IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 02

Criminal Appeal No 6 of 2016

Between

PUBLIC PROSECUTOR

… Appellant

And

BAB

… Respondent

GROUNDS OF DECISION

[Statutory interpretation] — [Penal statutes]

Public Prosecutor
v
BAB

[2017] SGCA 02

Court of Appeal — Criminal Appeal No 6 of 2016
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Tay Yong Kwang JA
28 September; 10 October 2016

6 January 2017

Tay Yong Kwang JA (delivering the grounds of decision of the court):

Introduction

1 This was an appeal by the Prosecution against the decision of the High Court Judge ("the Judge") in *Public Prosecutor v BAB* [2016] 3 SLR 316. It involved the interpretation of s 376A(1)(*b*) of the Penal Code (Cap 224, 2008 Rev Ed), in particular, whether this provision was intended by Parliament to apply to female offenders.

2 The respondent, now 40 years old, is biologically a female but has lived as a male since the age of 16. It was common ground between the Prosecution and counsel for the respondent that she was suffering from Gender Dysphoria. She managed to obtain a false passport with a male name. She maintained the charade of being a male by dressing like one and wearing a dildo. She was apparently so convincing as a male that she even married two

women. She fooled the two women by telling them that under the Batak culture, they were not allowed to touch or to see her penis because if they did that, she would no longer be able to have an erection. She would have sex with the two women in the dark or by using a pillow or a comforter to prevent them from looking at her uncovered private parts. The two women are not involved in any of the charges discussed below.

3 We now set out the background facts leading to the charges and the procedural history of this case.

Facts

4 The respondent suffered from Gender Dysphoria, which, according to one of the psychiatrists who examined her, was evident by her strong desire to be male. The victim, V, was a female minor who was 13 and 14 years old at the material time of the offences.

5 In 2011, the respondent and V became acquainted as they were neighbours, living on the same floor of flats in a public housing estate. V was unaware that the respondent was a female and believed she was a male at the material time. V frequently visited the respondent at the latter's flat ("the flat") after school. They began to develop feelings for each other.

6 In January 2012, the respondent kissed V on her cheek for the first time while they were in a taxi travelling to a family outing. In February 2012, when V was 13 years old, the respondent brought her to the kitchen of the flat and kissed her on the lips. The respondent then brought her to the master bedroom, removed her T-shirt and her brassiere before proceeding to lick her breasts and nipples. This incident in

the flat formed the subject of the charge under s 7(*a*) of the Children and Young Person's Act (Cap 38, 2001 Rev Ed) ("the CYPA").

7 About a month later, on 16 March 2012, the respondent and V were alone in the flat. At the request of the respondent, V agreed to have sex with her. The respondent brought her to the master bedroom and proceeded to remove V's clothes. The respondent then sexually penetrated V's vagina with the dildo which the respondent was wearing. V was below 14 years of age then.

8 From March 2012, V and her siblings began to spend most of their time at the flat. They would go home from time to time during the day to shower and to get changed. They would sleep overnight at the flat but would shower, change and dress in their home every morning before leaving for their respective schools. V's father was aware of this and allowed the situation to continue as he trusted the respondent. Both families were also on good terms at that time.

9 Following this, the respondent and V began engaging in sex frequently with the respondent using the dildo that she was wearing. On 9 April 2012, while V was still below 14 years of age, the respondent sexually penetrated V's vagina with the dildo.

10 In December 2012, after V had turned 14 years old, the respondent sexually penetrated V's vagina with the dildo that she was wearing. The respondent committed the same act in June 2013.

11 Sometime in August 2013, while they were being intimate, V began to masturbate the respondent's "penis" through her shorts. In fact, this "penis" was the dildo that the respondent was wearing. As V masturbated the respondent, the latter used her finger to sexually penetrate V's vagina. This happened again in September 2013.

12 In December 2013, the respondent felt guilty about her relationship with V and decided to end it. On 21 March 2014 at about 11pm, the respondent and V had an argument. V then told her family members about what had happened between her and the respondent. The respondent eventually went to V's flat to apologise and admitted to having "sex" with V. She pleaded with V's family not to report the matter to the police. After discussing with her family, V lodged a police report on 23 March 2014 stating that she had sex with the respondent, giving the respondent's male name and describing her as a male.

13 The day before V lodged the police report, the respondent left Singapore for Kedah with her sister as she feared that she would be arrested. Her sister subsequently persuaded her to return to Singapore. Before they boarded the plane for the flight back, the sister informed the Singapore police who waited for them. The police arrested the respondent when she returned on 25 March 2014.

The charges

14 The respondent faced a total of 21 charges for offences against V. 20 charges were brought under s 376A(1)(*b*). Out of these 20 charges, eight were punishable under s 376A(3) because V was under 14 at the time of the offences and 12 were punishable

under s 376A(2) as V was under 16 at the time of the offences. All the eight charges punishable under s 376A(3) were for sexual penetration with a dildo with V's consent. Of the 12 charges punishable under s 376A(2), seven were for sexual penetration with a dildo with consent and five were for digital penetration with consent.

15 The last charge was for sexual exploitation of a young person under s 7(*a*) of the CYPA by kissing V on the lips and licking her breasts and nipples while she was under 14 years old (see [6] above). All 21 charges related to incidents that took place between February 2012 and December 2013.

16 Based on the facts set out above, the Prosecution proceeded with the following seven charges ("the proceeded charges") against the respondent:

(a) two charges under s 376A(1)(*b*) punishable under s376A(3) (penetration of V's vagina with a dildo while V was under 14 years of age);

(b) two charges under s 376A(1)(*b*) punishable under s376A(2) (penetration of V's vagina with a dildo while V was under 16 years of age);

(c) two charges under s 376A(1)(*b*) punishable under s 376A(2) (digital penetration of V's vagina when V was under 16 years old); and

(d) one charge under s 7(*a*) CYPA (kissing V on the lips and licking her breasts and nipples when V was under 14 years old).

The procedural history

17 The matter was fixed for hearing in the High Court on 7 December 2015. The respondent pleaded guilty to the proceeded charges and admitted to the statement of facts without qualification. She was convicted accordingly on the proceeded charges. The respondent also gave her consent for the remaining 14 charges to be taken into consideration for the purpose of sentencing. The Prosecution and the respondent, both having tendered written submissions, made their oral submissions on sentence. The Judge then reserved judgment.

18 On 10 February 2016, the Judge directed the parties to file written submissions to address the question whether the words "a part of A's body (other than A's penis)" in s 376A(1)(*b*) implied that A had to be a male for the purpose of s 376A(1)(*b*). Parties were asked to file their submissions by 19 February 2016 but were subsequently granted an extension of time to 24 February 2016. On 12 April 2016, the Judge delivered judgment.

The Judge's decision

19 The Judge first dealt with the interpretation of s 376A(1)(*b*). He discussed the legislative history of the provision referring to the draft iterations of the provision and the relevant parliamentary debates. The Judge opined that the literal and grammatical meaning of the provision was clear and that s 376A(1)(*b*) applied to a person with a penis. Turning to the purpose of the provision, the Judge noted that the question of making it an offence for a woman to use a part of her body or an object to penetrate the vagina or anus of a minor was under discussion. However, he said that different views could be taken on whether the provision extended to cover female offenders. According to the Judge, the fact that the provision was passed with only one vote against

may be seen as evidence that the purpose expressed in the explanatory notes to the bill and in the minister's speeches in Parliament was adopted for the provision. However, he went on to say that the choice of words in the statute could be taken as an indication that the offence was intended to apply to men only, "on the very reasonable assumption that Parliament understands the laws it passes".

20 The Judge held that since the provision had only one meaning (*ie*, that it applied only to male offenders), to read it in line with the legislative purpose would amount to rewriting the provision and this would be impermissible in law. As the Judge was of the view that he was not *functus officio* at that stage, he set aside the convictions under s 376A(1)(*b*) and acquitted the respondent on those six charges.

21 The respondent was therefore left with only the conviction under s 7(*a*) of the CYPA. The Judge noted that there were some mitigating factors in favour of the respondent. These included the fact that she had no antecedents and that she surrendered herself and cooperated with the police. For this charge, there was no penetration or touching of naked genitalia, the acts were consensual and there was no coercion and no severe or lasting psychological harm on V. The Judge therefore passed a sentence of eight months' imprisonment on the respondent for this sole charge.

The submissions

22 The Prosecution submitted that the Judge erred in interpreting s 376A(1)(*b*) as applying to only male offenders. First, the Prosecution argued that it was clear that Parliament intended both male and female offenders to be captured under s 376A(1)(*b*).

Parliament specifically considered that it would be an offence where both male and female persons could be the aggressor. Further, the Prosecution submitted that the gender neutral interpretation was supported by the text and structure of the provision itself. The use of the phrase "any person" in this section, as opposed to the phrase "any man" which appears in s 375 for the offence of rape and which was used in the draft iterations of s 376A, showed that s 376A(1)(*b*) was meant to be gender neutral. Finally, even if there were two possible interpretations of s 376A(1)(*b*), it should be read to cover both male and female offenders since such an interpretation would further the legislative purpose of the provision.

23 Counsel for the respondent submitted that s 376A(1)(*b*) was gender specific. This was contrary to the position that she took before the Judge. She contended that ss 376A(1)(*a*) and (*b*) were gender specific, applying only to males, while ss 376A(1)(*c*) and (*d*) were gender neutral. The Judge therefore was not wrong as the provision was capable of only one meaning despite the clear legislative intent.

Our decision

24 Section 376A is in the following terms:

> **376A.**—(1) *Any person (A) who —*
>
> (*a*) penetrates, with A's penis, the vagina, anus or mouth, as the case may be, of a person under 16 years of age (B);
>
> (*b*) *sexually penetrates, with a part of A's body (other than A's penis) or anything else*, the vagina or anus, as the case may be, of a person under 16 years of age (B);
>
> (*c*) causes a man under 16 years of age (B) to penetrate, with B's penis, the vagina, anus or mouth, as the case may be, of another person including A; or

> (*d*) causes a person under 16 years of age (B) to sexually penetrate, with a part of B's body (other than B's penis) or anything else, the vagina or anus, as the case may be, of any person including A or B,
>
> with or without B's consent, shall be guilty of an offence.
>
> (2) Subject to subsection (3), a person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 10 years, or with fine, or with both.
>
> (3) Whoever commits an offence under this section against a person (B) who is under 14 years of age shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.
>
> (4) No person shall be guilty of an offence under this section for an act of penetration against his or her spouse with the consent of that spouse.
>
> (5) No man shall be guilty of an offence under subsection (1)(*a*) for penetrating with his penis the vagina of his wife without her consent, if his wife is not under 13 years of age, except where at the time of the offence –
>
> (*a*) …
>
> …
>
> (*e*) …
>
> [emphasis added]

25 In deciding whether the italicised words in s 376A above must lead to the conclusion that s 376A(1)(*b*) applies only to male offenders, we turn to the legislative history behind the provision to try to determine the intention of Parliament. As is mandated by s 9A of the Interpretation Act (Cap 1, 1997 Rev Ed), an interpretation which promotes the purpose of the provision is to be preferred over an interpretation that does not promote the purpose.

Legislative history and parliamentary intent

26 The genesis of s 376A could be traced back to the year 2006. In that year, the draft Penal Code (Amendment) Bill ("the Draft Bill") was circulated for public consultation before the actual amendment bill (Bill 38 of 2007) was tabled in Parliament. The Draft Bill included a new provision, s 376A, to deal with the offence of sexual penetration of a minor. However, the draft s 376A was worded differently from s 376A as it now stands. It read:

> **376A.**—(1) Any man (A) who —
>
> (*a*) penetrates, with A's penis, the vagina, anus or mouth of a person under 16 years of age (B); or
>
> (*b*) causes another man under 16 years of age (B) to penetrate, with B's penis, the anus or mouth of A,
>
> with or without B's consent, shall be guilty of an offence.
>
> (2) Any person (A) who —
>
> (*a*) sexually penetrates, with a part of A's body (other than A's penis) or anything else, the vagina or anus of a person under 16 years of age (B);
>
> (*b*) causes a man under 16 years of age (B) to penetrate, with B's penis, the vagina or anus or mouth of another person (C); or
>
> (*c*) causes a person under 16 years of age (B) to sexually penetrate, with a part of B's body (other than B's penis) or anything else, the vagina or anus of A or B or of another person (C),
>
> with or without B's or C's consent, shall be guilty of an offence.

The Explanatory Notes to the Proposed Amendments to the Penal Code Offences ("Explanatory Notes"), in a section on gender neutrality, explained as follows:

> In the review, we considered whether provisions which are currently gender-specific should be amended to provide for gender neutrality.
>
> Having considered the matter, we have decided not to take the approach that all offences should be "gender neutral". Many of our laws remain gender specific because they reflect situations where men tend to be the aggressors e.g. rape will remain an offence that only males can commit. The offence of rape is clearly understood to be non-consensual penile penetration perpetrated by a man on a woman. Due to the anatomical differences between men and women, the offence of rape should remain an offence that can only be physically be performed by a man. *If a woman has sex with a minor, she can be prosecuted under section 7 of the Children and Young Persons Act (sexual exploitation of child or young person).*
>
> *However, for offences where both a male or a female could be the aggressor, our approach is to make it gender-neutral e.g. a female could be prosecuted for using any body part or object to penetrate the anus of a male victim.*
>
> [emphasis added]

27 As is evident from the Explanatory Notes and the draft s 376A, a situation in which a female aggressor had sexual intercourse with a male minor was initially not captured by the draft s 376A. This was justified on the anatomical differences between men and women and on the basis that rape should remain an offence that could only physically be performed by a man. However, where females could be the aggressor by using any body part or object to penetrate a male victim, the approach taken was to make the penal provision gender neutral.

28 After receiving feedback from the public, s 376A as it appeared in the Draft Bill was amended to read as it stands today. In the second reading of the bill, the Senior Minister of State for Home Affairs, Assoc Prof Ho Peng Kee ("the Minister") had this to say in relation to the amendments (*Singapore*

Parliamentary Debates, Official Report (22 October 2007) vol 83 at cols 2175):

> Feedback received highlighted concerns over female sexual abuse of male minors. On further consideration, we accept that these younger male children could be exploited by older women. Consequently, we have decided to make it an offence for a woman to engage in penile penetrative sexual acts with a male minor under 16 and to have commercial sex with a male minor under 18. Section 376A will be introduced to make oral and anal sex, whether consensual or non-consensual, with a minor under 16, an offence, attracting an imprisonment term of up to 10 years or fine or both. This new offence will also cover other penetrative acts such as penile-vaginal penetration and penetration of the anus or vagina by any part of the body or object. Causing a minor to penetrate or be penetrated by any person will also be an offence. Whilst there is some overlap with the Women's Charter and the Children and Young Persons Act, we believe that this new offence will provide the prosecution with greater prosecutorial discretion in deciding on the appropriate charge to prefer based on the circumstances of the case.

29 The Minister then said on the following day after Parliament had debated the Draft Bill (*Singapore Parliamentary Debates*, Official Report (23 October 2007) vol 83 at cols 2440 – 2441):

> … We look at the provisions and look whether they ought to be made gender neutral. We have stated the position in this House before that we do not take the position that all our criminal offences should be gender neutral because of the psychological and physiological differences between men and women – I think that is a point that Mr Charles Chong also alluded to. I do not know how many male Members will agree with him or me when I say that we, who are males, are less likely to feel that our modesty has been insulted compared to our wives or girlfriends. So section 509 is kept only where women are victims - insulting the modesty of a woman. And there are also other offences where it is not gender neutral. *Rape is one*. Marital immunity is to protect wives, not husbands. But having said this, we have also moved. Because, as I have said, we took the consultation period very seriously. *We had feedback saying that for some offences, perhaps, a female adult predator who "exploits" a male minor should be*

> *liable, like sexual assault by penetration*. And we agreed. So, that is now proposed to be the law.
>
> [emphasis added]

30 Having set out the legislative history, we consider whether it was Parliament's intention that female aggressors should be liable for sexual penetration of a minor. In our judgment, it is clear that Parliament intended for female aggressors to be within the ambit of s 376A in the Penal Code amendments that came into force in 2008. Even before the Draft Bill was circulated for public consultation, the Explanatory Notes to the Draft Bill (see [26] above) made clear that the approach was to make the offence gender-neutral where both males and females could be the aggressor. Specifically, the example given was a situation in which a *female* aggressor used a body part or an object to penetrate the anus of a male victim. Such a situation would have been captured by s 376A(2)(*a*) of the Draft Bill. It can be seen that the then s 376A(2)(*a*) was worded in practically the same terms as s 376A(1)(*b*) as it stands today. This suggests that it was Parliament's intention that s 376A(1)(*b*) is to apply to female aggressors as well and not to males only.

31 Parliament's intention to make female aggressors criminally liable under the Penal Code for sexual penetration of a minor was even more apparent when the amendment bill was debated in Parliament in 2007. From the Minister's speeches set out above, the government took on board the feedback it received and decided to make female aggressors liable for penile penetration with a male minor under 16. In particular, the Minister explained that "[c]ausing a minor to penetrate or be penetrated by *any person* will also be an offence" [emphasis added] (see [27] above). In the context of this debate, we were satisfied that the deliberate choice of words by the Minister showed that Parliament intended that

female aggressors who penetrate minors would be liable under the Penal Code. With this in mind we now turn to discuss the proper interpretation to be applied to s 376A(1)(*b*).

The interpretation of s 376A(1)

32 In interpreting s 376A(1)(*b*), the first point of reference must be the words used in the section itself. The words must of course be read against the backdrop of the rest of the section. Focusing on particular words used in a legal provision without reference to context could lead to an erroneous understanding. In *Moyna v Secretary of State for Work and Pensions* [2003] 4 All ER 162 at [24], Lord Hoffmann referred to:

> … the well-known distinction between the meaning of a word, which depends upon conventions known to the ordinary speaker of English or ascertainable from a dictionary, and the meaning which the author of an utterance appears to have intended to convey by using that word in a sentence. The latter depends not only upon the conventional meanings of the words used but also upon syntax, context and background. The meaning of an English word is not a question of law because it does not in itself have any legal significance. *It is the meaning to be ascribed to the intention of the notional legislator in using that word which is a statement of law.* …
>
> [emphasis added]

33 The Prosecution submitted that the deliberate use of "any person" in s 376A(1) was an indication that the section was gender neutral. We agree that the drafter's deliberate choice of "any person" in the opening words of s 376A(1) suggested strongly that the section was gender neutral in its application to offenders. The drafter was careful to differentiate the use of "person" and "man" throughout the section. The person "A" in the opening words could therefore be male or female.

34 However, it need not necessarily follow from this that each sub-section in s 376A(1) must be gender neutral. Section 376A(1)(*a*) mentions penetration by A with A's penis. This means that A in s 376A(1) must be a male. However, any suggestion that the remaining sub-sections are also gender specific would be negated by s 376A(1)(*c*), because in this sub-section, it is envisaged that A, the person who is penetrated, could be someone with a vagina. Thus, under s 376A(1)(*c*), A could be either a male or a female. It was thus imperative to look specifically at whether the person A described in s 376A(1)(*b*) could only be a male or could be either a male or a female.

35 The Judge held that the phrase "with a part of A's body (other than A's penis)" had only one meaning. In his opinion, A must be someone with a penis and therefore A has to be a male. Such an interpretation was indeed plausible if s 376A(1)(*b*) was read entirely on its own. However, a similar phrase appears in s 376A(1)(*d*) in relation to another person, B. Section 376A(1)(*d*) applies to a situation in which B is caused to sexually penetrate, "*with a part of B's body (other than B's penis)* or anything else, the vagina or anus, as the case may be, of any person including A or B" [emphasis added]. Using the Judge's reasoning, the emphasised phrase in s 376A(1)(*d*) in relation to B would mean that B has to be a male. However, the same provision also contemplates that B could be a person with a vagina, *ie*, a female. This clearly demonstrates, therefore, that the words "with a part of A's body (other than A's penis)" do not necessarily mean that A must be a male. In our view, internal consistency within a section dictates that A in s 376A(1)(*b*), like B in s 376A(1)(*d*), could be either male or female.

36 Similarly, the fact that the word "vagina" is used in reference to the person penetrated in all four limbs of s

376A(1) certainly does not mean that the person penetrated must be a female. To hold otherwise would run contrary to legislative intent because this section was meant to protect all minors under 16 years of age and not to protect only female minors, with the exception in s 376A(1)(*c*) where the minor is stated to be "a man". Even in this exception, it cannot be that "another person" or A, the aggressor, who is penetrated by the minor B, must have a vagina and therefore must be a female. To hold otherwise would again be contrary to the legislative intent of gender neutrality seen in the parliamentary debates that we have cited. We think the entire section can be read purposively such that where "other than A's (or B's) penis" is mentioned, Parliament clearly intended to say also, "if that person has a penis". Similarly, where "vagina" is used, it is implicit that it is qualified by "if that person has a vagina".

37 Counsel for the respondent submitted that the words in parenthesis would be superfluous if we hold that the phrase "with a part of A's body (other than A's penis)" means that A could be a male or a female. We do not think so. In our view, the words "(other than A's penis)" serve the purpose of differentiating penile penetration (which would be captured by s 376A(1)(*a*) and (*c*)) from non-penile penetration under ss 376A(1)(*b*) and (*d*). It can be seen that where penile penetration is involved, the three bodily orifices (vagina, anus or mouth) of the person penetrated are mentioned in the sub-section but where non-penile penetration is involved, the mouth of the person penetrated is omitted.

38 Therefore, on a proper reading of s 376A as a whole, s 376A(1)(*b*) is gender neutral and applies to both male and female offenders. For completeness, with our interpretation of s 376A(1)(*b*), the gender neutral provisions would apply also to

offenders of indeterminate gender. Further, although this point was not in issue before us, we would add that "penis" in this section refers to the actual body organ and not an artificial appendage like the dildo that the respondent wore on her body.

Conclusion on conviction

39 For the reasons expressed above, we disagree with the Judge that s 376A(1)(*b*) applies only to male offenders. We therefore allowed the Prosecution's appeal and set aside the Judge's decision to set aside the convictions that he had initially pronounced in respect of the six proceeded charges under s 376A(1)(*b*). Counsel for the respondent confirmed that the respondent understood the nature and consequences of her plea of guilt and maintained her plea before us. The respondent also confirmed her unequivocal admission of all matters set out in the statement of facts tendered by the Prosecution in the High Court. Counsel also confirmed that the respondent still consented to the remaining 14 charges being taken into consideration for the purpose of sentencing.

40 In the circumstances, we reinstated the conviction of the respondent on the six charges under s 376A(1)(*b*) and the one charge under s 7(*a*) of the CYPA, with the respondent having consented to the remaining 14 charges under s 376A(1)(*b*) being taken into consideration for the purpose of sentencing. As the parties requested time to prepare for submissions on sentence instead of relying on their submissions before the Judge, we adjourned sentencing to a later date.

The sentences

The Prosecution's submissions on sentence

41 The Prosecution suggested the following sentences for the individual offences:

(a) For the charges punishable under s 376A(2), the suggested sentence was 12 months' imprisonment for each charge;

(b) For the charges punishable under s 376A(3), the suggested sentence was six to seven years' imprisonment for each charge;

(c) For the charge under s 7(*a*) of the CYPA, the suggested sentence was 12 months' imprisonment, instead of the 8 months' imprisonment imposed by the Judge.

42 The Prosecution submitted that the appropriate total sentence should be at least eight years' imprisonment. This comprised three consecutive imprisonment terms made up of one imprisonment term from each group of offences, making a total of at least 12 months plus six or seven years plus 12 months.

43 The Prosecution submitted that the respondent abused her position of trust and authority as she was effectively a caretaker of V from April 2012 to December 2013. The multiple sexual offences were committed during the time that V spent in the respondent's flat because V's father trusted the respondent. The Prosecution cited several cases in which abuse of trust and authority was regarded as an aggravating factor in sentencing sexual offenders (*Public Prosecutor v UI* [2008] 4 SLR(R) 500; *Public Prosecutor v AOM* [2011] 2

SLR 1057; *Public Prosecutor v Yap Weng Wah* [2015] 3 SLR 297 ("*Yap Weng Wah*"); *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 ("*Shouffee"*)).

44 The Prosecution also highlighted the fact that there were 20 instances of sexual penetration of V's vagina over some 20 months by the respondent using the dildo or her finger. It cited *Shouffee* for the proposition that the presence of multiple distinct offences over a long period is a cumulative aggravating factor which should be considered when the court decides how many imprisonment terms should run consecutively.

45 For the offences punishable under s 376A(2), where the victim's age is between 14 years and under 16 years, the Prosecution cited *AQW v Public Prosecutor* [2015] 4 SLR 150 where the High Court considered an imprisonment term of between ten and 12 months to be the appropriate starting point for fellatio performed by or on a minor above 14 years of age who did not appear to be particularly vulnerable, without coercion or pressure and where there was no element of abuse of trust. The Prosecution also referred to *Yap Weng Wah* where the High Court imposed an imprisonment term of five years for fellatio on a minor who was 15 years old. In that case, there was a high risk of reoffending, a high degree of premeditation and abuse of trust. The accused there used the Internet to lure the victims and recorded the sexual acts on video. The Prosecution argued that penetration of the vagina using a dildo or a finger was at least comparable in severity to fellatio.

46 For the offences punishable under s 376A(3), the Prosecution emphasised that the maximum imprisonment term provided by law is 20 years, which is double that under s 376A(2). In *Yap Weng Wah*, the High Court

considered a term of six to seven years' imprisonment as the benchmark for fellatio under s 376A(3), in the absence of aggravating or mitigating circumstances. In *Public Prosecutor v Sim Wei Liang Benjamin* [2015] SGHC 240, the accused pleaded guilty to eight charges involving four female minors and consented to 15 other charges being taken into consideration for sentencing. Seven out of the said eight charges involved sexual offences. The offender was a prowler on the Internet, looking out for young girls. The High Court imposed ten years' imprisonment and ten strokes of the cane for each of the two statutory rape charges, five years' imprisonment and two strokes of the cane for each of the two fellatio charges and 12 months' imprisonment and two strokes of the cane for the digital-vaginal penetration charge. There were also two charges under ss 7(*a*) and (*b*) of the CYPA for which the sentences were 12 months' imprisonment and six months' imprisonment respectively. The total sentence was imprisonment for 20 years and six months and 24 strokes of the cane. The offender's appeal against sentence was dismissed by the Court of Appeal in July 2016. The Prosecution emphasised that there was caning imposed for the digital-vaginal penetration charge whereas the respondent in this appeal would not be subject to caning because she is a female.

47 The Prosecution pointed out that counsel for the respondent had asked for a sentence of less than 12 months' imprisonment before the Judge for the offences punishable under s 376A(3). The Prosecution argued that such a sentence for an offence which has a maximum of 20 years' imprisonment and caning would be entirely incongruous with statutory rape cases (where the victim's consent is also irrelevant) and even with less serious sexual offences such as outrage of modesty.

48 For the offence under s 7(*a*) of the CYPA, the Prosecution appealed against the imprisonment of eight months imposed by the Judge. The punishment provided for a first conviction under this section is a fine not exceeding $5,000 or imprisonment not exceeding two years or both. This was the only offence dealt with by the Judge because he had set aside the convictions under s 376A.

49 The Prosecution submitted that the Judge was wrong in holding that any trust reposed in the respondent at the time of this offence was not significant. This was because the respondent was effectively V's caretaker. V's consent and the absence of coercion were not mitigating factors because V was only 13 years and two months old at that time. Further, the absence of severe or lasting psychological harm was at best a neutral factor and could not be regarded as a mitigating one. With the convictions under s 376A restored, the respondent could no longer be said to be a first offender before the court. The Prosecution also submitted that the Judge placed too much weight on the fact that the respondent returned to Singapore to surrender to the police. The reality was that the respondent had gone out of Singapore to evade arrest and a police gazette was in fact issued for her arrest. It was the respondent's sister who persuaded her to return and who informed the police of their return.

50 Citing *Shouffee,* where the High Court set out guidelines in considering consecutive sentences, the Prosecution submitted that one sentence for each type of offence should run consecutively (see [41] and [42] above). This was because the three types of offences in the proceeded charges were all separate and distinct in that they took place on different dates and involved different sexual acts. Neither the one-transaction principle nor the totality principle would be infringed by a cumulative

sentence of at least eight years' imprisonment in the light of the multiple charges (including those taken into consideration for sentencing), the fact that they took place over about 20 months and V's age at the material time.

The respondent's submissions on sentence

51 Counsel for the respondent submitted that a global sentence of less than three years' imprisonment would be appropriate because of the mitigating factors. These included the fact that the respondent cooperated fully with the police by returning to surrender herself and that she pleaded guilty. She left Singapore for fear that her real gender would be exposed by the investigations and that she would not be able to bear the shame and embarrassment caused to her family. She was under the mistaken impression that it was not an offence to have consensual sexual activities with a minor.

52 This case was the respondent's first brush with the law. She committed these offences because she was suffering from Gender Dysphoria and has been living as a male since the age of 16. She has been assessed by Dr Tommy Tan, a psychiatrist, to have a low risk of reoffending. The offences were committed in the context of a developing romantic relationship. She is also genuinely remorseful.

53 There was also an absence of aggravating factors in this case. The respondent did not set out to deceive V about her gender or to groom her sexually. Her case was unlike *Yap Weng Wah* where the accused befriended victims by using different identities. The respondent was not in a position of trust in relation to V. She was not V's guardian, teacher or spiritual guide. V's parents did not entrust the care of V or her siblings to the respondent. V and her siblings went to the flat and left as

and when they wished. The fact that V developed romantic feelings for the respondent indicated strongly that she did not see the respondent as a "fatherly figure" or someone in authority over her. The respondent did not seek out V and there was no coercion exercised by her on V to enter into a relationship.

54 In *Public Prosecutor v Ng Kean Meng Terence* [2015] SGHC 164 ("*Ng Kean Meng Terence"*), a case also referred to by the Prosecution in its submissions and which is on appeal before the Court of Appeal, the High Court sentenced the accused to one year's imprisonment and two strokes of the cane under s 376A(3) for an offence of digital penetration. Counsel for the respondent argued that an imprisonment term of less than 12 months would be appropriate here because, unlike *Ng Kean Meng Terence*, the respondent did not explicitly offer to take care of V. This was so even after taking into account the fact that the respondent, a female, is not subject to caning.

55 In *Yap Weng Wah*, the offence in question was fellatio. It was argued that sexual penetration by a dildo was a vastly different act from fellatio and the latter act could also lead to the transmission of sexual diseases. Further, there were 76 charges and 30 victims in that case, in addition to other aggravating factors such as the targeting of young and vulnerable victims and the video-recording of the sexual acts. When compared to the guidelines on s 376A(2) in *AQW*, the guidelines on s 376A(3) were questionable as the latter were about seven times higher.

56 For the offences punishable under s 376A(2), counsel for the respondent cited *Public Prosecutor v Qiu Shuihua* [2015] SGHC 102 where the district court imposed imprisonment terms of two months for digital-vaginal penetration and four months for penile-vaginal penetration. On appeal

by the Prosecution there, the High Court maintained the first sentence and enhanced the second sentence to ten months' imprisonment.

57 Based on the above, counsel for the respondent submitted that the appropriate sentence under s 376A(2) for digital-vaginal penetration should be two months' imprisonment and that for penetration using a dildo should be six months' imprisonment.

58 In respect of the offence under s 7(*a*) of the CYPA, counsel for the respondent submitted that the sentence imposed by the Judge was not manifestly inadequate. This was because he took into account all the relevant circumstances, including the guidelines set out in *AQW*.

59 On the issue of consecutive sentences, as mandated by s 307 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC"), counsel for the respondent submitted that only the imprisonment term for one charge of penetration by dildo under s 376A(3) (which was suggested at [54] above as less than 12 months) and that for the charge under s 7(a) of the CYPA (which, it was argued, should stand at eight months) should run consecutively. Alternatively, should we decide that more than two sentences ought to run consecutively, it was suggested that the imprisonment term for one charge of digital penetration when V was above 14 years of age under s 376A(2) be added to the above. This, as suggested at [57] above, would add another two months to the total imprisonment term. The total sentence submitted by counsel for the respondent is therefore about 20 months' imprisonment (if two sentences are ordered to run consecutively) or 22 months' imprisonment (if three sentences are ordered to run consecutively).

Our decision on sentence

60 Before we set out our decision on the sentences, we thought it appropriate to make two remarks by way of preface. The first is that when the court in some of the precedents cited was faced with a multitude of sexual offences, there may sometimes be a tendency for all concerned to focus on the offences carrying the heavier punishments and as a result, less attention may have been given to offences which by comparison seem less serious. This is ultimately a function of proportionality but this factor must be borne in mind when we look at the individual precedents and try to extract from them the rules that we think they can properly stand for and how they are to apply in other contexts.

61 The second point is that it is always important to refer to the decisions of the courts with some care. We can provide two illustrations to demonstrate this. One is the reference made to *AQW* where we had to make the point repeatedly that the benchmarks laid down by the court in that case were qualified explicitly by reference to circumstances that did not apply here. An even better illustration can be seen in relation to the case of *Yap Weng Wah*, where the offender was a predator who befriended young victims on the Internet, abused them and even filmed the sex acts. Some of the charges were brought under s 376A(3) and in respect of these, the Judge in that case observed that the starting point for an offence involving fellatio under that section would be an imprisonment term of six to seven years. However, to focus on this alone ignores two facts. The first is that on the facts of the case as a whole, the Judge in fact imposed an aggregate term of imprisonment of 30 years and 24 strokes. The second fact is that in relation specifically to the fellatio charge under s 376A(3), the Judge imposed a sentence of

imprisonment of eight years and four strokes of the cane. We therefore need to be mindful of the facts when we look at how the court has articulated the benchmark and how the court has in fact applied it in the factual situation in any particular case. It must also be noted that in cases involving multiple charges, when the court finally deliberates on what the overall sentence ought to be, it frequently makes adjustments to the sentences for individual charges in order to arrive at an aggregate that it thinks is proportionate to the culpability of the offender and which is just in all the circumstances.

62 In the present case, we considered that the aggravating circumstances included in particular the abuse of the position of trust that the respondent in fact enjoyed. We also considered the number of offences that were committed and those that were taken into consideration for the purpose of sentencing as bearing on the appropriate length of the term of imprisonment that is to be imposed.

63 As against these considerations, we regarded the following three factors as mitigating. We used that term loosely because some of the considerations were not mitigating in the strict sense but were factors that pointed towards a shorter sentence having regard to interests such as relativity and consistency.

64 The first factor was that it appeared that there was a genuine romantic relationship that developed between the respondent and V. Related to that, the second factor was that the respondent was not a serial offender targeting multiple minors. We add here that the respondent as a mature adult should not have contemplated a romantic relationship with a minor in the first place. The third factor in the respondent's favour was that there appeared to be a

relatively low risk of her re-offending. This emerged from the psychiatric assessments that were presented in court. The Prosecution did not object to the submissions that the respondent was a low risk where re-offending in future was concerned.

65 With this background, we consider that the appropriate starting points, having regard to the gravity of the offence, the applicable sentencing range and the factor of abuse of trust but not yet considering the elements of proportionality and the mitigating factors that we have just outlined, to be as follows:

(a) for offences punishable under s 376A(2), where there is an element of abuse of trust, we consider that the starting point will be a term of imprisonment of three years and this would apply for each of the offences under this section in this case;

(b) for the offences punishable under s 376A(3), again where there is an element of abuse of trust, we consider that the starting point will be a term of imprisonment of between ten and 12 years. On the facts of this case, we think a term of 11 years would in principle be appropriate as a starting point. It must also be remembered that s 376A(3), unlike s 376A(2), provides for caning as well. That is irrelevant here because female offenders cannot be caned under the law. However, the court may impose an additional term of imprisonment of not more than 12 months in lieu of caning under s 325(2) of the CPC; and

(c) for the offence under s 7(*a*) of the CYPA, we think a term of imprisonment of one year would be appropriate.

66 Ordinarily, we would have been minded to run three sentences consecutively because of the large number of offences. However, as we have alluded to, we are bound to consider the element of proportionality having regard to the principles outlined in *Shouffee* and also to the mitigating circumstances that we have referred to. After considering these points, we decided that it would be appropriate to adjust the sentences in this case as follows:

(a) we ordered only two imprisonment terms to run consecutively (that is the minimum number of consecutive sentences specified in s 307(1) of the CPC);

(b) we reduced the length of imprisonment for each of the offences punishable under s 376A(3) from the starting point of 11 years to a term of nine years;

(c) the imprisonment term of nine years for the first charge, which concerns penetration of V's vagina with the dildo when she was under 14 years old, an offence punishable under s 376A(3), would run consecutively with the imprisonment term of 1 year for the 21st charge, which concerns the offence under s 7*(a)* of the CYPA, for an aggregate term of imprisonment of ten years.

We think that in all the circumstances of this case, this sentence would be appropriate and would give due regard to the considerations of the principle of proportionality as well as the mitigating circumstances that we have outlined. All the other sentences, including the three years' imprisonment for each of the offences punishable under s 376A(2), were ordered to run concurrently with the two consecutive sentences.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Tay Yong Kwang Judge of Appeal

Kwek Mean Luck, Dwayne Lum and Tan Zhongshan (Attorney-General's Chambers) for the appellant;
N Sudha Nair and Lum Guo Rong (Lexcompass LLC) for the respondent.