IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 56

Criminal Appeal No 32 of 2016

Between

PRAM NAIR

… Appellant

And

PUBLIC PROSECUTOR

… Respondent

JUDGMENT

[Criminal Law] — [Offences] — [Rape]

[Criminal Procedure and Sentencing] — [Sentencing] — [Benchmark sentences]

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Pram Nair
v
Public Prosecutor

[2017] SGCA 56

Court of Appeal — Criminal Appeal No 32 of 2016
Sundaresh Menon CJ, Chao Hick Tin JA, Andrew Phang Boon Leong JA, Judith Prakash JA and Tay Yong Kwang JA
11 April; 27 June 2017

25 September 2017 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 On the night of 5 May 2012, [V] went with a female friend [S] to a party at the Wavehouse, a club at Siloso Beach, Sentosa. There they met Pram Nair, the appellant. A period of revelry followed. Later that night [V] and the appellant left the club by themselves and headed for the beach. What happened after that was the central dispute in this case. [V] said that by this time, she was intoxicated to the point of being barely conscious, and that the appellant had penetrated her with his finger and also raped her while they were on the beach. The appellant asserted that [V] was not as intoxicated as she claims to have been, and that the sexual activity between them, which included some foreplay, was consensual.

2 Following investigations, the Public Prosecutor ("PP") brought two charges against the appellant: one for rape under s 375(1)(*a*) of the Penal Code (Cap 224, 2008 Rev Ed), which is punishable under s 375(2), and another for sexual assault by penetration under s 376(2)(*a*), punishable under s 376(3).

3 At the conclusion of the trial in the High Court, the judge ("the Judge") convicted the appellant of both offences and sentenced him to 12 years' imprisonment and 6 strokes of the cane for each charge. The Judge reduced the imprisonment terms to 11 years and 19 days for each offence to take into account the time that the appellant had spent in remand before being released on bail. With both sentences ordered to run concurrently, the appellant's aggregate sentence was 11 years and 19 days' imprisonment and 12 strokes of the cane. The Judge issued separate grounds of decision in respect of the appellant's conviction and sentence: *Public Prosecutor v Pram Nair* [2016] 4 SLR 880 ("Conviction GD") and *Public Prosecutor v Pram Nair* [2016] 5 SLR 1169 ("Sentence GD") respectively. The appellant has appealed against his conviction and sentence.

4 We heard the appeal on 11 April 2017 and received further submissions on 27 June 2017. Three significant legal issues were the focus of counsel's arguments: first, how is a court to determine whether a rape victim, who was intoxicated at the material time, had in fact consented to sexual activity; second, whether the fact that a victim is intoxicated is a factor that aggravates an offence of rape or sexual assault by penetration; and third, whether or not the benchmark sentences for the two offences should be equated. We will set out our views on those issues in due course. For now, we turn to sketch out the factual background in greater detail, focusing for the moment on those facts which are undisputed.

Background

[V] goes to the Wavehouse with [S]

5 The material events occurred over a short span of about four hours, between 11pm on 5 May 2012 and 2:50am on 6 May 2012. [V] was 20 years of age at the material time and was employed as a contract teacher.[1] She wanted to have a "girls' night out".[2] She learnt through a Facebook invitation of a beach party that would be held at the Wavehouse on the 5th of May, with free entry and drinks for women. The party was to promote Cointreau, a brand of orange-flavoured liqueur.[3] She asked [S], whom she had met through a teachers' training program, to go with her.[4]

6 On the evening of 5th May, [V] and [S] met at the Harbourfront MRT station and they took the sky-train to Sentosa.[5] [V] was wearing a white tank top, a black strapless bra, a blue-green bikini bottom, a pair of sweat shorts, and pink flip-flops.[6] They entered the Wavehouse after someone named [K], the event promoter who sent [V] the Facebook invitation, had let them in.[7] [K] then took his leave of [V] and [S][8] and asked someone named [J] to attend to them.[9]

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1 Transcript (25 August 2015), p32, line 27

2 Transcript (25 August 2015), p 37, line 27

3 Statement of [S] at para 4 (ROP Vol 2, p 53)

4 Transcript (25 August 2015), p 37, line 22 to p 38, line 2

5 Statement of [S] at para 3 (ROP Vol 2, p 53); Transcript (15 September 2015) at p 23, line 12

6 Transcript (25 August 2015), p 40, lines 21–26

7 Transcript (25 August 2015), p 38, lines 22–24; p 44, lines 2–7

8 Transcript (25 August 2015) at p 46, lines 19–21

9 Statement of [J] at para 3 (ROP Vol 2 p 66); Transcript (25 August 2015) at p 46, line 5

[J] was working part-time for an events company and [K] was his superior. [J] was working at the party at the Wavehouse that night.

7 Before meeting [V] and [S], [J] had proceeded to the bar inside the Wavehouse to prepare drinks with alcohol provided by the club manager.[10] The bar is located on the beach and resembled a hut (it is a four-sided bar with just one way in and out).[11] There, [J] met the appellant, who was sitting at the bar counter and having drinks.[12]

8 The appellant, who at the material time was a part-time beach patrol officer, had finished his shift at 7pm and had planned to attend the Wavehouse party with some friends. He registered himself at the party and collected a bottle of Cointreau which he had won. He drank some Cointreau and left the bottle at the bar.[13] While waiting for his friends, he went back to the beach patrol office, and had drinks with some colleagues there. It turned out that his friends could not make it for the party. He thus returned to the Wavehouse on his own.[14] He sat at the bar and drank Cointreau with mixers such as Coke and Sprite.[15] He was wearing a black T-shirt and red shorts.[16]

9 The appellant struck up a conversation with [J]. He offered [J] a few drinks of Cointreau with mixers. They chatted about their jobs.[17] During their conversation, [J] called [V] asking her to meet him at the bar counter.[18]

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10 Transcript (2 September 2015), p 16, lines 3 – 6

11 Transcript (2 September 2015) at p 15, lines 27–32

12 Transcript (2 September 2015) at p 15, lines 11–12

13 Statement of Pram Nair dated 7 May 2012 at "Q2" (ROP Vol 2, p 122)

14 Transcript (13 April 2016), at p 62, line 8–22

15 Statement of Pram Nair dated 7 May 2012 at para 2 (ROP Vol 2, p 122)

16 Statement of Pram Nair dated 21 May 2012 at "Q1" (ROP Vol 2, p 129)

[V] meets the appellant

10 [V] arrived at the bar counter with [S]. This was probably sometime after 11:20pm. This is because [V] and [S] both recalled having to wait for some time, after reaching the Wavehouse at 11pm, for [K] to let them in; [S] estimated that it was about 20 minutes.[19] In fact, [J] said that [K] had texted him at 11:45pm asking him to entertain [V].[20]

11 After [V] and [S] arrived, the appellant started talking to them. [V] recalled that the appellant spoke more to [S] than to her[21] and that she was more inclined to talk with [J].[22] The appellant recalled that he chatted a little bit more with [V] than with [S].[23] We should add that we do not think it really matters whether at that point the appellant was talking more to [V] or to [S]. [J] was also at the counter and recalled interacting with [V] and [S]. However, he would sometimes have to entertain other guests.[24] While he did so, the appellant, [V], and [S] would continue conversing amongst themselves.[25]

12 There was plenty of drinking. [V] recalled drinking neat shots of whisky or Cointreau and Cointreau mixed with juice.[26] At times she allowed [J] or the

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17 Transcript (13 April 2016), p 62, lines 29–32

18 Statement of [J] at para 5 (ROP Vol 2, p 66)

19 Transcript (15 September 2015) at p 6, lines 1–7

20 Statement of [J] at paras 3–4 (ROP Vol 2 p 66)

21 Transcript (25 August 2015) at p 53, lines 18–19; lines 29–30

22 Transcript (25 August 2015) at p 54, lines 3–4

23 Transcript (13 April 2016) at p 63, lines 11–12

24 Transcript (13 April 2016), p 63, lines 4–5 ; Transcript (2 September 2015), p 16, lines 11–27

25 Transcript (2 September 2015), at p 16, lines 23–27; p 23, lines 13–14

26 Transcript (25 August 2015) at p 50, lines 11–16

appellant to pour whisky or Cointreau directly into her mouth from the bottle[27] – [S] remembered that [V] had Cointreau poured into her mouth at least four to eight times.[28] [S] herself drank two mixed drinks and also had liquor poured into her mouth once or twice.[29] The appellant consumed a few drinks and he too had liquor poured into his mouth by [J].[30]

13 There was one occasion where [V] had Cointreau poured into her mouth for some 20 seconds straight. It came to light that she had turned 20 the week before, on the 29th of April.[31] It was thus suggested (either by the appellant, according to [V] and [S],[32] or [S], according to the appellant[33]) that [V] should drink Cointreau continuously for 20 seconds. It is undisputed that it was the appellant who poured Cointreau directly from the bottle into [V]'s mouth for that 20 seconds.[34]

[V] goes to the VIP area and returns to the bar counter

14 At one point in time, [V] left the bar counter for the VIP area in the Wavehouse because [J] had asked her to go there with him.[35] The VIP area is also outdoors but further away from the seashore.[36] According to [J], [V] drank

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27 Transcript (25 August 2015) at p 50, lines 3–6

28 Transcript (15 September 2015) at p 12, line 16

29 Transcript (15 September 2015) at p 14, lines 4–7

30 Transcript (13 April 2016) at p 63, lines 10–19

31 Transcript (25 August 2015), p 52, lines 2–4

32 Transcript (25 August 2015) at p 51, lines 2–4; Transcript (15 September 2015), p 12, line 31

33 Statement of Pram Nair dated 7 May 2012 at para 2 (ROP Vol 2, p 122)

34 Transcript (13 April 2016) at p 64, lines 16–17

35 Transcript (2 September 2015) at p 18, lines 6–10

36 Transcript (25 August 2015) at p 55, line 28

more Cointreau with mixers.[37] [V] could not remember what she had drunk there.[38] She did however remember that [S] and the appellant were not at the VIP area and that she left her bag at the VIP area.[39] [V] later went back to the bar counter area to rejoin [S] and the appellant.[4041]

15 It is reasonably certain that the appellant, [V], and [S] stayed at the bar counter until past midnight. We know this because while they were at the bar counter, [S] used her Canon camera to take two photos[42] of [V] and the appellant. The timestamp on the photos was inaccurate as the camera was set to a different time zone but it is not in dispute that they were both taken at 12:15am on 6 May 2012.[43] In both [S]'s and the appellant's recollection, the photos were taken after [V] had gone to the VIP area and returned.[44]

16 In both the photos, [V] was standing on the appellant's right, her arm around his shoulder. They were both facing the camera and standing close enough to each other for their bodies to be in contact. As the photos were probably taken in quick succession, they are identical in most respects. One difference is that in the first photo, [V] was pointing at the appellant with her index finger, whereas in the second photo, she was holding up two fingers, also

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37 Statement of [J] at para 6 (ROP Vol 2 p 67)

38 Transcript (25 August 2015) at p 57, line 2

39 Transcript (25 August 2015) at p 57, lines 9–11; line 20

40 Statement of [J] at para 6; Transcript (13 April 2016) at p 65, lines 16–17

41 Transcript (13 April 2016) at p 66, lines 29–31

42 ROP Vol 2, p 154, 156

43 Appellant's Note, p 1

44 Statement of [S] at para 7 (ROP Vol 2, p 54); (Transcript (13 April 2016) at p 70, line 14)

pointed towards him. Another difference is that the appellant was smiling in the first photo but not in the second.

[V] dances with [J]

17 [V] recalled dancing on the dance floor with [J]. [V] may have shuffled between the VIP area and the bar counter a few more times, though she could not recall how she ended up going from the VIP area to the dance floor. She did however remember that she liked [J] and had a "really good time" dancing with him.[45] She hugged and kissed him while dancing.[46] [J] noticed that [V] was in general quite energetic at the dance floor: she was "very hyper" and "dancing a lot".[47] The appellant saw [V] go to the dance floor and that she danced with "a couple of guys".[48] [V] could not remember if she danced with anyone else apart from [J].[49]

18 At some point, while she was dancing, [V] realised she was "way too drunk" and wanted to go home. She thus tried to look for [S].[50] She went to the bar counter because that was where she had last seen [S]. In [V]'s recollection, [S] then "popped out" of nowhere and told her that they needed to go home. [V] agreed and recalled telling [S] something to the effect of "we need to go home". [S] then asked her where her ([V]'s) bag was, and [V] told her it was in the VIP area. [S] then told her to stay at the bar counter where she was and not go

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45 Transcript (25 August 2015) at p 58, line 12, lines 26–28

46 Statement of [V] at para 7 (ROP Vol 2, p 9); Statement of [J] at para 7 (ROP Vol 2, p 67)

47 Transcript (2 September 2015) at p 20, line 17

48 Transcript (13 April 2016) at p 70, lines 17–29

49 Statement of [V] at para 7 (ROP Vol 2, p 9)

50 Transcript (25 August 2015) at p 59, line 26

anywhere.[51] She could not remember what happened after that because "everything went blank for a moment".[52]

19 [S] gave a slightly different account of how [V] and the appellant came to leave the Wavehouse. [S] said that she called [V] and [V] told her that she was in the VIP area. [S] went with the appellant to the VIP area. They split up to look for [V] and the appellant found her; [S] then met up with both of them at the intersection between the bar and the VIP area.[53] [S] said that the appellant then asked her to get [V]'s bag from the VIP area. When she returned, the appellant and [V] were no longer there. We note that the Judge accepted [S]'s account of events (see the Conviction GD at [127]).

20 There is a significant divergence in the PP's and the appellant's accounts of what happened after [V] and the appellant left the Wavehouse.

PP's account of what happened at the beach

21 The PP's account of the events was derived from the perspective of three groups of witnesses: [V], [S] and [J], and two independent eyewitnesses.

22 [V] said that she could not really remember what happened after she left the Wavehouse.[54] She could not even remember being brought away from the bar counter at all.[55]

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51 Transcript (25 August 2015) at p 60, lines 5–17; Statement of [V] at para 8 (ROP Vol 2 p 9)

52 Statement of [V] at para 9 (ROP Vol 2, p 9)

53 Statement of [S] at para 8 (ROP Vol 2, p 54)

54 Statement of [V] at para 9 (ROP Vol 2, p 9)

55 Transcript (25 August 2015), p 31, lines 24–26

23 The next thing she remembered was waking up. It was the pain of being penetrated that woke her.[56] Lying with her back on the sand, she saw the appellant on top of her (though not pressing down on her). She saw his face. She heard him saying "[V]…[V]…it's ok". She started crying and saying "No…No…No".[57] She tried to push him away but she was too weak and drunk – she did not think her body was "capable of… functioning" or doing what she wanted to do at that time.[58] Then she "blacked out".[59] When she next woke up she was in the hospital.

24 [S]'s account is as follows. On realising that [V] had gone missing, she spent about 20 minutes looking for her.[60] She ran into [J] and asked if he had seen [V]. [J] said he too was looking for her.[61] They split up to look for [V] in the Wavehouse. A bouncer told [J] that [V] had left with an "Indian guy".[62] [S] called [V] on her mobile phone a few times. The first time, someone picked up but did not say anything. The second time, the appellant answered and told her that he and [V] were on the beach. He also told [S] to remain at the Wavehouse and that he would look for her. However, [S] went to look for [V] on the beach nonetheless.[63]

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56 Transcript (25 August 2015), p 63, lines 9–10

57 Statement of [V] at para 10

58 Transcript (25 August 2015), p 64, lines 25 – 26

59 Statement of [V] at para 10 (ROP Vol 2, p 10); Transcript (25 August 2015), p 63, lines 8–17

60 Statement of [S] at para 9 (ROP Vol 2, p 55)

61 Statement of [J] at para 8 (ROP Vol 2, p 67)

62 Statement of [J] at para 9 (ROP Vol 2, p 68)

63 Statement of [S] at para 10

25 When [S] walked towards the beach, she saw the appellant's bag, and as she approached [V] she saw her lying on the sand looking like she had passed out. [V] was wearing only her tank top and the bottom half of her body was naked. The appellant's bag was behind the tree and he was rummaging through it for a pair of shorts which [S] could help [V] put on. He threw [S] a pair of red shorts. The appellant told [S] that he had found [V] at the spot completely naked. [S] told him to go away. [S] tried talking to [V] but the latter was not responding clearly. She saw [V] foaming at the mouth and, in a state of panic, she called the Singapore Civil Defence Force to request an ambulance. That was at 2:50 am on 6 May 2012.[64]

26 Two partygoers named Kason and Terence, who were friends and had gone to the Wavehouse that night, saw roughly what happened between the appellant and [V] on the beach. At about 2am, Kason was walking along the beach looking for a friend's lost slippers with the aid of the torchlight function on his mobile phone. From a distance of about 35 metres away he saw a man, his bare buttocks facing him, kneeling down and bending over a woman lying on the sand. It is not in dispute that these were the appellant and [V] respectively. Kason assumed it was a couple making out and ignored them. He continued walking up and down the beach searching for his friend's slippers.[65]

27 Kason saw them a second time when he passed by the same location. This time he saw the appellant kneeling in between [V]'s legs. Kason thought he was fully naked.[66] Based on the positions of their bodies, Kason assumed the appellant was having sex with [V][67] although he did not actually see it happen.

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64 Statement of [S] at paras 11 and 12 (ROP Vol 2, pp 55 and 57); ROP Vol 2, p 57

65 Statement of Tan Kia Rong Kason at paras 3–6 (ROP Vol 2, p 58)

66 Statement of Tan Kia Rong Kason at para 6 (ROP Vol 2 p 58)

28 Kason met up with Terence and told him what he had seen. Terence went to have a look for himself. He saw that [V] was naked from the top; he knew this because he could see her breasts. He also saw that the appellant's hand was moving around [V]'s lower body, and that there was "little movement" from [V]. He went back to Kason and said that what they had seen was "not right".[68]

29 Kason went back for a third look. This time he saw, because of the light shining from the lighthouse, that [V] was naked. He also saw that [V] was trying to push the appellant away with the use of one hand, but it seemed to him that she was "very weak".[69] Thinking and fearing that [V] might be being taken advantage of, Kason called the police. He made that call at 2:25am and reported, "There is a group of Indian man trying to do something to the girl. Can you send the police. The girl is naked and drunk. I am just passing by."[70] When testifying in court, Kason clarified that he only saw one male Indian – the appellant – on top of [V]. But he saw a group of male Indians nearby and assumed that the appellant was part of that group.[71]

30 Kason called the police again at 2:38am, reporting "I called just now, I think the police should come faster as there are more guys coming in and doing something to this girl."[72] Kason did so because he felt a "sense of urgency".[73] In his view, [V] was naked and something was "basically not right".[74]

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67 Statement of Tan Kia Rong Kason at para 7 (ROP Vol 2, p 59)

68 Statement of Chung De Wei, Terence at para 5 (ROP Vol 2, pp 64–65)

69 Statement of Tan Kia Rong Kason at para 9 (ROP Vol 2, p 59)

70 ROP Vol 2, p 62.

71 Transcript (1 September 2015) at p 54, lines 1–26

72 Statement of Tan Kia Rong Kason at para 15 (ROP Vol 2, p 61)

73 Transcript (1 September 2015) at p 52, line 9

74 Transcript (1 September 2015) at p 52, lines 9–15

Appellant's account of what happened at the beach

31 According to the appellant, [V] had been "flirtatious from the start" – from the time he first met her at the bar.[75] He claimed that [V] would sometimes touch his arms or waist when talking to him.[76] She even put her hand around him when they took the photos together. These acts gave him the idea that she liked him.[77]

32 When [V] went to dance at the VIP area, he stayed at the bar counter. Later, he went up to [V] because she was "looking a little bit…tipsy" and he wanted to "make sure that she was okay"; he thus offered to take her and [S] home.[78] She then put her arms around him and told him, "please… take me away from… all these guys around here".[79] She told him she "kind of" liked him.[80] They walked out of the Wavehouse, arms around each other,[81] and towards the beach. [V] was able to walk on her own.[82] When they reached the beach they sat at a tree and started kissing. He asked her if she wanted to take her clothes off and she said yes.[83] He helped her remove her tank top, bikini top and shorts. He took off his shirt and shorts too.[84] They continued kissing "with [their] clothes off".[85]

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75 Transcript (13 April 2016) at p 68, line 25

76 Transcript (13 April 2016) at p 65, lines 22–30

77 Transcript (13 April 2016) at p 69, lines 16–20

78 Transcript (13 April 2016) at p 71, lines 14–15

79 Transcript (13 April 2016) at p 71, lines 8–9

80 Transcript (13 April 2016) p 73, lines 9–10

81 Transcript (13 April 2016), p 75, line 25

82 Transcript (13 April 2016), p 76, line 9

83 Transcript (13 April 2016), p 78, lines 1–7

84 Transcript (13 April 2016) at p 79, line 6; Statement of Pram Nair at para 4 (ROP Vol 2, p 123)

33 There was then some foreplay. We need not recount all the details. The sequence is broadly as follows.[86] [V] let him suck her nipples. The appellant asked [V] if she would like to perform fellatio on him. She did, but vomited while doing so. He wiped her mouth with his hands and they continued kissing. They rolled onto the sand with the appellant on top of [V]. They continued kissing. He inserted his middle finger[87] into her vagina. He asked her if she wanted to have sex and she said 'Yes'. At trial, the appellant claimed that he did not penetrate her, but in a statement given to the police, he said he penetrated her with his penis for a while but then withdrew and ejaculated outside her vagina.[88]

34 According to the appellant, [V] suddenly pushed him away and started crying. He asked her what was wrong and whether she wanted to go home. She said 'yes'. So he put on a spare pair of clothes that he had and proceeded to help [V] put on her tank top. He also tried to help her put on the red shorts he had been wearing earlier (it is unclear why he chose his shorts and not hers). Just as he was about to do so, [S] called.[89] He told [S] to stay at the Wavehouse, but [S] eventually came and found them. [S] told the appellant to stay away and he did. He went back to the Wavehouse where he remained in case [S] were to require his help.[90]

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85 Transcript (13 April 2016) at p 79, line 8

86 Statement of Pram Nair at para 4 (ROP Vol 2, pp 124–125); Transcript (13 April 2016) at

87 Transcript (14 April 2016) at p 27, line 30

88 Statement of Pram Nair dated 21 May 2012 (ROP Vol 2 at p 130)

89 Transcript (13 April 2016) at p 83, line 16 to p 85, line 6

90 Transcript (13 April 2016) at p 85, lines 2–6

Appellant is placed under arrest

35 Following Kason's first information report, Inspector Yap Tze Ching of the Singapore Police Force arrived at the scene at 2:53am.[91] He and his officers found [V] lying motionless on the beach. He observed that [V] had foam coming out of her mouth. When the ambulance arrived, [S] gathered all of [V]'s clothes and left with her for Singapore General Hospital ("SGH")[92] accompanied by a police officer.[93]

36 The remaining police officers looked around the area for a person matching the description [S] had given of the appellant.[94] They found him near a bicycle kiosk. When queried by Inspector Yap, the appellant said that he had had too much to drink and did not know what was going on. He said that he had fallen asleep and when he woke up, he found [V] lying naked next to him. He thus took an extra pair of red shorts and put it on for [V].[95] At the request of the police officers, the appellant led them to the location on the beach where he had supposedly found [V].[96]

37 At 6:20am on 6 May 2012 the appellant was placed under arrest on suspicion of having committed the offence of rape.[97]

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91 Statement of Inspector Yap Tze Ching at para 3 (ROP Vol 2, p 44)

92 Statement of [S] at para 15

93 Statement of Inspector Yap Tze Ching at para 5 (ROP Vol 2, p 45)

94 Transcript (2 September 2015) at p 7, lines 15–16

95 Statement of Inspector Yap Tze Ching at para 6 (ROP Vol 2, p 45)

96 Statement of Inspector Yap Tze Ching at para 7 (ROP Vol 2, p 45)

97 ROP Vol 2, p 136 (Arrest Report)

Medical examination and forensic tests

38 [V] arrived at SGH and was registered in an emergency department at 3:34am on 6 May 2012.[98] From 6.20am to 7.30am [V] was examined by Dr Ravichandran Nadarajah, Registrar at the Department of Obstetrics & Gynaecology.[99]

39 Dr Ravichandran subsequently produced a medical report dated 4 August 2012.[100] The report stated:

> [V] is 20 year old single with no relevant medical or surgical history. Her menstrual cycle is regular with the flow of 5 days.
>
> Claimed was raped by a stranger on 6th May 2012. The assailant is 24 year old Indian and [V] met him at Sentosa Pub. After she took alcohol, he brought her to the Sentosa Beach and forced her for sexual intercourse. The incident happened between 1 to 2 o'clock. [V] can't remember the incident clearly due to alcohol intoxication. However, she was very certain there were vaginal penetration. The assailant did not use condom during intercourse and ejaculated ***outside*** the vagina [correction: ejaculated ***inside*** the vagina].[101] She denied any oral or anal penetration.
>
> On examination, she was neatly dressed, appear calm and very cooperative. There was no obvious evidence of recent external physical trauma or injuries. Clinical examination of the chest was normal and her secondary sexual characteristic well developed. Pelvic examination revealed there was old tear over the hymen at 3, 7 and 9 o'clock. Chlamydia test was ***positive*** [correction: ***negative***[102]] and the rest of screening tests for gonorrhea, syphilis, HIV & hepatitis B were negative.
>
> [emphasis added]

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98 Transcript (16 September 2015) at p 12, lines 11–14

99 Transcript (16 September 2015) at p 13, lines 8–12

100 ROP Vol 2 p 151

101 Transcript (16 September 2015) at p 11, lines 8 – 9

102 Transcript (16 September 2015) at p 19, lines 6–9

40 As recorded in the extract above, Dr Ravichandran made corrections to his medical report during trial. Although he said that [V] had told him that the appellant ejaculated inside her vagina, he confirmed that he did a test for sperm inside [V]'s vagina but found no sperm present.[103]

41 [V]'s blood was drawn from her to determine her blood alcohol level and the presence of any sexually-transmitted diseases.[104] The drawing of the blood was done by Dr Ravichandran at about 7:30am on 6 May 2012 after he had concluded his medical examination of [V].

42 On 8 May 2012, one sample of [V]'s blood was submitted to the Analytical Toxicology Laboratory of the Health Sciences Authority ("HSA") for testing. On analysis, it was found to contain 159mg of ethanol per 100ml of blood.[105] This analysis was submitted to Dr Wee Keng Poh, a senior consultant at the Forensic Medicine Division of the HSA. Dr Wee's report, dated 5 October 2012, contained the following opinion about [V]'s likely blood alcohol level at the material time and its consequent physical effects:[106]

> Assuming that there was no further alcohol intake from 1am, and assuming that the victim was healthy, and that her liver would reduce the alcohol in her system at the rate of 15mg/100ml per hour, the retrograde extrapolation of the alcohol in her system at the time of the incident would be between:
>
> > 159 + 6.5 x 15 and 159 + 4 x 15 = 256.5mg ethanol/100ml blood and 219 mg ethanol/100ml of blood.
>
> The effect of having 219–257 mg ethanol per 100 ml blood would be that the victim was drunk. The victim would need

103 Transcript (16 September 2015) at p 26, line 2 to p 27, line 9

104 Transcript (16 September 2015) at p 13, lines 13–24; p 14, line 22

105 ROA Vol 2, p 138

106 ROP Vol 2 pp 149–150

> assistance in walking. There was total mental confusion. There was dysphoria (anxiety and restlessness), and nausea may appear. There may be some vomiting.

43 The clothes that [V] and the appellant wore that night were taken from them and submitted to the HSA for forensic DNA testing. The bikini bottom [V] was wearing tested positive for acid phosphate, which might indicate the presence of seminal and vaginal fluid, but negative for semenogelin, which is a confirmatory test for the presence of seminal fluid. In other words, the bikini bottom tested negative for the presence of semen.

44 The appellant made one statement to the police on 7 May 2012[107] and another on 21 May 2012.[108] Both statements were recorded by Senior Staff Sergeant Aloysius Tay from the Serious Sexual Crimes Branch of the Criminal Investigation Department. At trial, the appellant sought to challenge the admissibility of those statements on the ground that they had been made involuntarily, but after an ancillary hearing the Judge ruled that they were admissible. The appellant does not challenge this finding in the present appeal.

Decision below

Conviction

45 For the offence of rape under s 375 of the Penal Code, the PP bore the burden of proving beyond a reasonable doubt that (a) the appellant had penetrated the vagina of [V] with his penis; and (b) [V] did not consent to the penetration. For the offence of sexual assault by penetration under s 376 of the Penal Code, the PP had to prove that (a) the appellant had sexually penetrated

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107 ROP Vol 2 p 121–128

108 ROP Vol 2 p 129–132

the vagina of [V] with his finger; and (b) [V] did not consent to the penetration.

46 The Judge found that the PP had proven beyond a reasonable doubt that, in the early morning of 6 May 2012, the appellant had penetrated [V]'s vagina, once with his penis and once with his finger.

(a) The Judge noted that the medical and forensic evidence was neutral. There was no evidence of ejaculation inside [V]'s vagina. Both the DNA sample taken from [V]'s vagina and the bikini bottom [V] had worn tested negative for semen. There was no fresh tear at [V]'s hymen. (Conviction GD at [69]–[71]).

(b) [V]'s evidence on whether the accused had penetrated her vagina with his penis was not unusually convincing. Her evidence alone would not have been sufficient to conclude that there had been penile penetration. It was, however, corroborated by the appellant's 7 May and 21 May statements in which he had admitted to penetrating [V] with his penis. The Judge therefore concluded that the PP had proved beyond a reasonable doubt that the appellant had penetrated [V]'s vagina with his penis (at [72]–[77]).

(c) As for whether there had been digital penetration, there was no factual dispute because the appellant admitted in his 7 May statement that he had inserted his finger into [V]'s vagina more than once. He did not retract that statement at trial (at [78]).

47 Second, on the issue of consent, the Judge found that the PP had proven beyond a reasonable doubt that [V] did not consent to either instance of penetration.

(a) It was clear to the Judge that the appellant had lied about having fallen asleep and woken up to find [V] drunk and naked (Conviction GD at [137]). The appellant testified that he panicked on seeing the police coming. But he would not have lied nor felt panic on seeing the police if he had indeed engaged in consensual sexual foreplay with [V] (at [138]).

(b) The evidence in its entirety suggested that, at the beach, [V] was in no condition to and did not actively engage in sexual foreplay (Conviction GD at [140]).

(c) Given the appellant's vacillating evidence on the point, the Judge rejected his claim that he had asked [V] whether she wanted to have sex and that she had said 'Yes' (Conviction GD at [143]).

48 The Judge added that even if the appellant had asked [V] whether she wanted to have sex, and even if [V] had said yes, her response would have been vitiated by s 90(*b*) of the Penal Code (Conviction GD at [144]). Section 90(*b*) provides:

> **Consent given under fear or misconception, by person of unsound mind, etc., and by child**
>
> **90**. A consent is not such a consent as is intended by any section of this Code —
>
> …
>
> (*b*) if the consent is given by a person who, from unsoundness of mind, mental incapacity, *intoxication*, or the influence of any drug or other substance, is unable to understand the nature and consequence of that to which he gives his consent; or
>
> …
>
> [emphasis added]

49 Finally, the Judge rejected the appellant's reliance on the defence of mistake of fact provided in s 79 of the Penal Code. Section 79 provides:

> **Act done by a person justified, or by mistake of fact believing himself justified by law**
>
> **79.** Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it.

50 In the Judge's view, the appellant's reliance on s 79 was misplaced. It was premised on there having been mutual sexual foreplay between the appellant and [V], but the Judge had already found that there was no such foreplay (Conviction GD at [146]).

Sentence

51 The Judge found, at [30] of the Sentence GD, that the rape of an intoxicated victim should be treated as falling "somewhere between Category 1 and 2" of the four categories set out in *Public Prosecutor v NF* [2006] 4 SLR(R) 849 ("*NF*"). According to *NF*, an offence of rape falls in Category 1 if no aggravating or mitigating circumstances are present; the starting sentence is 10 years' imprisonment and not less than 6 strokes of the cane (*NF* at [20], [24]). An offence of rape falls in Category 2 if any of a number of aggravating features are present, such as the offender being in a position of responsibility towards the victim, or the offender exploiting the victim's physical frailty and/or mental impairment; the starting sentence is 15 years' imprisonment and 12 strokes of the cane (*NF* at [20], [39]).

52 Having found that the rape offence committed by the appellant fell between Category 1 and 2, and taking into account the fact that there were no aggravating or mitigating factors in this case, the Judge concluded that an

appropriate sentence for the rape offence would be 12 years' imprisonment and six strokes of the cane. However, in view of the time the appellant had spent in remand from 13 January to 23 December 2014 before he was released on bail, the Judge reduced the imprisonment term to 11 years and 19 days. At this juncture, we should mention that the *NF* framework has since been reviewed and revised – we will revert to this point later (from [117] onwards).

53 The Judge then found that the sentence for sexual assault by penetration should be the same as that for rape, for two reasons. We set out his holding in full:

> 56 Like Tay J in *AUB* [*Public Prosecutor v AUB* [2015] SGHC 166], I am of the view that victims of sexual assault by penetration experience the same emotional scars as rape victims. Furthermore, the act of inserting one's finger into a vagina is similar to that of inserting one's penis into a vagina. It certainly is a grave violation of the victim. On the other hand, there are the risks of pregnancy and of contracting sexually transmitted diseases in the case of rape. *However, I doubt that such risks should give rise to any marked differentiation between the benchmark sentences for the two offences.*
>
> 57 Moreover, I am of the view that the structure of ss 375 and 376 of the Penal Code suggests that both offences are considered to be of the same severity. Under s 375(1) read with s 375(2) of the Penal Code, rape is punishable with imprisonment for a term which may extend to 20 years and the accused is also liable to fine or to caning. Under s 376(2)(a) of the Penal Code, any accused who sexually penetrates with a part of his body (other than his penis) the vagina of another person without consent is liable to punishment under s 376(3) of the Penal Code with the same punishment as for rape.
>
> 58 Therefore, I conclude that the punishment for the Accused for the offence of sexual assault by penetration should be the same as that for the rape offence.
>
> [emphasis added]

Thus, the Judge imposed the same sentence of 12 years' imprisonment and six strokes of the cane for the digital penetration offence – this was similarly

reduced to 11 years and 19 days' imprisonment and six strokes of the cane after taking into account time spent in remand.

54 The Judge ordered both sentences to run concurrently in view of the one-transaction rule (Sentence GD at [60]) – the effect of this rule is that where two or more offences are part of a "single transaction", in that they are proximate in time and similar in nature or can be considered a single invasion of a legally protected interest, the sentences imposed for these offences should generally be ordered to run concurrently.

Threshold for appellate intervention

55 The role of the appellate court is not to reassess the evidence in the same way that a trial judge would (*Haliffie bin Mamat v Public Prosecutor and other appeals* [2016] 5 SLR 636 ("*Haliffie*") at [31]). As we said in *Haliffie* at [32], an appellate court is restricted to considering:

> (a) whether the judge's assessment of witness credibility is plainly wrong or against the weight of evidence;
>
> (b) whether the judge's verdict is wrong in law and therefore unreasonable; and
>
> (c) whether the Judge's decision is inconsistent with the material objective evidence on record, bearing in mind that an appellate court is in as good a position to assess the internal and external consistency of the witnesses' evidence, and to draw the necessary inferences of fact from the circumstances of the case.

Conviction

56 In the present appeal, the appellant does not challenge the Judge's finding that he had penetrated [V]'s vagina with both his penis and his finger.[109] The main question of fact in dispute is whether the Judge correctly found that [V] had not consented to the acts of penetration.

57 Where sexual offences are concerned, a complainant's testimony alone can constitute proof beyond reasonable doubt if it is so unusually convincing as to overcome any doubts that might arise from the lack of corroboration (*AOF v PP* [2012] 3 SLR 34 at [111]; *Haliffie* at [27]). If the evidence of the complainant is not unusually convincing, it would not be safe to convict the accused person unless there is further corroborative evidence (*Haliffie* at [30]).

58 As we understand it, the appellant has three key arguments. The first argument is that, because the Judge found that [V]'s testimony was not unusually convincing, it was necessary for there to have been corroborative evidence of the absence of consent; but there was no corroborative evidence here. The Judge's finding that [V] did not consent was in fact inconsistent with the material evidence on record.[110]

59 Second, the appellant submits that the Judge was wrong to have found that [V] was incapable of giving consent due to her intoxication. [111]

60 Third, the appellant submits that the Judge erred in finding that he could not rely on the defence of mistake of fact under s 79 of the Penal Code. [112]

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109 Appellant's Case at para 5

110 Appellant's Case at para 7

111 Appellant's Case at paras 24–28

61 We will take these three arguments in turn. Before doing so, we should first say that there is a significant degree of overlap between the first and the second arguments. At the hearing, we asked counsel for the PP, Mr David Khoo, whether the PP's case was that [V] had no capacity to consent, or whether it was that [V] did not in fact consent. Mr Khoo's response was as follows: (a) [V] did not in fact consent to the penetration, and (b) in the alternative, [V] was unable to and had no capacity to consent. We will hence deal with the parties' arguments in that order although we stress that the findings on each argument cannot be seen in isolation from one another. The evidence that goes toward showing whether [V] did in fact consent will also bear on the question of whether [V] had the capacity to consent. Our views on the first argument will necessarily foreshadow our views on the second argument.

62 It is possible in future cases to approach the matter in the reverse order. Indeed, it may even be more logical. Where the absence of consent is an element of an offence, and it is shown that the alleged victim was incapable of giving consent, then it would not matter whether she ostensibly did since such a consent would not be valid. That is the effect of s 90(*b*) of the Penal Code. If, however, the victim was not intoxicated to such a degree as to negate any ostensible consent she gave, the PP can still make out the offence by proving that, although capable of giving consent (in that the victim was intoxicated but still able to understand the nature and consequence of her acts), the victim did not in fact do so.

63 This approach has been adopted in previous cases. For example, in *Ong Mingwee v Public Prosecutor* [2013] 1 SLR 1217 ("*Ong Mingwee*"), Quentin Loh J's approach was to determine, first, whether the victim was capable of

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[112] Appellant's Case at para 38

consenting to sexual intercourse before determining whether she did in fact consent. Loh J found that she was capable of consenting and did in fact consent. Also relevant, though perhaps less directly, is *Public Prosecutor v Iryan bin Abdul Karim and others* [2010] 2 SLR 15 ("*Iryan*"), where, in relation to s 90(*a*)(i) of the Penal Code (consent given under fear of injury) and the offence of sexual assault by penetration under s 376(1)(*a*), Tay Yong Kwang J (as he then was) found that the victim who had fellated the accused persons had done so only out of a fear of injury; this rendered any alleged "consent" of the victim nugatory (at [127]–[128]).

Absence of consent

64 There are three main points that the appellant relies upon as raising a reasonable doubt that [V] did not consent to the penetration.[113]

(a) First, [V] said in oral testimony that she was not interested in talking to the appellant, but this was inconsistent with the extrinsic evidence, *ie*, her behaviour from 11:20am to 1am that night which showed that she and the appellant had drunk together and even acted like a couple.

(b) Second, based on the objective evidence, there could have been foreplay between 1am, when the appellant and [V] left the Wavehouse, and 2:25am, when Kason saw [V] trying to push the appellant away.

(c) Third, the undisputed medical evidence of Dr Ravichandran (taken after the alleged offence) showed that [V] had no fresh vaginal tears.

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113 Appellant's Note at pp 2–4

[V]'s behaviour towards the appellant

65 The appellant relies on the following evidence which showed that [V] was friendly towards and possibly flirting with him. This evidence was identified in a note which counsel for the appellant, Mr Paul Tan, submitted to us at the hearing of the appeal.

(a) First, the appellant and [V] were drinking together at the bar counter earlier on the night of 5 May 2012. The two photos taken at 12:15am showed that [V] was still fully conscious and was friendly towards the appellant. The evidence showed that [V] directed [S] to take the photos of her and the appellant. [V] went to the VIP area a few times but came back to the bar counter where the appellant was. Also, [V] allowed the appellant to pour alcohol directly into her mouth.

(b) Second, one Teo Jie Wei, who was working as a part-time waiter at the Wavehouse that night, spotted the appellant and [V] to be "behaving like a couple" when they were about to leave the Wavehouse (See Conviction GD at [115]).

66 Having carefully scrutinised the evidence, we do not think it goes in any way towards showing that [V] had consented to sexual contact of any sort with the appellant.

67 That [V] was sociable and friendly towards the appellant cannot mean that she consented to sexual activity with him. That conclusion would not change even if we assume in the appellant's favour that [V] had gone beyond being friendly and flirted with him. According to the appellant, [V]'s supposed flirting was in the form of putting her hands on his arm or waist; he also relied on the photos which showed that, at least at those moments the photos were

taken, the appellant and [V] were in close physical contact. These do not seem to be particularly suggestive gestures. We struggle to see how it could be suggested that they constituted her consent to any sort of sexual activity.

68 Furthermore, and more crucially, the appellant's argument fails to account for three other pertinent facts.

69 First, [V] was also friendly, and in a sense was flirting, with [J], whom she kissed and hugged. This is relevant to Mr Tan's argument that [V]'s recollection that she was "not interested" in the appellant was undermined by the evidence of her "flirting" with the appellant. This argument simply does not give sufficient regard to the party spirit of the occasion – a partygoer like [V] might just have been there to get to know as many people as possible without wanting to develop a serious interest in any particular person.

70 Second, [V] had become more intoxicated after the photographs were taken. The appellant does not dispute this. In his own account, he said that he went up to her to offer to take her home because she was looking "tipsy" and he wanted to "make sure that she was okay" (see [32] above).

71 Third, just before the appellant took [V] away from the bar counter to the beach, the latter had indicated her desire to go home as she herself realised that she was by then "way too drunk". She said this in her testimony (see [18] above). Even in the appellant's version of events, he had offered to take her home, and that was when she supposedly said "please take me away from all the guys". That statement (assuming she did make it) is not inconsistent with her wanting to go home. The appellant's testimony does not feature her saying anything about going to the beach.

72 The question we then ask ourselves is whether, in light of (a) [V]'s general friendly disposition at the party, (b) her worsening inebriation, and (c) her express intention to return home, it was possible that [V] then decided to engage in consensual sexual activity on the beach with the appellant in spite of her being fairly intoxicated. Looking at the situation as a whole, the evidence relating to the earlier interaction between the appellant and [V] at the bar counter appears only remotely relevant to answering that question. More material to this analysis is what happened after [V] left the Wavehouse with the appellant for the beach. And what is critical is her state of intoxication at that time. These are matters which we will come to in the next section.

73 As for Teo, all he saw was that the appellant had his hand around [V]'s waist. But his evidence is equivocal. In cross-examination, Teo candidly agreed that he could not see exactly what was going on between the appellant and [V], particularly since his vision was obstructed by the crowd around them.[114] Teo's evidence was before the Judge, who considered that little weight should be given to Teo's account because it was lacking in detail (Conviction GD at [120]). We agree with the Judge's evaluation and we do not see how the appellant can get any more mileage out of this witness's testimony.

Alleged foreplay between 1am and 2:25am

74 Mr Tan suggested that at the beach the following facts supported an inference that there might have been foreplay between the appellant and [V]:

> (a) There was a significant gap, in terms of time, between 1am, when [V] and the appellant left the Wavehouse, and 2:25am, when Kason spotted [V] trying to push the appellant away.

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114 Transcript (21 April 2016) at p 9, lines 23–32

(b) That they could spend such a long period of time on the beach together – a full hour – is consistent with his account that they had been engaged in foreplay.[115]

(c) This is supported by the testimony of Kason and Terence, both of whom passed the appellant and [V] three times without thinking that anything untoward was happening. Kason in fact thought, when he first saw and passed by them, that they were a couple making out and ignored them.

(d) Neither the PP nor the Judge addressed the issue of what exactly happened between the appellant and [V] during that period of time.[116]

75 It is necessary and appropriate to consider the evidence relating to the period of time when the appellant and [V] were on the beach in two parts: (a) what happened from 1am to 2am and (b) what happened from 2am onwards.

76 It is true that the only evidence on what happened from 1am to 2am came from the appellant and [V]. Kason only appeared on the scene at 2am. [S]'s phone calls could not safely be said to be probative of what happened between 1am and 2am either. During the hearing, we inquired of the parties if the timing of [S]'s phone calls to [V] was in evidence. It is significant that [V] did not answer when [S] called her the first time. It is even more significant that the appellant answered the call the second time around; one would have thought that he could easily have passed the phone over to [V]. But counsel for the PP, Mr David Khoo, informed us during the hearing that there was no time log of

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115 Appellant's Case at para 22(f)

116 Appellant's Note, p 2

[S]'s phone calls because her phone was not put in evidence. Hence, it is not certain that [S] called [V] sometime between 1am and 2am.

77 Mr Tan suggested that given the one hour they spent together, it was unlikely that the appellant would have been sexually assaulting [V] all that while. Given that the beach was a public area, he argued that if it were true that the appellant had taken advantage of [V], he would have quickly left her after the acts. Therefore, it was more likely than not that they had actually spent time making out. In a similar vein, Mr Tan said that it was "illogical" that the appellant did nothing to [V] for one hour from 1am until 2am, at which point Kason first spotted them. This seemed to be a suggestion that it would not have been in line with human behaviour for the appellant and [V] to have sat or laid on the beach and done nothing.

78 What is clear is that [V] was already inebriated when she left the Wavehouse with the appellant. The Judge accepted [S]'s evidence that [V] looked really drunk before [S] left to collect [V]'s bag as suggested by the appellant, intending that [V] and the appellant would wait for her to return (at [127] of the Conviction GD). We have not heard any argument from the appellant that [S]'s testimony in this regard was not credible. The Judge found (at [140] of the Conviction GD) that all the evidence pointed to [V] being in no physical condition to engage in foreplay at the beach.

79 Mr Tan's submission is premised on [V] being in control of her faculties However, since it is undisputed that [V] left the Wavehouse with the appellant while significantly inebriated, and that [V] was found in a state of near-unconsciousness sometime later, one might also surmise – and we suggested this to Mr Tan during the hearing – that the appellant had done other sexual acts to [V] without her knowing and consenting. This is plausible bearing in mind

[V]'s firm testimony that she could not remember anything about what happened after leaving the Wavehouse and only woke up to find herself on the beach in the midst of being penetrated. We are not saying that that is definitely what happened. The point here is that the only available evidence does not show what exactly occurred, and Mr Tan's suggestion that there must have been consensual foreplay is but a speculation on his part. And once we factor in the level of intoxication of [V], Mr Tan's speculation becomes less tenable; indeed, it is possible to make other speculations which are less favourable to the appellant. Hence, this submission does not, in our judgment, cast any reasonable doubt on the Judge's finding that [V] could not and did not consent to any form of foreplay, much less the acts of penetration that followed.

80 We will now move to consider the evidence relating to the period from 2am to 2:25am. It was at 2am that Kason first noticed the appellant and [V]. It is true that Kason was not alarmed enough to call the police after the first two occasions he saw the appellant and [V]. He assumed they were either making out or having sex consensually. Yet Kason felt it necessary to inform Terence, who then went to look for himself. Kason himself also went to take a third look. They both concluded that there was something distinctly strange about what they had seen. In Terence's words, a half-naked person would not be lying in a fairly public area like the beach with another person when there were other people around.[117] Hence, Mr Tan's reliance on Kason and Terence's evidence does not really assist him in showing that there was consensual foreplay between the appellant and [V].

81 Finally, we should add that even the appellant's own account of consensual foreplay is riddled with improbabilities and inconsistencies. We will

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117 Transcript (1 September 2015) at p 68, line 29 to p 69, line 16

take two examples which we had raised with Mr Tan during the hearing of this appeal.

82 First, the appellant told the court during cross-examination that while they were making out on the beach, [V] vomited several times, and that even after vomiting she continued kissing the appellant and even "came on" to him.[118] We said to Mr Tan that we found this difficult to accept as a probable account of what happened. Mr Tan conceded, correctly in our view, that his client's evidence was quite inculpatory in this respect.

83 Second, when [V] was found by [S] in a state of undress, the appellant's first response to [S] was to say that "he found [V] there lying completely naked".[119] If he and [V] had really been making out, one would have expected him to say that. Yet he did not. The inference to be drawn is that, as the Judge pointed out at [133] of the Conviction GD, he had a guilty conscience.

84 Perhaps the appellant said what he did to [S] because he was in a state of panic or was embarrassed to let [S] know that he and [V] had had sex. Yet, even when Inspector Yap asked him, a few hours later, what had happened, he repeated the same story that he had fallen asleep and woken up to find [V] lying naked next to him. There was still no mention of he and [V] having made out. As the Judge noted at [138] of the Conviction GD, he would have had time to think about what happened and could have corrected himself if he had made a false statement inadvertently. He did not. And it is clear that his account of having fallen asleep cannot be true because Kason and Terence spotted him doing something to [V]. Hence he changed his story and said that there had been

118 Transcript (14 April 2016) p 18, line 18

119 Statement of [S] at para 11 (ROP Vol 2, p 55); Transcript (14 April 2016) at p 3, lines 22–25

foreplay with [V]. The Judge found that the appellant had lied about there having been foreplay because he knew he had taken advantage of [V]. We have not found any reason to disagree with the Judge.

Medical evidence indicating lack of vaginal tearing

85 The appellant argues that the medical evidence strongly indicates that the penetrations were consensual.[120] According to the appellant, Dr Ravichandran's testimony establishes the following premises: First, vaginal tears may be caused by blunt penetration, such as by a finger or penis. Second, if there is penetration, there should be tearing unless there is vaginal lubrication. Third, vaginal lubrication only occurs when a female is aroused, and arousal shows willingness on the part of the female to have sexual intercourse.

86 It follows, according to the appellant, that had [V] been unconscious during the acts of penetration, or an unwilling participant in any way, there would have been vaginal tearing. That there was no tearing means that there was vaginal lubrication and she was aroused. The lack of fresh tearing also undermines [V]'s testimony that she felt pain when the appellant tried to penetrate her; if there had been pain, there would have been vaginal tearing. The appellant says the Judge failed to address this incontrovertible medical evidence.

87 The parts of Dr Ravichandran's testimony that the appellant relies on emerged when he was asked about the statement in his medical report (see [39] above) that he found an "old tear over [her] hymen".[121] We reproduce the relevant part of the transcript in full to set out his views in their proper context.[122]

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120 Appellant's Case at para 29

121 ROP Vol 2 p 151

Q: Can you explain this? [The finding of an old tear at [V]'s hymen]

A: Er, "old tear" means the tear may happen couple of days or weeks or months or years, it's not something fresh. So, my conclusion is she sexually active prior to this incident.

Q: So when you say when the old tear can be days before?

A: Yes.

Q: So this---what causes this tear?

A: Can be any blunt penetration like fingers or, er, penile penetration, so any penetration to the vagina.

Q: So if there's a penetration into her vagina it will reveal some tear, right?

A: Yes.

Q: So for this occasion there is no tear detected.

A: Yes.

Court: So will it---you did not---would it be fair to say that you did not detect any fresh tear?

Witness: Yes.

Court: So, if there is no fresh tear, does that mean that therefore there is no penile penetration recently?

Witness: It's difficult to ex---difficult to explain that part. Sometime is depends on the---how much resistance let's say that the victim put it on---during the intercourse or how much force the---by the assailant or the duration of the intercourse, and the---what are the---the, er---er, er---weapons or any other devices they used for the intercourse.

Q: So if it is for a willing female---

A: Yes.

Q: ---in this case, there's likelihood because of the vagina lubrication---

A: Yes.

Q: ---there should not be a fresh tear.

A: Yah, possible

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122 Transcript (16 September 2015) at p 31, line 1 to p 32, line 12

> Q: And vagina lubrication, as a gynae---I know you are not a psychologist, but as a gynae do you happen to know that vagina lubrication also trigger off by psychology?
>
> A: Yah, you---if a human, er, aroused then this vaginal lubrication was secreted and they can make it---the intercourse easier.
>
> Q: *And when the woman is aroused, it also meant that she may be willing.*
>
> A: "Willing" means willing in terms of physical or---I---I don't understand the question.
>
> Q: In terms of sexual intercourse.
>
> A: *Possible.*
>
> Q: And in that case that the penetration will not make any fresh tear.
>
> A: Yes, possible.
>
> [emphasis added]

88 The Judge referred to Dr Ravichandran's evidence when considering the issue of whether the appellant had penetrated [V] with his penis. He did not consider it again when dealing with the issue of absence of consent. The appellant says this renders the conviction unsafe.

89 We do not agree. First, such evidence would be neutral if [V] were not able to consent in the first place. That was indeed the case here. We have already said that she was, at the material time, intoxicated to the point where she was verging on unconsciousness. Indeed, Dr Ravichandran suggested that the absence of a fresh vaginal tear could still be consistent with there having been penile penetration if a victim had not put up any resistance. In fact, if there was no resistance, the chances of there being a vaginal tear (or any injury or bruising to the vagina, for that matter), was low. As Dr Ravichandran explained in re-examination:[123]

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[123] Transcript (16 September 2015) p 38, lines 8 – 18

> Q: So if there was no resistance by the victim, would you expect to see fresh tears, bruises or injuries to the victim's vaginal area?
>
> A: It's also depends.
>
> Q: What is the likelihood? Perhaps you could explain to us what is the likelihood if the victim was not resisting.
>
> A: If let's say she's not resisting, chances is very low to ---expect the injury.
>
> Court: Chances are very low to expect injury. What about bruises and tears? Because counsel used three words.
>
> A: Yes. Bruises also very low. If---
>
> Court: Tears?
>
> A: Low.

The evidence suggests that [V] was in a state where she might not have been able physically to resist the appellant's advances. As we highlighted during the hearing, it was possible that, since [V] was probably drifting in and out of consciousness, she would not have put up much resistance and there would be nothing to stop the appellant from penetrating her slowly. That could account for the lack of a fresh vaginal tear.

90 Second, Dr Ravichandran only agreed with the appellant's counsel, in cross-examination, that if a woman was aroused, it was "possible" that she was a "willing" participant in the sexual intercourse. The fact of arousal is thus not conclusive proof that a woman has given consent to sexual intercourse. The appellant's case would appear to be that as there was no new tear, it meant that [V] was aroused and therefore she had consciously consented. If that was indeed his case, it was incumbent on him to establish the point in cross-examination. He did not. Further, as noted in the extract at [89] above, it appears that there would likely to be no new tear if there was no conscious physical resistance and [V] was certainly in no state to physically resist in view of her level of intoxication.

91 The appellant also seizes on Dr Ravichandran's finding that there were "no obvious evidence of recent external physical trauma or injuries" as indicating that [V] might have consented.[124] Again, this presupposes that [V] was in a fully conscious, alert state when the appellant tried to penetrate her and might therefore have been expected to resist or put up a struggle. But we have found that she was not in such a state but was probably near to losing consciousness. Dr Ravichandran's finding in fact supports that conclusion.

Capacity to consent

92 The appellant submits that the Judge was wrong to have found that [V] was unable to consent because of her intoxicated state.[125]

93 The question of whether a particular complainant is able or unable to consent is one of fact. Nevertheless, a few reminders of what a trial judge should look out for in making this determination may be worth highlighting. The PP drew our attention to *Iryan*, where, at [123], Tay J cited the following passage from *Ratanlal & Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code 1860 vol 2* (CK Thakker & M C Thakker eds) (Bharat Law House, 26th Ed, 2007) ("*Ratanlal*"):

> … Consent on the part of a woman, as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge of the significance and the moral quality of the act, but after having freely exercised a choice between resistance and assent… A woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a power she wanted. Consent implies the exercise of free and untrammeled right to forbid or withhold what is being consented to; it is always a

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124 Appellant's Note, p 4

125 Appellant's Case at para 24

> voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.

94 *Iryan* concerned s 376(1)(*a*) of the Penal Code but the passage from *Ratanlal* was dealing with the offence of rape. Thus that passage is entirely applicable to the present case.

95 *Iryan* was also a case where consent (to fellatio) was vitiated because of the complainant's fear of injury. As regards the question of how intoxication affects the ability of a complainant to consent to sexual activity, we find helpful the following observations from *Rook & Ward on Sexual Offences Law and Practice* (Sweet & Maxwell, 5th Ed, 2016) at para 1.252, which were adapted from directions which the English Court of Appeal considered, in *R v Gael Tameu Kamki* [2013] EWCA Crim 2335, to have been correctly put to the jury:

> (i) If a person is asleep, or has lost consciousness through drink or drugs, they cannot consent (as there is no freedom and capacity to choose), and that is so even though their body responds to the defendant's advances.
>
> (ii) A person can still have the capacity to make a choice and have sex even where they have had a considerable amount to drink.
>
> (iii) Consumption of alcohol or drugs may cause someone to become disinhibited and behave differently from the way they would normally behave. If they are aware of what is happening, but the consumption of alcohol or drugs has caused them to consent to activity which they would ordinarily refuse, then they have consented no matter how much they may later regret it. The fact that a person makes an unwise choice does not mean that [he] lacked the capacity to make it. A drunken consent is still a consent, if a person has the capacity to make the decision whether to agree by choice.
>
> (iv) However, a person may lose the capacity to consent through the consumption of drink or drugs before a complete loss of consciousness arises.
>
> (v) Consideration then has to be given to the degree of consciousness or otherwise to determine the issue of capacity. Clearly a complainant will not have had the capacity to agree by choice where, due to intoxication through drink or drugs,

> their understanding and knowledge are so limited that they are not in a position to decide whether or not to agree.
>
> (vi) Thus, if a complainant becomes so intoxicated that they no longer have the capacity to agree, there will be no consent. For instance, a person may be in a state where they know they do not want to take part in any sexual activity with someone, but they are incapable of saying so. Alternatively, they may have been affected to such a degree that, whilst having some limited awareness of what is happening, they are incapable of making any decision at all.
>
> (vii) If it is determined that the complainant may have had the capacity to make a choice, consideration will then have to be given whether she did or may have consented to sexual intercourse.

96 We would identify the following as the relevant general principles:

(a) Under s 90(*b*), a person who is unable to understand the nature and consequence of that to which that person has allegedly given his consent has no capacity to consent.

(b) The fact that a complainant has drunk a substantial amount of alcohol, appears disinhibited, or behaves differently than usual, does not indicate lack of capacity to consent. Consent to sexual activity, even when made while intoxicated, is still consent as long as there is a voluntary and conscious acceptance of what is being done.

(c) A complainant who is unconscious obviously has no capacity to consent. But a complainant may have crossed the line into incapacity well before becoming unconscious, and whether that is the case is evidently a fact-sensitive inquiry.

(d) Capacity to consent requires the capacity to make decisions or choices. A person, though having limited awareness of what is happening, may have such impaired understanding or knowledge as to

lack the ability to make any decisions, much less the particular decision whether to have sexual intercourse or engage in any sexual act.

(e) In our view, expert evidence – such as that showing the complainant's blood alcohol level – may assist the court in determining whether the complainant had the capacity to consent.

97 We turn now to address the appellant's argument. It may have become apparent, from our discussion in the previous section on absence of consent, that we consider [V] to have been intoxicated to a degree that she was unable to give consent. Our conclusion is based on both (a) expert evidence of her blood alcohol level at the material time and (b) the objective circumstances.

98 The expert evidence showed that, around the time of the offences, [V]'s blood alcohol level was high. We have mentioned Dr Wee Keng Poh's calculation of [V]'s blood alcohol level at [42] above.

99 The appellant places much emphasis on Dr Wee's concession that the effect of blood alcohol content could vary from person to person. In Dr Wee's words, "two persons may have the same blood alcohol content…with one walking down the street and another in deep coma".[126] We also note that Dr Wee conceded that the rate of elimination of alcohol would vary according to the person's sex, weight, and drinking habits, though he added that the variation would not be much.[127]

100 It is true that Dr Wee cannot tell us with certainty how [V]'s blood alcohol level would have affected her specifically. However, we cannot

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126 Appellant's Case at para 27; Transcript (15 September 2015), p 73, lines 21–22

127 Transcript (15 September 2015) at p 84, line 25 to p 85, line 7

disregard the fact that her blood alcohol level was high. There was at least a possibility of "total mental confusion". Dr Wee added that by "total mental confusion" he meant that [V] might be confused as to where she was and what led her to be there.[128] So it is imperative for us to consider Dr Wee's assessment in determining whether [V] had the capacity to consent.

101 We should highlight that in *Ong Mingwee*, a similar calculation of the victim's blood alcohol level was performed, which Quentin Loh J held to be "speculative and of limited value" (at [21]) because it had failed to take into account the fact that each individual had a unique rate of eliminating alcohol. We would note, however, that in *Ong Mingwee*, the analyst had tried to assess the precise value of the victim's blood alcohol level at a precise time (see [20]) whereas here Dr Wee has instead provided a range of possible values of the victim's blood alcohol levels over two hours. Since the physical effects mentioned in his report would be manifested across the entire range of blood alcohol levels, his concession that the rate of elimination of alcohol could differ from person to person does not undermine his conclusion about [V]'s physical state at the time of the incident. Moreover, Dr Wee's report was unopposed by the defence and not lacking in defensibility and a court should not lightly reject it and instead draw its own inferences: *Saeng-Un Udom v Public Prosecutor* [2001] 2 SLR(R) 1 at [26]. During the hearing, Mr Tan agreed with our observation that the calculation of [V]'s blood alcohol level went unchallenged in the court below and was therefore a significant piece of evidence.

102 In any event, Loh J's point in *Ong Mingwee* was simply that the contemporaneous evidence regarding the complainant's behaviour must also be weighed in order to deduce her capacity to consent (at [22]). We agree entirely.

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128 Transcript (15 September 2015) at p 74, lines 8–9

As we have mentioned, expert evidence on a complainant's blood alcohol level may assist in determining whether the complainant had the capacity to consent, but the question of capacity is ultimately a factual one and the expert evidence must be weighed in the balance together with the evidence of the objective circumstances.

103 Here, the objective circumstances bear out Dr Wee's assessment of [V]'s physical state. They show that [V]'s intoxication became more intense throughout the night and ended with her being almost unconscious (not to mention foaming at the mouth).

104 It is fair to say that [V] was not yet heavily intoxicated when she was with [J]. The evidence of [J] was that she was "talkative, hyper", would repeat sentences she had already said, but that she did not need support when walking and was able to dance alone.[129] [S] saw them together. Her evidence was that [V]'s "inhibitions were loosened [and] she was not---not in control of herself" though she remembered that [V] could walk and dance on her own.[130] Lowered inhibition is not in and of itself indicative of a lack of capacity to consent.

105 However, [V] was heavily intoxicated by the time she met up again with [S] and communicated her wish to go home. Before [V] left the Wavehouse with the appellant, there is evidence that she could not walk and could not stand up unassisted. [S]'s testimony was that [V] "couldn't talk in full sentences", had "droopy" eyes, "definitely could not stand by herself", and was held up by the appellant who placed his hand under her armpit.[131]

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129 Transcript (2 September 2015), p 19, lines 6–26

130 Transcript (15 September 2015) at p 27, line 27 to p 28, line 4

131 Transcript (15 September 2015), p 14, line 21 to p 15, line 20

106 The next relevant period of time to consider was when [V] was with the appellant on the beach. The evidence shows that she was severely intoxicated and lacking even control of basic motor functions:

(a) [V] pushed the appellant away weakly. The Judge observed that this showed she was in no condition to consent to sexual foreplay (Conviction GD at [130]) and it follows that she was in no condition to consent to sexual intercourse. Kason said that he saw [V] pushing the appellant away using only one hand, and that "it looked like she was very weak"[132] Terence saw that [V] was "lying down and there was little movement from her".[133]

(b) Even on the appellant's own account, the signs of [V]'s severe intoxication are clear. First, [V] vomited (while supposedly fellating the appellant), which would suggest a severe degree of intoxication consistent with the physical effects described by Dr Wee in his report (see [42] above). In fact, in cross-examination, the appellant agreed that [V] had vomited "several times" while they were making out.[134]

(c) Finally, it is curious that the appellant answered [V]'s handphone twice out of the several times [S] called her. As the Judge observed, the appellant "could not explain why he had not passed the handphone to [V] if she had not passed out" (Conviction GD at [132]).

107 By the time she was found, [V] was motionless – she looked like she had "passed out", according to [S]'s statement.[135] When asked to explain what

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132 Kason's Statement at para 9 (ROP Vol 2, p 59)

133 Terence's Statement at para 5 (ROP Vol 2, p 64)

134 Transcript (14 April 2016), p 17, line 21 to p 18, line 1

she meant by this, [S] told the court that [V] was "pale", "dazed and confused", "going in and out of consciousness" and "could barely talk" except to murmur an instruction to [S] to call her boyfriend, and became "non-responsive again until…she started foaming".[136] The Judge noted that [S]'s evidence on this point was unchallenged (Conviction GD at [116]). It remains unchallenged before us.

108 On the whole, the evidence as to [V]'s mental state immediately before, during and immediately after the time she was with the appellant at the beach suggests she was in no capacity to consent to penile or digital penetration. At the time she was found, she did not appear able even to execute basic physical functions such as walking or talking. It is highly likely that she was either unconscious or barely conscious during the period of time that she and the appellant were together on the beach. In our considered view, [V], when found, had at best a limited awareness of her surroundings. She was too intoxicated to understand the nature and consequences of giving consent. She could not have consented to either act of penetration by the appellant.

109 We therefore reject the appellant's argument on this front.

Mistake of fact

110 It remains for us to deal with the appellant's argument that, contrary to the Judge's finding, the defence under s 79 of the Penal Code was made out. The burden was on the appellant to establish this defence on a balance of probabilities (*Public Prosecutor v Teo Eng Chan and others* [1987] SLR(R) 567

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135 Statement of [S] at para 11 (ROP Vol 2, p 55)

136 Transcript (15 September 2015) at p 19, line 27 to p 20, line 15; Statement of [S] at para 12 (ROP Vol 2, p 56)

("*Teo Eng Chan*") at [26]). His burden was to show that "by reason of a mistake of fact" he "in good faith" believed himself to be justified by law in doing what he did to [V] – in other words, in believing that [V] consented to the two sexual acts forming the basis of the charges against him. Nothing is believed "in good faith" if it is believed "without due care and attention" (s 52 of the Penal Code). In *Teo Eng Chan*, P Coomaraswamy J held (at [24]), after having referred to this section, that the position in Singapore was different from that in the UK. The position in the UK at that time was, following the House of Lords' decision in *Director of Public Prosecutions v Morgan* [1976] AC 182, that a man could not be found guilty of rape if he honestly believed that a woman had consented, regardless of whether that belief was based on reasonable grounds.

111 We agree with Coomaraswamy J's holding. It follows that the inquiry under s 79 is not based purely on the actual belief of the appellant. The appellant has to persuade us that, having exercised due care and attention, he believed that [V] consented to the sexual acts forming the basis of the offences. That has to be determined by having regard to all the circumstances.

112 The appellant relies on the totality of the following circumstances although it is not immediately apparent how they relate to each other: [137]

(a) [V] was flirting with the appellant;

(b) There is sufficient objective and medical evidence of a significant period of foreplay between [V] and the appellant, from which one could infer that [V] was a willing and consenting participant to sex;

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[137] Appellant's Case at para 38

(c) The appellant too had been drinking; and

(d) The appellant was only 23 years old at the time, 3 years older than [V]. All in all, the appellant's acts should be characterised as misjudgment on a young person's part, not predatory conduct.

113 In *Ong Mingwee*, Loh J found (at [78]) that the defence of mistake of fact had been made out. The complainant boarded a taxi with the accused, kissed him on the way to his flat, did not attempt to leave his bedroom, did not protest when they had sexual intercourse and did not attempt to push him off or away, and apparently nodded when asked whether she wanted to have sex.

114 The facts here are starkly different. As we have said, even if [V] was flirting with the appellant, that does not mean she led him to believe that she would consent to digital or penile penetration. Second, we have also rejected the appellant's account of there being foreplay. That leaves the points about the appellant's own intoxication and the small age gap between him and [V]. The appellant appeared to be relying on these two points (together with the two points we have rejected) to suggest that these led him to hold the subjective belief that [V] was consenting to penile and digital penetration. However, it was still necessary for him to show that he had arrived at this belief after having exercised due care and attention. He had not attempted to show he had exercised due care and attention in arriving at his belief. On the contrary, it was clear to us that the appellant had tried to take advantage of [V] due to her intoxicated state. We therefore have no hesitation in rejecting the appellant's attempt to rely on s 79 of the Penal Code.

Conclusion on the issue of conviction

115 In our opinion, the state of [V]'s intoxication; the fact that the appellant took [V] to the beach by asking [S] to go and take [V]'s handbag from the bar counter and did not wait for [S] to return; the fact that the calls made by [S] to [V]'s mobile went unanswered except once when the appellant answered and yet did not pass the phone over to [V], instead telling [S] not to come over to where they were; the untruths which the appellant uttered to [S] (when [S] saw him and [V] together on the beach) and to Inspector Yap a little later that morning, all clearly point to the following conclusion. In taking [V] in her inebriated state to the beach without informing [S] or waiting for her to return, the appellant intended to take advantage of [V]. While the appellant and [V] were on the beach, he penetrated her vagina with his finger and his penis when she was in no capacity to consent to such penetrations. Whatever else happened between them before those acts of penetration, we do not know for sure, but in view of [V]'s serious intoxication, it could not have been consensual foreplay.

116 In the circumstances, we affirm the Judge's findings that (a) [V] did not consent to digital or penile penetration by the appellant, (b) [V] was in any event incapable of giving consent because of her intoxication, pursuant to s 90(*b*) of the Penal Code, and (c) the appellant has not succeeded in proving the defence of mistake of fact under s 79 of the Penal Code. The appellant's conviction on both charges therefore stands. We now turn to the question of the appropriate sentence.

Sentence

117 The Judge made his decision on sentence based on the sentencing framework propounded in *NF*. That framework was revised in a recent judgment of this court, *Ng Kean Meng Terence v Public Prosecutor* [2017] 2

SLR 449 ("*Terence Ng*"), which was issued on 12 May 2017, after we had heard this appeal. This court in *Terence Ng* expressly held that the revised framework would apply immediately (see [74]).

118 Accordingly, in anticipation that the revised framework enunciated in *Terence Ng* could be relevant if we were to affirm the conviction recorded by the Judge against the appellant, we invited parties to make specific submissions on how the new framework would impact the sentences in this case.[138] The parties filed their submissions on 27 June 2017.

119 The revised framework enunciated in *Terence Ng* requires a court to (a) identify the number of offence-specific aggravating factors in a case, (b) determine, based on the number and intensity of the aggravating factors, which of three sentencing bands the case falls under, (c) identify where precisely within the sentencing band the case falls in order to derive an indicative starting sentence, and (d) adjust that indicative sentence to reflect the presence of any offender-specific aggravating and mitigating factors (*Terence Ng* at [73]).

120 The offence-specific aggravating factors listed in *Terence Ng* are: group rape, abuse of position and breach of trust, premeditation, violence, rape of a vulnerable victim, forcible rape of a victim below the age of 14, hate crime, severe harm to victim, and deliberate infliction of special trauma (at [44]).

121 In *Terence Ng* this court propounded three sentencing bands (at [47]):

(a) Band 1: 10–13 years' imprisonment, 6 strokes of the cane.

(b) Band 2: 13–17 years' imprisonment and 12 strokes of the cane.

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[138] Letter from the Registry dated 5 June 2017

(c) Band 3: 17–20 years' imprisonment and 18 strokes of the cane.

122 A rape falls in Band 1 if there are "no offence-specific aggravating factors or where the factor(s) are only present to a very limited extent and therefore should have a limited impact on the sentence" (*Terence Ng* at [50]); in Band 2 if there are two or more offence-specific aggravating factors (at [53]); and in Band 3 where the number and intensity of the aggravating factors present an extremely serious case of rape (at [57]).

Rape

123 The appellant submits that, as there are no offence-specific aggravating factors in this case, it falls within Band 1 of the *Terence Ng* framework.[139] His argument has two parts: the intoxication of a victim *per se* is not an aggravating factor, but even if it were, the present case still falls within Band 1, because the offence was less serious than that in *Haliffie*, a case which this court, in *Terence Ng*, regarded as falling within Band 1.

124 The PP submits that there are two offence-specific aggravating factors here – the vulnerability of the victim and the appellant's premeditated act – and that the rape here, therefore, falls within Band 2.[140]

Intoxication can be an offence-specific aggravating factor

125 In *Terence Ng*, this court explained that a victim could be vulnerable because of "age, physical frailty, mental impairment or disorder, learning disability" (at [44(e)]). The appellant's interpretation of this aggravating factor is that it encompasses all manner of vulnerability caused by "characteristics of

139 Appellant's Supplementary Submissions at para 2

140 Respondent's Supplementary Submissions at paras 5 to 19

a *permanent and enduring nature*, and not … temporary intoxication"[141] (emphasis added). Against this, the PP argues that victims who are "severely intoxicated" are also vulnerable because their physical and mental state renders them unable to resist sexual assault.[142] The PP does concede, however, that mildly intoxicated victims may not be physically or mentally impaired and thus not vulnerable.

126 We agree with the PP for two reasons. First, approaching the matter in the abstract, we see no basis for distinguishing between a victim who is vulnerable because of a permanent characteristic and one who is vulnerable because of a temporary condition – for example, one who is physically frail because of a sprained ankle or mentally impaired because of heavy intoxication. The latter might also become targets because they are less able to fend off the offender's sexual advances in the moment of the offence. A permanent condition may make a victim more vulnerable because it may afford the offender an opportunity for a more sustained course of sexual assault. This is the case with young victims: consider *Public Prosecutor v BNN* [2014] SGHC 7, where the offender was the stepfather of the victim and abused her over three years, his abuses growing in intensity and perversion (see *Terence Ng* at [54(d)]). A victim with only a temporary disability or impairment may be less likely to be subjected to such a course of sexual assault, but it does not mean she is not vulnerable on the single occasion on which she is assaulted. The essential feature of this aggravating factor is that its existence makes it easier for the offender to commit the rape of the victim. The offender who targets an intoxicated victim exploits the same advantage. The intoxicated victim might be physically weak or suffer lapses in consciousness, and thus would be, in the

141 Appellant's Supplementary Submissions at para 9

142 Respondent's Supplementary Submissions at paras 7–8

Judge's words, in "less of a condition to resist any sexual assault" (Sentence GD at [28]).

127 Second, as a matter of case authority, it is well recognised that an intoxicated victim is in a position of vulnerability in relation to a sexual offender, and that this factor in turn aggravates the offence.

128 The appellant is not correct in saying that there are several local cases that "do not consider intoxication *per se* as an aggravating factor".[143] The four cases he has cited in support are equivocal on this point as it was not in fact argued: the appeal in *Seow Choon Meng v Public Prosecutor* [1994] 2 SLR(R) 338 was concerned with the admissibility of statements and did not discuss the applicable sentencing principles; *Rizal bin Abdul Razak v PP* [2000] SGHC 148 was an appeal only against conviction; *V Murugesan v PP* [2006] 1 SLR(R) 388 concerned an appeal against sentence but the main question there concerned the ordering of sentences to run consecutively; and finally, in *Public Prosecutor v Muhammad Fadly bin Abdull Wahab* [2016] SGHC 160 the PP had submitted there that there had been an exploitation of a particularly vulnerable victim (an intoxicated one), but the High Court judge did not address this argument. Thus, none of the cases cited by the appellant considered, much less rejected, the intoxication of the victim as an offence-specific aggravating factor.

129 As against this, there are two cases which explicitly recognised that a sexual offence was aggravated if it involved an intoxicated victim.

130 The first case is *Public Prosecutor v Ong Jack Hong* [2016] 5 SLR 166 where Sundaresh Menon CJ held that the fact that a victim was drunk and

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143 Appellant's Supplementary Submissions at para 2; Appellant's Case at para 46

vulnerable was "by itself, sufficient to aggravate the offence [of sexual penetration of a minor]" (at [18]). Menon CJ categorically stated that the victim's intoxication was an aggravating feature of the offence (at [18]):

> …the Respondent was in control of the situation over the victim, who was in a drunk and vulnerable state and who was carried to the scene and then turned around into the position by the Respondent for him to do what he then proceeded to do. This, to my mind, is a factor that makes the offence graver because the Respondent was effectively in control throughout the entire episode. While I accept Ms Ng's submission that the victim was neither unconscious nor wholly without control of her faculties, this does not materially advance the Respondent's case because the fact that she was drunk and vulnerable is, by itself, sufficient to aggravate the offence.

If it is an aggravating factor to exploit, for one's sexual gratification, a victim who is "neither unconscious nor wholly without control of her faculties", it must be more aggravating to exploit a victim who is nearly unconscious and is without control of her faculties – as [V] was. The offender would have greater control over a near-comatose victim.

131 The second case is *Haliffie*. This court, in *Terence Ng*, regarded it as falling within Band 1, and observed that the "offender had taken advantage of the fact that the victim was inebriated (though not unconscious), but there were otherwise no other offence-specific aggravating factors of note" (at [52]). In other words, this court recognised that taking advantage of an inebriated victim is an offence-specific aggravating factor, but because it was the only such factor in *Haliffie*, the case was not so severe as to fall into Band 2 (which requires two or more offence-specific aggravating factors). Although the court did not say what offence-specific aggravating factor was disclosed in that case, in the circumstances, it was clearly a case of "rape of a vulnerable victim".

132 However, we do accept that intoxication of the victim may not always be treated as an offence-specific aggravating factor. Whether this must be so depends very much on how intoxicated the victim was. The PP acknowledges, rightly, that there are degrees of intoxication. Thus, there cannot be a rule that an intoxicated victim is always a vulnerable one. Only a victim who is so intoxicated as to lost control over her ability to respond to or resist sexual advances is vulnerable. The greater the loss of control, the greater the vulnerability. Here, as we have found at [108], [V] was severely intoxicated and had no control over even basic motor movements. She was definitely a vulnerable victim and the appellant exploited that to his advantage. Therefore, this offence-specific aggravating factor is present in the instant case.

The appellant did not act out of premeditation

133 The PP characterises the appellant's offence as premeditated because he separated [V] from her friends and took her away from the Wavehouse to the beach when she was in no position to resist his moves.[144] We are unable to agree.

134 The Court in *Terence Ng* mentioned, as examples of premeditation, the use of drugs or soporifics to reduce a victim's resistance, predatory behaviour such as sexual grooming, or the taking of deliberate steps towards the isolation of the victim such as by arranging to meet at a secluded area under false pretences (at [44(c)]). These examples reflect a high degree of deliberation and planning.

135 Here, by contrast, the appellant had not deliberately offered drugs or soporifics to [V] and had only met her for the first time at the party at the

144 Respondent's Supplementary Submissions at para 17

Wavehouse. We agree with the Judge's assessment (at [35] of the Sentence GD) that the fact that the appellant plied [V] with alcohol had to be seen in the context of the party that they were there for. The appellant had offered drinks to others, and [V] had also accepted drinks from other people. It would not be fair to say that the appellant was targeting [V] specifically with the intention of getting her drunk.

136 It is true that the appellant might have distracted [S] by asking her to retrieve [V]'s bag so that he could take [V] away without [S] tagging along. But in the circumstances of the present case, as we have mentioned, what happened appears to us to be a case of an offender seizing an opportunity rather than having acted in a calculated manner.

137 This is all the more so when we compare the appellant's behaviour with the kind of sexual offences that our courts have characterised as being premeditated. To take but a few recent examples:

(a) In *Ng Jun Xian v Public Prosecutor* [2017] 3 SLR 933 ("*Ng Jun Xian*"), the victim wanted to return to the hostel she was staying at. The offender persuaded her to rest at a hotel and he reassured her that she would be left alone and allowed to sleep. After bringing the victim to the hotel room, he took the opportunity to sexually assault her. See Kee Oon JC (as he then was) observed that there was premeditation because the offender had "sought to set the stage by sending the victim to the hotel despite her initial reluctance and he took the opportunity when it presented itself to commit the sexual assault" (at [42]).

(b) In *Public Prosecutor v Lee Ah Choy* [2016] 4 SLR 1300, the offender observed the victim for a period of time and came to understand her morning routine. He took the victim to a HDB block and even

brought along a paper-cutter which he used to threaten her. Hoo Sheau Peng JC observed that this "demonstrated his resolve to see his plan through to completion" and that he did not commit the offence on the spur of the moment (at [51]).

(c) In *Public Prosecutor v Sim Wei Liang Benjamin* [2016] SGHC 240, the accused had used the internet with the clear intention of ensnaring his victims and luring them to engage in sexual activities with him (at [30]). This court noted in *Terence Ng* that the offender had acted in a "predatory manner" (at [55]).

138 These examples show that the kind of premeditation which the law regards as aggravating an offence involves a significant degree of planning and orchestration. The appellant's acts did not really involve any pre-planning. Before their meeting on that fateful day, they were strangers to each other. It appears to us that the appellant's moves that night were hatched on the spur of the moment.

Application to the facts

139 In our judgment, there is only one offence-specific aggravating factor in this case. In this regard, the appellant is right to draw an analogy between this case and *Haliffie*. As mentioned earlier, there was only one offence-specific aggravating factor in that case – taking advantage of a vulnerable victim. That said, the appellant's suggestion that the present case should fall within the lower range of Band 1 is unsustainable in view of the clear direction from this court in *Terence Ng* that the presence of one aggravating factor places a case within the middle to upper range of Band 1 (at [50]).

140 The sentencing range of Band 1 is 10–13 years' imprisonment with 6 strokes of the cane. If the sentence is to be at the higher end of the range, the indicative sentence would be 12 or 13 years' imprisonment and 6 strokes of the cane. Given that range, the Judge's sentence of 12 years' imprisonment and 6 strokes of the cane for the rape charge cannot be said to be manifestly excessive. Given the lack of any significant mitigating factors, as the Judge found (see [52] above), there is also no scope for reducing the appellant's sentence. Thus, applying the *Terence Ng* framework, we do not see any basis for interfering with the sentence imposed by the Judge for the rape charge.

Sexual assault by penetration

141 We now turn to the sentence for the digital penetration charge.

142 The appellant has not make any submission on the impact of *Terence Ng* on the sentence for the digital penetration charge. The PP has. The PP argues that the sentencing framework applicable to rape offences should be the same as that for sexual assault by penetration offences;[145] that foreign jurisdictions such as New South Wales, Australia, and the UK make no distinction between sentencing for both types of offences; and that it is unprofitable to rank different sexual offences according to severity, with rape at the apex of the hierarchy. The PP thus invites us to transpose the *Terence Ng* framework to s 376 offences as well.[146] Applying that approach, the PP submits that the appropriate starting sentence for the digital penetration charge was 13 years' imprisonment and 12 strokes of the cane – this was based on its submission that the sentence for the rape charge should fall within the lower half of Band 2 (a submission which we have rejected).

145 Respondent's Supplementary Submissions at para 28

146 Respondent's Supplementary Submissions at para 40

143 The PP relies on cases from New South Wales which caution against treating rape as objectively more serious than sexual assault by penetration. For example, in *R v Hibberd* [2009] NSWCCA 20, the Court of Criminal Appeal of New South Wales observed (*per* Tobias JA):

> 19 … I consider there to be a danger in adopting, at least in the case of sexual assault upon an adult, a general proposition that an act of digital penetration, without more, is less serious than an act of penile penetration, without more. The problem is that it is never "without more". True it is that penile penetration, contrasted with digital penetration, may carry risks to a female adult victim such as pregnancy or sexually transmitted disease. On the other hand, digital penetration has the potential to cause more physical damage than penile penetration. These are some of the many factors which are required to be taken into account when determining the objective seriousness of the offending act and the point on the scale of seriousness where that act should be placed.
>
> …
>
> 21 In my respectful view the time has come for this Court to depart from any prima facie assumption, let alone general proposition, that digital sexual intercourse is to be regarded as generally less serious than penile sexual intercourse. If one was to accept such a proposition, then it may well be appropriate to also assert that forced vaginal penetration in some of its more gross forms is likely to be more serious than penile penetration. As the objective seriousness of the offence is wholly dependent on the facts and circumstances of the particular case … any resort to prima facie assertions that one form of penetration is likely to be or generally will be more serious than another, is to be avoided. It can, in my view, only lead a sentencing judge to erroneously attribute more weight to the general proposition or assumption than the particular facts of the case.

144 Similar observations about the unprofitability of ranking sexual offences according to their seriousness were made in *R v AJP* [2004] NSWCCA 434 at [24]–[25]; *Doe v Regina* [2013] NSWCCA 248 at [54]; and *Simpson v R* [2014] NSWCCA 232 at [33].

145 The PP also cites a UK Sentencing Council consultation paper published in 2012.[147] The Council noted (at 31) that "the means of penetration, whether it

be penile, another body part, or object, may not in every case make a difference to the victim as the violation incurred by the victim is as severe". Thus, its position was that there was no justification for any difference in sentencing between rape and sexual assault by penetration.

146 We note that the PP's submissions here was made before See JC in *Ng Jun Xian*. The PP relies on the same authorities – cases from New South Wales and the UK Sentencing Council guidelines (see [58]–[61] of *Ng Jun Xian*). But the PP's submissions there were pitched slightly differently. As See JC noted, the PP was not seeking to equate the benchmark sentences for rape and sexual assault by penetration; the PP had, after all, asked for a starting point of eight years' imprisonment and six strokes of the cane for the latter offence when the starting point for rape (until *Terence Ng*) was 10 years' imprisonment and six strokes of the cane (at [62]). Rather, the PP was only suggesting that a court should be slow to assume that the offence of sexual penetration is always a less severe offence than that of rape, and to that extent, See JC agreed. See JC then suggested that the appropriate benchmark sentence for the offence of digital penetration was in the region of eight years' imprisonment and six strokes of the cane (at [67]).

147 The PP now submits that the digital penetration offence here fell within Band 2 of the *Terence Ng* framework and should have attracted the same starting point of 13 years' imprisonment and 12 strokes of the cane.[148] This goes further than its submission in *Ng Jun Xian* that the benchmark sentence for sexual assault by penetration ought to be close to, but not identical with, that for rape.

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147 Respondent's Supplementary Submissions at para 35

148 Respondent's Supplementary Submissions at para 42

148 In this case, the Judge also found that the sentences for the rape charge and digital penetration offence ought to be the same. As we observed at [53], he took this view for two reasons. First, victims of sexual assault by penetration experience the same emotional scars as rape victims; the act of inserting a finger into a victim's vagina is as grave a violation as inserting a penis. Second, the fact that those who are convicted under s 375 of the Penal Code and those convicted under s 376(2)(*a*) are both liable to be punished to the same extent suggests that both offences should be considered to be of the same severity.

The benchmark sentences for rape and digital penetration should not be equated

149 With respect, we are unable to agree with the PP or the Judge. We reach this conclusion for six reasons.

150 First, at the highest level of abstraction, there is an intelligible difference between penile penetration of the vagina and digital penetration of the vagina. There are at least two reasons for this.

(a) One, penile penetration carries the risk of unwanted pregnancy and of transmitting sexual diseases. The cases and authorities all recognise this as a relevant consideration even if they regard it as insufficient to justify a differentiation in benchmark sentences (see the Sentence GD at [56]; *R v Hibberd* at [19], and the UK Sentencing Council's guideline at p 29). It cannot be denied that an unwanted pregnancy and contracting a sexually-transmitted disease would have far-reaching consequences for the victim. The knowledge that she would be at risk of becoming pregnant or contracting a sexually-transmitted disease would itself inflict an extra level of trauma on the victim.

(b) Two, penile penetration is a more intimate act than digital penetration. The abuse of such an act therefore represents a greater degree of intrusion into the sexual autonomy of the victim. Also, an offender derives more gratification from penile penetration than digital penetration. There is therefore a greater degree of exploitation by the offender of the victim.

151 Second, as a matter of case law, our courts have always said that rape is generally regarded as "the most grave of all the sexual offences" (see *Chia Kim Heng Frederick* v *Public Prosecutor* [1992] 1 SLR(R) 63 at [9]). This court in that case quoted a passage from a Criminal Law Revision Committee which it felt was consonant with its views:

> Rape involves a severe degree of emotional and psychological trauma. It may be described as a violation which in effect obliterated the personality of the victim. Its physical consequences equally are severe: the actual physical harm occasioned by the act of intercourse; associated violence or force and in some cases degradation; after the event, quite apart from the woman's continuing insecurity, the fear of venereal disease or pregnancy. We do not believe this latter fear should be underestimated, because abortion would usually be available. This is not a choice open to all women and it is not a welcome consequence for any. Rape is also particularly unpleasant because it involves such intimate proximity between the offender and victim. We also attach importance to the point that the crime of rape involves abuse of an act which can be a fundamental means of expressing love for another, and to which as a society we attach considerable value.

152 In *Public Prosecutor v BMD* [2013] SGHC 235 ("*BMD*"), the accused was convicted of a number of sexual offences which included rape and sexual assault by penetration. In meting out the sentences for each charge, Tay J found that the offence for rape deserved the highest sentence because penile vaginal penetration would be "the most heinous" among the categories of offences listed in the charges. This would be followed by fellatio, penile-anal penetration and

finally digital-anal penetration (at [73]). There was clearly a distinction made between penile-vaginal penetration and other forms of penetration. On appeal, this court found no basis for disturbing any of the sentences (see *BMD v Public Prosecutor* [2015] SGCA 70).

153 Third, we are unable to agree with the Judge that because the maximum punishment for the offence of rape and sexual assault by penetration is the same, the offences are therefore of equal severity. We agree with See JC's observation at [65] of *Ng Jun Xian* that s 376(2)(*a*) criminalises a range of conduct involving penetration without consent, and that the identical statutory punishment range for both that offence and that of rape does not suggest that the punishments for both must always be the same. That would be inconsistent with the point just mentioned that courts have regarded rape as the most grave of sexual offences. Hence, in *BMD*, Tay J, having observed (at [73]) that "although the maximum punishment provided for [the offences of rape and sexual assault by penetration] is the same", nonetheless imposed different sentences according to the severity of each offence, with the highest sentence being imposed for the offence of rape.

154 Fourth, the Judge relied (at [56] of the Sentence GD) on Tay J's statement in *Public Prosecutor v AUB* [2015] SGHC 166 that victims of sexual assault by penetration experience the same emotional scars as rape victims, but it is not clear that Tay J went so far as to say that the sentence for rape should be the same as that of sexual assault by penetration. There, the accused was charged with sexual assault by digital penetration under s 376(2)(*a*). The victim was his biological daughter. The PP there submitted that the case was "analogous to a Category 2 rape as formulated in *PP v NF*" (at [9]). Under the *NF* framework, this would have attracted a starting sentence of 15 years' imprisonment (see [51] above). Tay J did note that the accused exploited a

position of trust (at [11]) – which is an aggravating factor – but he did not appear to use a starting sentence based on Category 2 Rape. Instead Tay J noted that the case precedents showed that imprisonment terms from 9 to 12 years with 12 to 16 strokes of the cane had been imposed (at [13]) and he eventually imposed a sentence of 12 years' imprisonment and 12 strokes of the cane on the accused.

155 Fifth – turning now to the position in foreign jurisdictions – we think the cases from New South Wales which the PP relies on are not entirely inconsistent with our views. The courts there were dealing with the appropriate sentences for individual offences. When dealing with these individual offences, the courts stressed that it would be facile to assume that a sexual offence was less serious just because it involved digital rather than penile penetration; they emphasised the need to look at the circumstances in which the offence was committed. That is undoubtedly correct. In some cases, the circumstances in which digital penetration is committed can make the offence even more severe than rape, due to the presence of other aggravating factors. In *R v Hibberd*, for example, the digital penetration, of an eight-month pregnant woman, was accompanied by abusive and degrading language, and even urination on the victim. In *Simpson v R*, the offender used digital penetration to humiliate the victim, this was shown by his "contemptuous wiping of his fingers on [her] face" which was intended to "degrade and humiliate her" (at [33]). The courts were therefore emphasising that a judge should not immediately mete out a lower sentence just because the offence is digital penetration. Nothing in our law would be inconsistent with that. Although the *benchmark* sentence should be lower, to reflect the difference in the type of sexual offence involved, it is possible that a significant aggravating factor (such as intense humiliation of the victim) could increase the starting sentence for digital penetration by so much that it would be on par with, or even higher than, a sentence for a rape offence involving no aggravating

factors (that is, falling within Band 1 of *Terence Ng*). If the proposition established by the Australian cases is that the court must ultimately look at all the facts of a case in assessing how serious a particular offence of digital penetration is, we agree entirely.

156 Sixth, we think the sentencing position set out by the UK Sentencing Council must be understood in context. That position could have been influenced by clear Parliamentary recognition that the offence of sexual assault by penetration of the vagina (by whatever means) was as serious as an offence involving penile penetration. The equivalent offence for sexual assault by penetration is s 2 of the Sexual Offences Act 2003 (c 42) (UK). The Minister moving the Sexual Offences Bill which introduced that section, Lord Falconer of Thoroton, noted that the offence in s 2 covers cases where "a person forcibly inserts his hands or fist into a woman's vagina", and that such penetration was "extremely serious offending behaviour that can inflict as much, if not more, pain and physical damage on a victim as penile penetration and is likely to result in similar psychological trauma" (*Hansard*, HL Vol 646, col 1186 (April 1, 2003). Short of similar Parliamentary intention in our context, we would be slow to upset a fairly well-established line of authority in our jurisprudence which establishes that rape is the gravest of all sexual offences and should generally attract a higher starting sentence.

157 For these reasons, we hold that there is an intelligible and defensible distinction to be drawn, in terms of offence severity, between rape and digital penetration. The benchmark sentences should not, therefore, be equated.

The same aggravating factors in Terence Ng *should apply to the offence of digital penetration*

158 Having said that, we do recognise the logic of the PP's suggestion that the *Terence Ng* framework should be transposed to the offence of digital penetration. Many of the offence-specific aggravating factors listed in *Terence Ng* (such as premeditation, abuse of a position of trust, special infliction of trauma) may also be present and pertinent in offences involving digital penetration.

159 It follows that there should also be three sentencing bands for the offence of sexual penetration of the vagina using a finger, though the range of starting sentence for each band should be lower to reflect the lesser gravity of the offence. The sentencing bands should be as follows:

(a) Band 1: 7 to 10 years' imprisonment and 4 strokes of the cane;

(b) Band 2: 10 to 15 years' imprisonment and 8 strokes of the cane;

(c) Band 3: 15 to 20 years' imprisonment and 12 strokes of the cane.

As for whether these three bands should similarly apply where the penetration of the vagina was done with the use of any other thing other than a finger, we shall leave that issue to be decided on another occasion where a case on point should arise.

160 In formulating these bands, we have been conscious that where the offence of sexual assault by penetration discloses any of the two statutory aggravating factors in s 376(4) of the Penal Code – *ie*, where there is use of actual or threatened violence (s 376(4)(*a*)) or where the offence is committed against a person under 14 years of age (s 376(4)(*b*)) – there is a prescribed

minimum sentence of 8 years' imprisonment and 12 strokes of the cane. These cases should fall within Band 2 (or even Band 3 if there are additional aggravating factors). We said the same in *Terence Ng* in relation to the identical statutory aggravating factors for rape (under s 375(3) of the Penal Code): we considered these statutory aggravating factors to be part of the list of offence-specific aggravating factors to consider in determining which sentencing band a particular offence falls under (at [44(d)] and [44(f)]) and that where any of the statutory aggravating factors are present, the case would almost invariably fall within Band 2 (*Terence Ng* at [53]).

161 We have also been conscious of the possible relevance of these proposed bands to s 376A of the Penal Code, which criminalises the sexual penetration of a minor under the age of 16, regardless of whether the minor consented. In January this year, this court issued its judgment in *Public Prosecutor v BAB* [2017] 1 SLR 292 ("*BAB*"), which concerned an appeal involving s 376A. In that case, an adult female, who suffered from Gender Dysphoria, was eventually convicted on the following charges involving a young female victim:

(a) two charges under s 376A(1)(*b*) punishable under s 376A(3), for penetration of the victim's vagina with a dildo when the latter was under 14 years old;

(b) two charges under s 376A(1)(*b*) punishable under s 376A(2), for penetration of the victim's vagina with a dildo when the latter was under 16 years old;

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

(d) one charge under s 7(*a*) of the Children and Young Persons Act Cap 38, 2001 Rev Ed) ("CYPA"), for kissing the victim on the lips and licking her breasts and nipples when the victim was under 14 years old.

At [65] of that judgment, this court set out the following sentencing ranges:

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

162 Sections 376 and 376A of the Penal Code have a lot in common and overlap in scope in some situations. The two main differences are that the latter section deals with sexual penetration offences against minors under 16 years of age, for which the consent of the minor is irrelevant. The court in *BAB* did not discuss caning, which was an available punishment in s 376A(3), because the accused there was a female.

163 In the light of what we have set out at [159], the starting point of 3 years' imprisonment for a s 376A(2) offence in *BAB* may now look rather lenient when compared to the 7 to 10 years' imprisonment range in Band 1 for a s 376 offence. However, it must be remembered that s 376A(2) prescribes a maximum sentencing range of 10 years or fine or both (with no caning) whereas s 376(3), the applicable provision in this appeal, provides for a maximum punishment of 20 years' imprisonment and a liability to fine or to caning. Bearing that in mind, the question of whether the starting point of 3 years' imprisonment for s 376A(2) cases proposed in *BAB* should be tweaked, and if so how, will have to be addressed on another occasion.

164 On the other hand, it is clear that the starting point of between 10 and 12 years' imprisonment for s 376A(3) offences (involving victims below 14 years in age) may need to be reviewed in the light of what we have said at [159] and [160] above because this sub-section has the same sentencing range as s 376(3), that is, a maximum imprisonment term of 20 years and liability to fine or to caning. In a future case involving digital penetration of the vagina which falls within s 376A(3), the court will have to decide on the appropriate sentence after considering what we have set out at [159] and [160] above. In addition, we must also note one other difference: unlike s 376(4)(*b*), there is no minimum imprisonment term and no mandatory caning in s 376A(3).

165 We will now consider where the precedents for offences under s 376 involving digital penetration fit within our sentencing bands. We do this purely for the purpose of illustration. It would be invidious for us to comment on the correctness of the sentences actually meted out in those cases.

166 In our opinion, the following are examples of Band 2 cases.

(a) First, *Public Prosecutor v GBA (B1) and BAV (B2)* [2015] SGDC 168 ("*GBA*"). The district judge' imposed a sentence of 6 years' imprisonment and 5 strokes of the cane on the offender (GBA) who faced a sexual assault by penetration charge. On appeal, the sentence for that charge was enhanced to 8 years' imprisonment and 6 strokes of the cane. There were two offence-specific aggravating factors here. First, the victim was vulnerable because she had passed out from drinking alcohol and was unconscious while the sexual assault took place. Second, the offence was premeditated. The High Court judge did not agree with the district judge's finding that the accused had acted opportunistically; although there was no pre-arranged plan to ply the victims with drinks, there was still, in his view, "obvious premeditation on their part in committing the offences over a sustained duration".[149]

(b) Second, *Ng Jun Xian*. As already mentioned at [137(a)], there was premeditation in this case. An additional offence-specific aggravating factor was that the sexual assault was violent. See JC described it as "serious, violent and prolonged" (at [38]). The victim suffered a number of injuries including "several bruises on her hands, face, arms and legs", bruises on her cheek and a chipped tooth (see [12] and [14]). See JC imposed a sentence of 8 years and 6 months' imprisonment and 6 strokes of the cane.

167 A case which could conceivably fall within Band 3 is *PP v Azuar bin Ahamad* [2014] SGHC 149 ("*Azuar*"). In *Terence Ng* we considered this case as falling within Band 3 of the framework for rape offences (at [58(b)]). We would similarly consider this a Band 3 offence for sexual assault by penetration

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[149] Minute Sheet (HC MA 38/2015) at p 3

as well. The offender pleaded guilty to three charges of rape and one charge of sexual assault by penetration using the finger. The High Court sentenced him to 12 years and 6 months' imprisonment and 12 strokes of the cane for each charge. There were easily at least two aggravating factors in that case. First, the assaults were premeditated: the accused spiked the victim's drink. He drugged them with Dormicum, a stupefying date rape drug which caused the victims to lose consciousness (at [110]). He had also created a false online persona and used lies to get them to meet him at a location of his preference (at [111]). Second, the victims were also vulnerable because they were unconscious when he committed the assaults. Overlaying these two factors was the consideration that the accused was assessed by psychiatrists to pose a risk of serious sexual harm to the public (at [126]). Indeed, he committed 33 distinct offences over 14½ months of which 22 were sexual in nature. There were multiple victims – each of the four proceeded sexual offences charges were against a different victim. His was a particularly egregious case which places it within Band 3.

168 A somewhat anomalous case is *Public Prosecutor v Koh Nai Hock* [2016] SGDC 48 ("*Koh Nai Hock*"). The accused held himself out as an alternative medicine practitioner and penetrated the victim's anus and vagina on the pretext of treating her for infertility. He faced 14 charges under s 376(2) of the Penal Code; 7 were for digital-vaginal penetration and 7 for digital-anal penetration. The district judge meted out sentences of 2 years' imprisonment for each individual charge (save for one charge involving digital-vaginal penetration where the accused had not worn a glove when he inserted his finger unlike on previous occasions). She ordered the sentences for 3 charges to run consecutively, resulting in a global sentence of 7 years' imprisonment. The accused's appeal against sentence was dismissed by the High Court.

169 We consider *Koh Nai Hock* a Band 1 case. The only aggravating there was arguably "abuse of position and breach of trust" since the accused had held himself out as a medical practitioner to gain the victim's trust, which he then violated. The individual sentences of 2 to 3 years would be some distance from our sentencing bands. We do note, however, that the global sentence was 7 years' imprisonment (no caning was imposed as the accused over 60 years of age). Hence, broadly speaking, this case is still somewhat consistent with the Band 1 sentencing range we have proposed, although we would caution against relying on it as a precedent for individual sentences in future.

170 It will be observed also that the actual sentences imposed in *GBA, Ng Jun Xian*, and *Azuar*, which we have placed in Band 2 and Band 3, are lower than the minimum sentence we have specified for the respective sentencing bands. As we said at [165], it is not for us to say whether the sentences in those cases were too low. It is not appropriate for us to consider the sentences in those cases *de novo*. Those sentences were arrived at after consideration of all sentencing factors, including mitigating factors, whereas we have only sought to identify the offence-specific aggravating features of those cases. Thus, we should not be taken to be saying that the sentences in *GBA, Ng Jun Xian* and *Azuar* are no longer of any precedential value. But those sentences now fall outside the sentencing bands we have indicated and should not as a rule be relied upon. Hence, in future, a judge who is minded to give a similar sentence as was given in those cases, thus departing from the sentencing bands, must set out "clear and coherent reasons" for doing so (*Terence Ng* at [62]).

171 We also reiterate – and clarify – the point we made in *Terence Ng* at [73(d)]: where the offender faces two or more charges and the court is required to run two or more sentences consecutively, a court may if necessary calibrate the individual sentences downwards to ensure that the aggregate sentence is not

excessive. If this is done, the individual sentences may fall outside the prescribed range for each sentencing band, and it is important that the court expressly says that it has adjusted the individual sentences in this way so that those adjusted individual sentences are not relied upon in future cases.

Application to the facts

172 Applying these sentencing bands to the present appeal, we find that the appellant's sentence for the digital penetration charge –12 years' imprisonment and 6 strokes of the cane – is too high and should be reduced. The indicative starting sentence should also be in the middle to upper range of Band 1 given the presence of the one offence-specific aggravating factor – which is that the appellant exploited the vulnerability of [V], who was intoxicated. That would give an indicative sentence of 8 to 9 years' imprisonment and 4 strokes of the cane.

173 In our view, an appropriate sentence would be 8 years and 6 months' imprisonment and 4 strokes of the cane. After taking into account the period of remand, the sentence would be reduced to 7 years, 6 months and 19 days' imprisonment and 4 strokes of the cane. As the sentences for the rape offence and the digital penetration offence were ordered to run concurrently, the aggregate sentence would be 11 years and 19 days' imprisonment and 10 strokes of the cane (rather than 12 strokes of the cane).

Conclusion

174 In conclusion, we find no basis to disturb the Judge's conviction of the appellant for the offence of rape under s 375(1)(*a*), punishable under s 375(2), and for the offence of sexual assault by penetration under s 376(2)(*a*) and punishable under s 376(3). The appeal against conviction is therefore dismissed.

175 We dismiss the appeal against sentence for the rape charge. We allow the appeal against sentence in respect of the digital penetration charge to the extent explained at [172]–[173]. Like the Judge, we order both sentences of imprisonment to run concurrently. The result, therefore, is that the total imprisonment term remains at 11 years and 19 days and the total number of strokes of caning is reduced from 12 to 10.

Sundaresh Menon Chief Justice	Chao Hick Tin Judge of Appeal	Andrew Phang Boon Leong Judge of Appeal

Judith Prakash Judge of Appeal	Tay Yong Kwang Judge of Appeal

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