overall, given the considerations outlined above, I declined to place significant weight on the testimonials the accused adduced. Coupled with the issues I have raised at [41], I did not see the accused's offences as altogether "aberrant" and "out of character".

43 In aggregate, I do not think that it can be said that the accused can be said to have "demonstrated" a positive desire to "change" since the commission of the offences. While the accused has indicated that he is willing to do so, something more than mere assertion is needed.

The second limb of the Terence Siow framework

44 While my analysis above would in and of itself suffice to conclude that rehabilitation should not apply as the dominant sentencing principle on these facts, and that probation would similarly not be appropriate, I go on to briefly consider the remaining limbs of the *Terence Siow* framework. The key inquiry

under the second limb is, per *Terence Siow* ([30] *supra*) at [57], whether the offender's environment presents conditions that are conducive to helping him turn over a new leaf. The non-exhaustive factors which may be relevant to this inquiry include:

(a) The presence of strong familial support;

(b) Availability of an external support system;

(c) External sources of motivation for reform; and

(d) The availability of positive avenues to channel energy.

45 Turning first to the presence of strong familial support, I noted that the cases cited at [57(a)] of *Terence Siow* appeared to indicate that, by and large, there needed to be demonstrable evidence of familial support. In *Praveen* ([36] *supra*), the offender's father had referred himself with his son for counselling with SINDA, and the offender's parents voluntarily attended the counselling sessions at SINDA with the offender. Further, the offender's parents were supportive and co-operative in updating the counsellors about the offender's attitude and behavioural pattern at home: *Praveen* at [48]. Similarly, in *Leon Russel Francis v Public Prosecutor* [2014] 4 SLR 651 at [17] and [18], the Court noted that the appellant's father shared a "close relationship with the [a]ppellant and spends time together with him 'having meals, watching football and playing video games'", while there was evidence of a similarly close relationship with the [a]ppellant's brother. His mother also represented that she would "do her part and make the effort to call and talk to [the appellant] more frequently".

46 While the DJ did not appear to have made any findings in relation to the accused's family and the likely provision of familial support, I was prepared to

accept, the absence of demonstrated support notwithstanding, that the accused's family would provide familial support. The plea in mitigation expressly described how the accused's family and church community formed an important network of support for the accused's rehabilitation, and further stated that the accused followed his parents to church on a weekly basis. In any event, the Prosecution did not contest that the accused would be able to derive strong familial support from his family.

47 The second factor under this analytical limb concerns the availability of an external support system. In this regard, it is clear that the accused's religion is being relied on as the external support system he has. Again, there did not appear to be serious objection to the fact that the accused was a practicing member of his religion, and was active in his church. The testimonials by the accused's religious ministers further illustrated his involvement with the church, and on overseas mission trips as well.

48 In respect of the third factor outlined under the second limb of the *Terence Siow* framework, the accused argues that his strongest external source of motivation is his desire to obtain his degree certificate and find gainful employment to support his family. I note in this regard that the example of an external source of motivation for reform outlined at [57(c)] of *Terence Siow* ([30] *supra*) is found in the case of *Public Prosecutor v Abdul Qayyum bin Abdul Razak and another appeal* [2020] SGHC 57 ("*Abdul Qayyum*"), where the Court observed at [12] that the offender in that case "had a young family that was largely intact with a supportive wife", and that "this provided [the offender] with the strongest possible reason to *want* to reform himself" (emphasis original). Demonstrating that desire to reform himself, the offender in that case had also secured a rental flat to provide a stable home for his family.

49 On the instant facts, I was prepared to accept that the accused did have some degree of motivation which would militate against re-offending, though I did take the view that the facts of *Abdul Qayyum* suggested a stronger or at least materially different degree of motivation insofar as the offender in that case bore the responsibility for his whole family, including four young children of his own. Further, I had considerable difficulty with the accused's explanation for why the degree certificate was a strong source of motivation for him. The accused explained that if he did not receive his degree certificate, "he would be a diploma holder and, despite his academic excellence, he will not be able to find employment that will allow him to sustain himself and his family in the years to come". I was somewhat taken aback by the suggestion that diploma-holders would not be able to "find employment that will allow [them] to sustain [themselves] and [their families] in the years to come", but the more significant difficulty I had was that I did not see how obtaining a degree certificate which the accused had already completed the requirements for was, in and of itself, a strong external source of motivation for not re-offending. While I could understand how a desire to provide for his family might motivate him to avoid re-offending, the accused's degree certificate, once granted by his university, was unlikely to be revoked even if he re-offended. I therefore did not see how his motivation to obtain his degree certificate would in fact help avoid re-offending, though I accept that a desire to provide for one's parents and university-going sibling may provide at least some motivation in that regard.

50 As for the availability of positive avenues for the accused to channel his energy, I was mindful that this factor should not be double-counted: see, for instance, *Public Prosecutor v Raveen Balakrishnan* [2018] 5 SLR 799 ("*Raveen Balakrishnan*") from [91] to [93]. The accused pointed to the "structured environment" that gainful employment would provide, as well as his

involvement in a charity event in May 2020. Given the accused's already-expressed desire to seek gainful employment, which has been addressed above at [48], I declined to place further emphasis on the accused's desire for employment.

51 Seen holistically, I accept that there are conditions in the accused's life that would be conducive to helping him turn over a new leaf. I emphasise, however, that this determination, as with most determinations in sentencing, is not a binary one – the extent to which those conditions are likely to be conducive to the said end-point will depend on the particular facts.

The third limb of the Terence Siow framework

52 Given my analysis of the first two limbs of the *Terence Siow* framework, I do not take the view that the evidence suffices for the Court to come to a provisional view that the accused has demonstrated a sufficiently strong propensity for reform. As consideration of the third limb of the framework would therefore be moot, and the Prosecution did not contend that risk factors existed, I decline to say more on this point.

Do considerations of deterrence nonetheless eclipse the propensity for reform

53 Where the Prosecution focused its arguments relating to rehabilitation was on showing that considerations of rehabilitation were displaced by considerations of deterrence and retribution. It is to this issue which I now turn.

54 At [52] of *Terence Siow* ([30] *supra*), the Court observed that "even if the adult offender demonstrates an extremely strong propensity for reform, the significance of rehabilitation as the dominant sentencing consideration in such

circumstances may be displaced … because of the gravity of the offence", citing *Boaz Koh* ([32] *supra*) at [30]. Moreover, notwithstanding the finding at [42] of *GCO* ([39] *supra*) that the offender in that case might be said to have an "extremely strong propensity for reform", the Court in that case considered that the offender's potential for rehabilitation was eclipsed by the need for deterrence given the serious nature of the offence. This was all the more so given that specific aggravating factors such as the exploitation of the vulnerability of a sleeping victim arose on the facts of that case: *GCO* at [41].

55 The Prosecution submits that the DJ correctly identified deterrence as the primary sentencing factor in this case. I agree. As observed in *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 from [24] to [25], general deterrence is engaged in the context of offences against vulnerable victims, which typically "create deep judicial disquiet". In *AQW* ([18] *supra*) at [15], the Court explained that, in the context of sexual offences against minors, the more vulnerable a minor was, the more protection she would require, and the more reprehensible an offender would be in exploiting the minor for his own gratification. This is particularly true of offences punishable under s 376A(3) of the Penal Code, where Parliament has itself provided for more deterrent penalties on the distinguishing basis of the minor's age.

56 On the facts of this case, I am satisfied that the victim was a vulnerable victim. This is so given her young age and familial circumstances, both of which were known to the accused. I caveat at this point that age cannot in and of itself be determinative, but rather needs to be seen in the round: *AQW* from [57] to [59]. That said, on the facts of this case, I note that the accused was entirely aware, at all material points, of the victim's young age. She was merely thirteen years old. Critically, the accused exploited the victim's young age and sexual inexperience in bringing pressure to bear on her to let him penetrate her vagina

with his penis: Statement of Facts at [13]. It is noteworthy in this regard that the victim had had to "remind" the accused that she was still a virgin, and explicitly indicated that she was "not comfortable with having sexual intercourse at [that] point". Notwithstanding that, and given the pressure the accused brought to bear, the victim is described as having "eventually relented". Both those words are important because they illustrate that the consent procured by the accused was in response to pressure or requests he had made (hence "relented"), and that such consent was procured only after the pressure and/or requests had persisted for some period of time (hence "eventually"). The victim's age and inexperience went towards her ability (or lack thereof) to deal with the pressure which was placed on her.

57 I am mindful not to overstate this point, however. The Statement of Facts was somewhat vague as to the extent of pressure deployed by the accused, and such pressure had to be inferred from the phrase "eventually relented". Thus, while I accept that there had in fact been pressure exerted by the accused, the evidence was not sufficient to fully illuminate the nature of that pressure. Accordingly, I was careful to not extrapolate too far into the pressure exercised.

58 As a further illustration of the victim's vulnerability, I note that on the accused's own arguments, the victim had confided in him about her family problems. As counsel for the accused at first instance repeatedly reminded the DJ, the victim came from a broken family background, and this fact was known to the accused.[16] In fact, counsel for the accused's own argument at first instance was that the accused, "being a more matured person [*sic*]", "saw the need for

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16 ROP at p 298, at [7] and [8].

[the victim] to get help".[17] It strikes me as remarkable that the accused takes that position, but still continued escalating his sexual behaviour with the victim (see [41(c)] above). One who knew the particular and unique vulnerability of a young child but nonetheless sought to exploit her for his sexual gratification acts in an especially reprehensible and calculated manner. Considerations of deterrence are certainly engaged on the instant facts.

59 Like deterrence, retribution is another sentencing principle which directly applies to this case. It is clear from cases such as *Public Prosecutor v BLV* [2020] 3 SLR 166 ("*BLV*") at [128] and [129], as well as *Public Prosecutor v BVZ* [2019] SGHC 83 ("*BVZ*") at [37] and [48], that retribution is directly relevant to cases involving serious sexual assault such as the present one. The instant facts clearly fall within the ambit of serious sexual assault given that the victim, being 13 years old at the material time, could not be said to have in any meaningful way consented to the sexual acts with the accused which formed the subject of the charges. Further, the seriousness of the assault is evident from [19] of *AQW* ([18] *supra*), where the Court stated categorically that penetrative sexual activity "represents the greatest intrusion into the bodily integrity and privacy of the minor, and involves the highest potential for physical, psychological and emotional damage to the minor". Retribution is thus significant in contexts such as the present because, as succinctly put by the Court in *Public Prosecutor v Tan Fook Sum* [1999] 1 SLR(R) 1022 at [16], "the punishment must reflect and befit the seriousness of the crime".

60 I note for completeness at this point that the appeal against *BVZ* was dismissed. Further, the appeal against conviction in *BLV* was dismissed, while

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17 Transcript of 6 January 2020, Page 12, Lines 29 to 31.

the sentence was enhanced on appeal. Appellate intervention did not affect the proposition of law I rely on both cases for.

61 Viewed as a whole, therefore, I agree with the Prosecution that considerations of deterrence and retribution should take centre-stage on the instant facts. At [28] of *Praveen* ([36] *supra*), the Court expressly held that:

> … [W]hen a young offender is convicted of a *serious offence*, the principle of rehabilitation may be outweighed by other considerations such as the need for general and specific deterrence and even retribution … Such offences include serious sexual crimes …, crimes involving violence, robbery, rioting and drug offences, in particular, those which relate to trafficking …
>
> [Emphasis original, references omitted]

Praveen is thus authority for the proposition that considerations of deterrence and rehabilitation can apply to outweigh the principle of retribution when sentencing young offenders for serious offences. This reasoning applies *a fortiori* in the context of adult offenders, who, as recognised above at [28], cannot avail themselves of any presumption in favour of rehabilitation.

62 Of course, I am mindful of the Court's observations at [29] of *Praveen*, where the following further observations were made:

> Nonetheless, this should not be the end of the inquiry. In considering whether rehabilitation retains its primacy in the sentencing matrix, the court should consider whether the particular offender's *capacity for rehabilitation* is ***demonstrably*** high, so that it outweighs the public policy concerns that are traditionally understood as militating against probation … In this regard, the main objective of rehabilitating young offenders is to wean them off a life-time career in crime and to reform them into 'self-reliant and useful citizens' …
>
> [Emphasis added in bold italics, emphasis original in italics, and references omitted]

It is immediately apparent that [29] of *Praveen* focuses on young offenders. While I accept the general principle that an adult offender's capacity for rehabilitation may in specific circumstances be so great that it satisfies all the limbs of the *Terence Siow* framework and is not displaced by considerations of deterrence and/or retribution, such cases will be rare. They will require the capacity for rehabilitation to be "demonstrably" high, and this will need to be borne out by actual manifestations of the propensity for reform rather than mere assertions of it.

63 Of course, while no two cases are exactly the same, the authority of *GCO* ([39] *supra*) is particularly apposite to this point. *GCO* involved an adult offender who was 25 years old when he outraged a sleeping adult victim's modesty by touching her "vagina area" after placing his hand through the opening of her shorts. In determining the weight to be placed on the seriousness of an offence in displacing considerations of rehabilitation when sentencing adult offenders, [41] and [42] of *GCO* are instructive:

> 41 … [I]t seems to me that even if the appellant were found to possess some potential for rehabilitation, it would be eclipsed or significantly outweighed by deterrence in the present case because the offence is a serious one … The fact that outrage of modesty under s 354(1) of the Penal Code is serious is clearly indicated by the fact that [a Mandatory Treatment Order] cannot be ordered in respect of such an offence. The seriousness of s 354(1) offences which by their very nature are already serious is then compounded by the specific aggravating factors in this case such as the exploitation of the vulnerability of the sleeping victim in the case of the OM offence. Therefore, on the facts of this case, rehabilitation would recede in significance as compared to deterrence. It is thus unnecessary to further consider probation as a sentencing option. The appellant has not shown that exceptional circumstances apply in his case for probation to be considered.
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> 42 I note also the appellant's submission that he has an extremely strong propensity for reform … The appellant might … be said to [have] an 'extremely strong propensity for reform'. But it is unnecessary to go further into this point because, as I

> have just pointed out, deterrence outweighs rehabilitation in this case.

GCO was expressly approved at [52] and [53] of *Terence Siow* ([30] *supra*), where the conclusion in *GCO* that the offender's potential for rehabilitation had been eclipsed by deterrence given (a) the serious nature of the offence; and (b) aggravating factors such as the exploitation of the vulnerability of a sleeping victim was emphasised. This underscores a robust approach to determining whether or not a "demonstrable" propensity for reform by adult offenders is in fact eclipsed by the important and weighty considerations of deterrence and retribution.

64 In sum, it does not appear that the accused has demonstrated a strong propensity for reform. Even if he has, considerations of deterrence and retribution have, on the facts, eclipsed that propensity. Probation is not appropriate on the instant facts.

The applicable sentencing framework

65 Given the unsuitability of probation in this case, I direct my attention to the applicable sentencing framework. The DJ rightly identified *AQW* ([18] *supra*) at [41] as setting out a benchmark sentence for certain offences under s 376A of the Penal Code, as follows:

> In my judgment, in the light of all these precedents, a sentence of between ten and 12 months' imprisonment would be the appropriate starting point for an offence under s 376A of the Penal Code where (a) the sexual act that took place between the offender and the minor was fellatio, regardless of which party performed and which received the fellatio, (b) the minor is 14 years old or above, and does not appear to be particularly vulnerable, (c) the offender did not coerce or pressure the minor into participating in the sexual act, and (d) there was no element of abuse of trust. This is intended to be no more than an indicative guide; there may be cases in which unusual circumstances call for a departure from the benchmark I have

> identified, such as, for instance, where the offender is suffering from a mental impairment such as diminishes his responsibility for his actions.

While the minor victim in *AQW* was male, the Court reasoned at [40] that the gender of the minor would not make a difference in sentencing.

66 The Penal Code was amended with effect from 1 January 2020 by the Criminal Law Reform Act 2019 (Act 15 of 2019) such that s 376A(2) of the Penal Code now includes sub-clauses s 376A(2)(*a*) and (*b*), with the former providing for sentences of up to 20 years' imprisonment where the offender is in a relationship which is exploitative of a victim who is below 16 years of age, but above 14 years of age. However, it was not contested between the parties that the law prior to this amendment would apply, and that, in any event, the benchmark in *AQW* continues to be applicable.

67 Taking each of the factors highlighted at [41] of *AQW* in turn, it is immediately apparent that the instant facts disclose a more serious iteration of the offence as compared to that envisaged in the benchmark. In particular:

(a) The benchmark operates where the offending conduct includes only fellatio. On the instant facts, the accused engaged in digital penetration, penile-oral penetration, and penile-vaginal penetration. It is trite, *per BPH v Public Prosecutor and another appeal* [2019] 2 SLR 764 at [62], that penile-vaginal penetration is deemed the gravest of the sexual offences given the risk of an unwanted pregnancy. The accused acts thus are more serious than the situation provided for in the benchmark, and should accordingly be punished more severely.

(b) Next, the benchmark assumes that the minor in question is 14 years old or above, and does not appear to be particularly vulnerable. As

outlined above at [56], the victim on the instant facts was 13 years-old at the material time. As was recognised at [56] of *Public Prosecutor v Yap Weng Wah* [2015] 3 SLR 297, the higher maximum sentence under s 376A(3) of the Penal Code serves to reflect Parliament's view that sexual abuse against victims below the age of 14 must be regarded more seriously. Buttressing this argument, I note in addition that the victim appears to have been, at least in part, more vulnerable *vis-à-vis* the accused insofar as she had confided in him and he instead used that to launch into a sexual relationship with her (see [58] above).

(c) Third, there does appear to have been at least some element of pressure exercised by the accused on the victim. As was clearly outlined in the Statement of Facts, the victim only "eventually relented" and let the accused penetrate her vagina with his penis. While there is no suggestion that the accused exercised force or used violence, it is still clear from the Statement of Facts that the victim's personal preferences were effectively overridden when the accused penetrated her vagina with his penis. There is thus a material distinction between this case and the situation envisaged at [41] of *AQW*, which involves a complete absence of coercion or pressure.

In sum, it is clear that on the premise of the benchmark outlined at *AQW*, and as submitted by the Prosecution, a significant uplift from ten to 12 months' imprisonment was warranted.

68 An uplift in sentence is all the more appropriate when one considers the applicable aggravating factors. namely the effect on the victim, and there being multiple charges.

69 First, the effect on the victim. The Prosecution argued that the DJ failed to give due weight to this factor. The analysis on this point centred primarily on the weight to be given to the VIS tendered and relied on by the Prosecution. In the VIS, dated 19 November 2018, the victim indicated that she experienced flashbacks when she was alone at home about the "incident", presumably the events of 5 May 2017. She indicated that these flashbacks were quite regular for about one to two months after the incident. She still experienced flashbacks, but "not that often". She had difficulty sleeping for the first few weeks after 5 May 2017, and she remains scared to be alone even now. The victim also recounted that she kept thinking of the incident, and it had "slightly affected" her studies for the first few months. The victim was also required to undergo counselling at a hospital and a specialist centre.

70 In his analysis of the content in the VIS, the DJ concluded that the victim was not as traumatised by the offences as the Prosecution had suggested. Rather, the DJ agreed with the observations of the Defence that the victim had not been coerced or deceived into the various sex acts. The victim's regrets and flashbacks were held to not have been of a traumatic nature, and not as frequent or debilitating as the Prosecution had suggested. The DJ's views were somewhat more nuanced and finely put than the accused's response to the VIS at first instance. In response to the VIS, the accused had, in written submissions titled "Defence Submission on Impact Statement of Victim", simply asserted as follows:

> 1. The Victim was always a bad student. Her statement that the incident had slightly affected her studies is exaggerated.
>
> 2. Her statement on her flashbacks are exaggerated. She had a boyfriend before [the accused]. After [the accused] she has another boyfriend. There is really no reason to experience flashbacks.

> 3. Her statement that she is "scared to be alone" is also exaggerated. This has nothing to do with [the accused].

71 Putting aside the unnecessarily dismissive tone adopted in the accused's submissions on this point, I was unable to agree with the weight the DJ had attributed to the VIS. While the victim may have been forthcoming with the other penetrative acts, she was nonetheless a virgin and had no experience of penile-vaginal intercourse until she "eventually relented" and let the accused penetrate her vagina with his penis. She had specifically indicated to the accused that she was not ready for it, but eventually gave in. That the 13 year-old victim was adversely affected as a result is to be expected, and should have been taken into account. If anything, the victim appears to have given a balanced account of what happened given her recognition that her studies had only been "slightly" affected and that the frequency of the flashbacks had decreased with the passing of time. I saw no reason to diminish the impact of the VIS, which clearly demonstrated significant physiological effects the victim sustained after the commission of the offences. I therefore accepted that the significant extent of the impact on the victim was an aggravating factor on the instant facts.

72 A further aggravating factor which clearly applies to the instant facts is the presence of multiple similar charges which were taken into consideration. Eight charges were taken into consideration for the purposes of sentencing, with the precise breakdown as outlined at [3] above. As explained in *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [38]:

> [I]f there are TIC offences to be taken into account, the effect, in general, would be that the sentence which the court would otherwise have imposed for the offences proceeded with would be increased … This is commonsensical as the offender, by agreeing to have the TIC offences in question taken into consideration for sentencing purposes, has in substance admitted that he committed those offences. This would *a fortiori* be the case where the TIC offences and the offence proceeded

> with are similar in nature (*eg*, if both sets of offences consist of sexual offences against the same victim). …

73 On the instant facts, it is clear that the vast majority of the charges which had been taken into consideration were sexual offences relating to the same victim. The majority of these offences, along with the three proceeded charges, had been committed across a span of two weeks. Not only is it not open for the accused's actions to be characterised as a momentary folly, I note that the accused's possession of obscene/uncertified films, which formed the basis of the charges under the Films Act, in fact post-dated the offences committed on 5 May 2017. Thus, even as late as July 2017, the accused had these obscene and presumably pornographic films in his possession. Bearing the charges which had been taken into consideration in mind, and seeing the accused's offending acts *in toto*, I am satisfied that an uplift in sentence on account of this aggravating factor is warranted.

74 Of course, that is not to foreclose the existence of mitigating factors which militate in favour of a more lenient sentence, which have been noted in the discussion above, from [34] to [51], and which will not be re-canvassed here.

The authorities considered by the DJ

75 Several authorities were cited to the DJ in sentencing, the majority of which do not appear to have been reported. As is fairly well-established, unreported decisions are of limited utility in sentencing because they are unreasoned: *Alvin Lim* ([28] *supra*) at [13]. Two cases which might appear superficially similar may differ materially in substance, particularly in the precise weight to be given to various aggravating and mitigating factors. That said, I note the view expressed in *Tang Ling Lee v Public Prosecutor* [2018] 4 SLR 813 at [22] that:

> … I noted the absence of written grounds of decision for most of the precedents set out above. This was because these decisions were not appealed against and thus only case summaries were available for reference. While case summaries can be helpful in sketching a broad view of relevant sentencing trends, they are of less assistance where the sentencing trend does not appear to be consistent, as the summaries would not fully disclose details of the facts and relevant aggravating and mitigating circumstances of each case with sufficient clarity to enable meaningful comparisons or distinctions to be drawn. …

I agree with this view. Summaries of unreported cases are of limited precedential value because they are unreasoned, but can nonetheless be helpful in sketching a broad view of relevant sentencing trends.

76 On the facts of this case, the DJ pointed to two specific cases he had relied on in reaching his decision: *Tan Li De* ([19] *supra*) and *Qiu Shuihua* ([19] *supra*). I do not propose to exhaustively address the other cases cited to the DJ but not addressed by him in his GD, and will focus my analysis on these two cases.

77 In *Tan Li De*, the accused, who was 22 years old at the time, randomly added the victim on Facebook. The victim was 12 years old at the time. They began to chat, and the victim revealed that she was a primary school student. They continued to communicate over a few months before entering into a relationship. About a year after having first become acquainted over Facebook, the accused and victim went to an HDB staircase landing, where the accused digitally penetrated the victim. The victim was 12 years old at that point. On another occasion in the same month, the accused used the victim's hand and masturbated himself at a staircase landing. About nine months later, at a hotel in Geylang, the accused and victim engaged in penile-vaginal sexual intercourse. The victim was 13 at the time of the sexual intercourse. The victim

confided about the matter to her mother slightly over three years later, and a police report was lodged.

78 The accused faced a total of 11 charges punishable under s 376A(3) of the Penal Code, two charges under s 7(*b*) of the CYPA, and two charges under the Films Act. The accused pleaded guilty to three proceeded charges – one punishable under s 376A(3) of the Penal Code for penile-vaginal penetration, one under s 376A(3) for digital penetration, and one under s 7(*b*) of the CYPA for having had the victim masturbate him. He was untraced, and was sentenced to 15 months' imprisonment for the charge concerning penile-vaginal penetration, 12 months' imprisonment for the charge involving digital penetration, and eight months' imprisonment for the third charge. The first and third of those sentences were run consecutively, for a global sentence of 23 months' imprisonment.

79 While the DJ in the instant case indicated reliance on *Tan Li De* as authority for the sentences passed, I note that the DJ nonetheless imposed a six-month imprisonment term for the First Proceeded Charge, which is substantially lower than the sentence imposed for the equivalent offence in *Tan Li De*. No explanation was provided for this difference. In any event, I was not satisfied, given (a) the very early age at which the sexual exploitation of the minor in *Tan Li De* had commenced; (b) the extended period of time the sexual exploitation had gone on for; and (c) the fact that three of the charges punishable under s 376A(3) of the Penal Code concerned penile-vaginal penetration, that the sentence passed in *Tan Li De* was defensible. To my mind, a considerably higher sentence reflecting those considerations was warranted. This was notwithstanding the fact that the sexual acts in *Tan Li De* had taken place within the framework of what appeared to be a relationship. The weight, if any, to be placed on the parties having been in a relationship would generally be highly

limited, and would depend on the precise facts and circumstances. I need only refer in this regard to the position adopted in *Public Prosecutor v AOM* [2011] 2 SLR 1057 at [34], that:

> … [A]s a matter of societal morality and legislative policy, girls below 16 years of age are, due to their inexperience and presumed lack of sexual and emotional maturity, considered to be vulnerable and susceptible to coercion and hence incapable of giving informed consent. …

80 Overall, bearing the analysis above in mind, the sentence imposed in *Tan Li De* ([19] *supra*) was inappropriate, and that case should not be followed by the courts below.

81 Turning next to *Qiu Shuihua* ([19] *supra*), the accused in that case had pleaded guilty to a charge of digital penetration and another of penile-vaginal penetration of a minor under 16, both punishable under s 376A(2) of the Penal Code. At the time the offences were committed, the accused was 21 years of age, while the victim was 14 years of age. Although the offences took place less than a week after the accused and the victim became acquainted with each other, the District Judge in that case had found that the accused and the victim were in a "genuine relationship", and took the position that this was a significant mitigating factor that warranted a lighter sentence. The District Judge in that case thus sentenced the accused to two months' imprisonment for the digital penetration offence, and four months' imprisonment for the penile penetration offence. The sentences were ordered to run concurrently. On appeal, the High Court allowed the appeal and enhanced the sentence for the penile-vaginal penetration offence to ten months' imprisonment. The sentence for the digital penetration offence was not adjusted on appeal.

82 On the instant facts, the DJ appears to have placed reliance on the sentences imposed by the High Court in *Qiu Shuihua*. While the DJ did bear in

mind that the offences in *Qiu Shuihua* were punishable under s 376A(2) of the Penal Code, which had a maximum penalty of only half that of s 376A(3) of the Penal Code, the DJ's reliance on *Qiu Shuihua* was not entirely well-founded on the instant facts.

83 First, and significantly, *Qiu Shuihua* concerned not only an older victim (who was 14, and thus not caught under s 376A(3) of the Penal Code at the time of the offences), but also a younger accused. The accused in *Qiu Shuihua* was 21 years old at the time of the offences, and his age, particularly in relation to his prospects for rehabilitation, was a consideration the Court bore in mind: *Qiu Shuihua* from [19] to [21]. Second, I did not read *Qiu Shuihua* as in any way suggesting that a sentence of two months' imprisonment for the offence concerning digital penetration was appropriate. At [32] of *Qiu Shuihua*, the Court observed that (a) no authorities were placed before it to demonstrate the appropriate benchmark sentence; and (b) in any event, the sentences for the two offences had been ordered to run concurrently, and any adjustment to the sentence for the digital penetration charge would not have had an effect on the accused's total length of imprisonment (unless that sentence was enhanced such that it exceeded the sentence for the penile-vaginal penetration, which was improbable). Accordingly, I did not read *Qiu Shuihua* as in any way supporting the notion that a sentence of two months' imprisonment for the digital penetration charge was appropriate. Third, I note that even for the charge in *Qiu Shuihua* concerning penile-vaginal penetration, the Prosecution only sought an uplift in sentence to "ten to twelve months' imprisonment", and did not seek any further uplift: *Qiu Shuihua* at [10]. Fourth, unlike the present case, the offences in *Qiu Shuihua* occurred over a much shorter period, on 14 and 16 November 2012 only. This stands in contrast to the present case, where, even if one were to exclude the offences concerning the exchange of nude photos and

the offences under the Films Act, the offences took place on three instances over two weeks. As I have outlined above, the length and duration of the offending behaviour, coupled with the escalation towards penile-vaginal penetration of the minor, is a significant aggravating factor. Fifth, the number of charges faced by the accused on the instant facts is considerably higher than that faced by the offender in *Qiu Shuihua*, and more charges were proceeded on against the present accused.

84 For the above reasons, I am satisfied that *Qiu Shuihua* may be distinguished from the instant facts. Even if I am mistaken on that point, I am not convinced that the sentence of two months' imprisonment for the digital penetration in *Qiu Shuihua* is one which the Court in *Qiu Shuihua* had in any way sanctioned. Furthermore, *Qiu Shuihua* pre-dates the decision setting out the benchmark sentence for offences punishable under s 376A(2) of the Penal Code in *AQW* ([18] *supra*), and I underscore that the instant facts disclose offences under s 376A(3), as opposed to s 376A(2), of the Penal Code.

85 These authorities did not therefore support the DJ's conclusions on the sentence.

The appropriate sentence

86 As noted above, with reference to the benchmark sentence in *AQW*, being in mind the seriousness of the offences committed here, the vulnerability of the victim, the pressure asserted, the effect on the victim, and the presence of multiple charges, the sentences imposed ought to be increased, from the ten to 12 months' imprisonment indicated in *AQW*, to 15 months' imprisonment and above.

87 Given the totality of the evidence placed before me, I enhance the sentences imposed as sought by the Prosecution, as follows:

(a) The First Proceeded Charge: 15 months' imprisonment;

(b) The Second Proceeded Charge: 15 months' imprisonment; and

(c) The Third Proceeded Charge: 18 months' imprisonment.

88 I agree with the DJ that the sentences for the First Proceeded Charge and the Third Proceeded Charge should run consecutively. This was, to my mind, compliant with the principles set out at [98] of *Raveen Balakrishnan* ([50] *supra*), and would not offend the totality principle. In total, the accused is therefore sentenced to an aggregate of 33 months' imprisonment.

89 I note that this aggregate sentence may in fact be said to be on the lower end, especially when one considers the existence of (a) at least some, albeit limited, pressure exerted by the accused on the victim in procuring her eventual relenting to let him penetrate her vagina with his penis; (b) the accused's failure to use any protection and the victim's exposure to potential pregnancy or sexually-transmitted infections; and (c) the multiplicity of offences taken into consideration which were targeted at the same vulnerable victim. However, I was not satisfied that I ought to, without more, impose a sentence in this case beyond that sought by the Prosecution.

The conduct of counsel

90 As a coda to this judgment, I pause to make a number of observations regarding the manner in which the accused's counsel at first instance, Mr Radakrishnan s/o Kannusammy Somalingam ("Mr Radakrishnan"), had conducted the accused's defence. I clarify at this point that these observations

are specifically addressed in relation to that counsel's conduct, and are not a comment on the counsel who conducted the accused's appeal, Mr Anand George.

91 I was somewhat perturbed by several of Mr Radakrishnan's comments, both in his oral submissions before the DJ, and the written submissions he tendered. It would not be useful, particularly with respect to the victim, to reproduce the statements fully. It suffices to note that the assertions made essentially blamed the victim, alluded to her supposed promiscuity and ill-repute, and being the initiator of intimacy. This conduct was made worse by the gratuitous inclusion of photographs which seemed to be intended to show the sexual maturity of the victim. I simply cannot understand how such assertions could be made on instructions by an officer of the Court, particularly when the victim is a minor. And for the record, such assertions would also be ill-placed even if the victim was an adult.

92 Mr Radakrishnan levied similar, if not even more remarkable, claims in his oral submissions. I found a short extract of Mr Radakrishnan's oral submissions particularly telling:

> … It's her character, I'm not sure whether it's due to her family background or not, I'm not sure, Your Honour. But there's nothing to do with the accused. Your Honour … we are saying that the victim never really regre---regretted her action, Your Honour[,] with the---with my client. She was disappointed that their relationship never was completed. Then, she went on to her next boyfriend …

93 Cumulatively, Mr Radakrishnan's submissions constituted a blatant and unapologetic attempt to foist responsibility and blame on the victim. Her character was flagrantly tarred, and I struggled to see what purpose such character-assassination served. The victim was only 13 years-old. On Mr

Radakrishnan's accounts, it sounded as though it was the victim who had been sexually predatory and led the accused astray. I am appalled: the accused was the adult in the situation.

94 The law in this regard is clear. In *Public Prosecutor v Ong Jack Hong* [2016] 5 SLR 166 at [23], the Court observed that:

> … [Counsel for the accused] Ms Ng referred to the fact that the victim has had sexual relations with her boyfriend. It was not clear to me just what the point was that was being made by this reference. Ms Ng suggested that all she was putting forward is that the victim had not been traumatised by the incident. I am not convinced first that that is a conclusion that can fairly be drawn in all the circumstances … It is not clear to me why it was thought necessary for a point that appeared, in the final analysis, to be directed at the morality of the victim to be put forward. ***That is seldom helpful in the context of sexual offences***. As officers of the court, counsel should always be mindful of ***the importance of ensuring the appropriateness and relevance of any submission that he or she is making***, and this is especially so where such a submission impugns the character or integrity of a person who is not only *not* on trial but is in fact the victim of the crime in question.
>
> [Emphasis in italics original, emphasis added in bold italics]

95 In *Ng Jun Xian v Public Prosecutor* [2017] 3 SLR 933 ("*Ng Jun Xian*") from [40] to [43], the Court clearly outlined the dangers for counsel who sought purely to cast aspersions on the character and morality of the victims of sexual offences:

> 40 Regrettably, at various parts of his submissions, counsel for the offender tried to shift some blame on the victim in order to downplay the offender's culpability … He further pointed out that the victim had given the offender 'mixed signals' and had 'agreed to accompany [him] to the hotel, instead of returning to her hostel' …
>
> 41 I found these to be obvious insinuations that the victim was a woman of questionable morals who had somehow led the offender on and caused him to think that she liked him. Collectively, they were a barely-disguised attempt to shift at least part of the blame to the victim. To make things worse,

> these insinuations were factually inaccurate and hence without basis. The offender's portrayal of the facts was clearly inconsistent with what was set out in the [Statement of Facts] which he had admitted to …
>
> 42 With respect, it was singularly unhelpful and unnecessary for the offender and his counsel to portray what were ironically termed by them as 'objective facts' in a selective and misleading manner …
>
> 43 Having regard to the offensive nature of the submissions made, I am compelled to remind counsel to refrain from making baseless submissions that disparage the character, integrity or morality of a victim in an attempt to shift blame to the latter. Menon CJ issued a similar reminder in *PP v Ong Jack Hong* [2016] 5 SLR 166 at [23], where he observed that such submissions are seldom helpful … I will also add that such submissions will often be a disservice to the accused, especially one who has pleaded guilty and accepted that he has committed an offence, because they invariably reflect a startling lack of remorse and insight into his behaviour.

96 Several of the observations cited in both of these cases were directly applicable to Mr Radakrishnan's behaviour. What counsel should properly do is to carefully consider their submissions to determine whether or not they are relevant to the offence, and whether they are at all indicative of their clients' culpability. If an argument is scurrilous or scandalising, and/or casts aspersions about a victim without any real relevance to the accused's wrongdoing, counsel should not make any such submission.

97 In this regard, counsel are specifically reminded of their duties under r 14(7) of the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) ("PCR"):

> If an accused person has pleaded guilty or has been convicted after trial, the legal practitioner representing the accused person, when presenting a plea in mitigation, must not make any allegation which is scandalous or is intended or calculated to vilify, insult or annoy any person.

98 As is clear from the decision by the Court of Three Judges in *Law Society of Singapore v Wong Sin Yee* [2018] 5 SLR 1261 at [45], cross-examination which involves questions asked without reasonable grounds, and which were instead indecent, scandalous, and calculated to insult or annoy, infringed the prohibitions in r 61(*a*) of the previous Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed), which covered similar ground as rr 12(5) and 14(7) of the current PCR. There is no doubt to my mind that the prohibitions in the PCR operate not just in relation to questions asked in cross-examination (see r 12(5) of the PCR), but also to statements made in a plea of mitigation. In fact, the very *raison d'etre* of r 14(7) of the PCR appears to be to regulate the conduct of legal professionals in presenting pleas in mitigation.

99 I should add, for completeness, that the accused appears to have, rightly, abandoned all of the victim-blaming arguments I have outlined from [91] to [92] above on appeal. Nonetheless, the fact that they were made at all suggests no small degree of attempting to foist blame on the victim, and is itself at odds with the notion that the accused is genuinely remorseful for his acts. In this regard, [43] of *Ng Jun Xian* ([95] *supra*) is apposite in its observation that such submissions "invariably reflect a startling lack of remorse and insight into [the accused's] behaviour", and ultimately are a disservice to the accused.

100 I should also note that in future, where such submissions are made, it may be appropriate for the court to impose an uplift to any sentence imposed to reflect a clear absence of remorse in attacking the victim in a scurrilous way, where it is clear that this was or must have been made upon the instructions of the accused person. If not for the disavowal of Mr Radakrishnan's submissions before me, I would not have hesitated to increase the uplift by a much more substantial amount.

101 I hope that no submissions of this nature will be seen in our courts in the future.

Conclusion

102 For the reasons above, I dismiss the appeal by the accused. I allow the Prosecution's appeal, and enhance the sentences imposed in the manner which I have set out at [87] and [88] above. The accused is accordingly sentenced to an aggregate sentence of 33 months' imprisonment.

Aedit Abdullah
Judge

Anand George and Radakrishnan s/o Kannusammy Somalingam (BR Law Corporation) for the appellant in MA 9040/2020/01 and the respondent in MA 9040/2020/02;
Sruthi Boppana and Teo Pei Rong Grace (Attorney-General's Chambers) for the respondent in MA 9040/2020/01 and the appellant in MA 9040/2020/02.