BMD *v* Public Prosecutor
[2015] SGCA 70

Case Number	: Criminal Appeal No 5 of 2013
Decision Date	: 14 January 2016
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Quentin Loh J
Counsel Name(s)	: Pradeep Pillai (Shook Lin & Bok LLP) and Sujatha Selvakumar (Law Society Pro Bono Services Office) for the appellant; Ng Cheng Thiam and Lin Yinbing (Attorney-General's Chambers) for the respondent.
Parties	: BMD — PUBLIC PROSECUTOR

Criminal law – Offences – Rape

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2013] SGHC 235.]

14 January 2016 Judgment reserved.

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

Introduction

1 The Appellant claimed trial in the High Court to six charges of a sexual nature: two for rape and four for sexual assault by penetration. The Prosecution had also brought six other charges against him, but they were stood down and subsequently withdrawn. The victim is the Appellant's mildly retarded half-sister. She was just under 19 years old at the time of the alleged offences, which were said to have taken place over two nights from 12 to 14 March 2010 in the Appellant's one-room flat. The reason why she was then staying at the Appellant's flat will become apparent later (see [6]–[7] below).

2 The six proceeded charges were for the following offences:

(a) Charge 1: Rape on 12 March 2010 at or about midnight punishable under s 375(2) of the Penal Code (Cap 224, 2008 Rev Ed).

(b) Charge 4: Digital-anal penetration without consent between midnight on 12 March 2010 and 6.00am on 13 March 2010 under s 376(2)(*a*) and punishable under s 376(3) of the Penal Code.

(c) Charge 6: Rape between the evening of 13 March 2010 and 6.00am on 14 March 2010 punishable under s 375(2) of the Penal Code.

(d) Charge 8: Penile-anal penetration without consent between the evening of 13 March 2010 and 6.00am on 14 March 2010 under s 376(1)(*a*) and punishable under s 376(3) of the Penal Code.

(e) Charge 9: Fellatio without consent between the evening of 13 March 2010 and 6.00am on 14 March 2010 under s 376(1)(*a*) and punishable under s 376(3) of the Penal Code.

(f) Charge 10: Digital-anal penetration without consent between the evening of 13 March 2010 and 6.00am on 14 March 2010 under s 376(2)(*a*) and punishable under s 376(3) of the Penal Code.

3 On 1 August 2013, the High Court found the Appellant guilty of all six charges and sentenced him to an aggregate of 22 years in prison and 24 strokes of the cane: see the grounds of decision of the judge ("the Judge") in *Public Prosecutor v BMD* [2013] SGHC 235 ("the GD") (at [3]).

4 The Appellant appealed against both conviction and sentence. The Appellant was unrepresented when the appeal was first heard on 12 January 2015. On that date, pursuant to s 8(3) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), we ordered that nothing be published that may lead to the identification of the victim. We also granted the Appellant's application to adjourn the matter to a date to be fixed to obtain counsel. Mr Pradeep Pillai eventually took on the matter. At the subsequent hearing on 10 September 2015, we reserved judgment after hearing the arguments of the parties. We now give our decision.

Background

5 We begin with a brief summary of the essential facts of the case, and the reader seeking a more comprehensive discussion of the background may refer to the GD (at [5]–[55]), where the Judge set out the facts and evidence in some detail.

6 The Appellant and the victim were born to the same mother by different fathers. Since 2006, when her mother passed away, the victim had been living with another half-brother, R, who is the Appellant's biological brother, being born of the same mother and father. The victim was assessed with an IQ of 58 and was therefore regarded as mildly retarded.

7 The Prosecution's case as to how the victim came to stay in the Appellant's flat over the two nights of the alleged offences was that, on 12 March 2010, the victim had an argument with R and his wife. The victim wanted to stop working at a fast food outlet under the supervision of R's wife, who was the manager of the outlet. R, unable to persuade her otherwise, thought it better to send her to stay with the Appellant, because the latter was thought to be a stricter person. R drove her to the Appellant's flat, where the Appellant was living with his wife and his six-year-old stepson (the Appellant's wife's child by another father).

8 The victim gave evidence on behalf of the Prosecution. She said that after she arrived at the flat on 12 March 2010, the Appellant asked his wife to leave the flat with the stepson. He then started talking with the victim and while doing so placed a hand on her thigh. She pushed his hand away. When the wife and the child returned to the flat, the Appellant said he wanted to punish the victim. The wife told him that what he wanted to do was up to him. He told the victim to remove her pants and she did so out of fear that he would beat her up. At the time, the stepson was sleeping on the mattress in the flat. The Appellant then made her bend forward and he examined her anus for moles. She said the Appellant used his hand phone to take photographs of the moles at her anus. She tried to dress herself, but the Appellant told her to remove all her clothes, which she did. He then laid down on her on the mattress and inserted his penis into her vagina. She wanted to push him away but he "just firm his body up". The Appellant continued the act for some time while his wife looked on.

9 At some point, the wife was told by the Appellant to lick the victim's vagina, which she did; he then smoked a cigarette. After that, he told the victim to bend forward like a dog, and she complied. He then inserted his finger into her anus for "I do not know how many times". She said: "I could feel his fingernails and I could feel pain. He inserted his fingers in and out of my anus. I could see his

shadow from the wall." After this, he turned her on her back and then had sexual intercourse with her until morning.

10 The next evening, 13 March 2010, the Appellant told his wife to play an obscene film. The victim was present. The victim was told to watch the film, and when it ended, he told her to remove her clothes. She complied because she was afraid. The Appellant and his wife had sex, and then oral sex; the victim sat and watched them first and then later was forced to perform fellatio on the Appellant. Later, the Appellant pushed the victim onto the mattress and he then inserted his penis into the victim's vagina, penetrated her anus with his fingers and then inserted his penis into her anus. All these acts over the two nights were alleged to have been committed without the victim's consent.

11 The victim said that the next morning, on 14 March 2010, she ran away from the Appellant's flat. She contacted some of her neighbours and told them that she had been sexually penetrated by the Appellant. After she returned to R's flat, she also told R's wife about the rape but the latter did not believe her. The victim then ran away from R's home.

12 She subsequently met with an Indian man who saw her crying. He invited her to a meal. She then suggested going to a hotel in Pasir Panjang to rest. Although she wanted to relax, the Indian man asked for sex. They had penetrative sex in both her vagina and her anus. The Indian man could not be traced.

13 The next morning, the victim approached her stepfather and told him that she had been raped by the Appellant. He was taking her to R's flat when she felt giddy and fainted. Thereupon she was brought to National University Hospital for medical attention. Swabs were taken from her mouth, anus and vagina and sent to the Health Sciences Authority ("HSA") for testing – the test results were set out in the DNA report titled "Report under Section 369 of the Criminal Procedure Code, Cap 68" dated 15 December 2010 ("the DNA Report"), which was disclosed to the Appellant before trial but which was not sighted by the Judge below, as the Judge declined to admit it on the ground that it was unnecessary to do so.

14 A number of persons, including R, his wife, the victim's stepfather, and two neighbours, also gave evidence that the victim had claimed that she had been sexually assaulted by the Appellant and that she was in severe pain. In fact, the stepfather's housemate, who had overheard their conversation and had observed the amount of pain that the victim was seemingly suffering, was the person who called the police to report the matter even though he was not asked to do so.

15 In her three statements to the police, the Appellant's wife (who was called as a Prosecution witness) provided a similar albeit not identical account of what had happened on the nights in question. Those parts of the statements which were inadmissible as marital communications within the meaning of s 124 of the Evidence Act (Cap 97, 1997 Rev Ed) were redacted. In the redacted statements, the wife described a variety of sexual acts which the Appellant had coerced the victim into doing. This included penile-vaginal penetration, digital-anal penetration, penile-anal penetration and fellatio. The wife was also involved in these acts but explained that if she did not cooperate, the Appellant would beat her up.

16 However, the Appellant's wife painted a different picture when she took the stand. In contrast to her statements, she testified in court that no sexual activity had taken place between the Appellant and the victim at all. She said that on the night of 12 March 2010, the Appellant had gone to bed drunk and nothing happened. On the night of 13 March 2010, she and the Appellant had watched a pornographic film, had sex, and then he went to bed. The victim was not involved and did

not watch the film with them. In the middle of night, she woke up with a stomach ache and saw the victim sitting astride the Appellant. In anger, she threw an ashtray at the Appellant (rather than the victim). The victim then went to sleep on the sofa, and left the flat the next day, having taken $50 from a piggy bank that was meant for household expenses. She alleged that she had been threatened by the police into giving evidence incriminating the Appellant.

17 The evidence that the Appellant gave in his defence amounted to a straightforward denial that he had assaulted the victim at all. He claimed that on the two nights in question, he had drunk large amounts of alcohol and was therefore "knocked out". He could not have attacked the victim. He claimed that he had been framed by his relatives because they blamed him for his mother's death.

18 The Appellant's defence at the trial had three key planks.

19 First, there was little objective evidence that the victim had indeed been raped or sexually assaulted. The medical evidence showed that the victim had had sex with someone, but not necessarily with the Appellant.

20 Secondly, the victim was not a credible witness. She had not revealed the fact that she had sex with the Indian man until months into the investigation, when she was confronted with the DNA Report; and while she had told other persons that the Appellant had raped her, that was evidence that ultimately still rested on her credibility. It was so improbable as to be fantastical that a person who had been raped would, the very next evening, have sex with a complete stranger. She had lied about the rape, perhaps to get back at the Appellant for beating her when she was younger, or in collusion with R.

21 Thirdly, statements made to the police by the Appellant's wife were tainted by threats and should be disregarded in favour of her court testimony. There was evidence that the wife herself was also mildly retarded and was therefore susceptible and vulnerable to threats made against her.

The decision below

22 The Judge found that the victim was largely a truthful witness. She was not intelligent and her answers were ponderous, and it was therefore unlikely that she would have either instigated or participated in any scheme of collusion against the Appellant. In fact she could have little motivation to do so since she had very little contact with the Appellant. While she had failed to disclose the sexual encounter on the night of 14 March 2010 with the unidentified Indian man, the Judge declined to hold this against her; he found that it was quite believable that someone in her circumstances and of less than average intelligence, tired and hungry and having suffered two nights of trauma and pain, would have sought solace in the company of the unidentified man, even at the cost of sex.

23 The Judge, however, rejected the testimony of the Appellant's wife in court which exculpated the Appellant and, pursuant to s 147(3) of the Evidence Act, substituted her prior statements as her evidence. She had changed her evidence in court because she realised that if her husband was put in jail he would not be able to support her and her son. Moreover, she repeated the import of her statements to the independent psychiatrist, Dr Alvin Liew, who was at the time preparing a psychiatric report on the Appellant. Thus the Judge found that the Appellant's wife's three statements to the police contained the truth while her testimony in court had been altered with the aim of saving her husband.

24 Finally, the Judge declined to believe the Appellant's testimony in his own defence. He was evasive and took every chance to target the Victim's promiscuity. He was unable to make out any

plausible case why all these witnesses would have colluded to put him behind bars.

25 The Judge therefore found the Appellant guilty of all the six charges and sentenced him as follows:

(a) Charge 1 - 15 years and 12 strokes

(b) Charge 4 - 2 years and 3 strokes

(c) Charge 6 - 15 years and 12 strokes

(d) Charge 8 - 7 years and 6 strokes

(e) Charge 9 - 7 years and 6 strokes

(f) Charge 10 - 2 years and 3 strokes.

26 The Judge said that penile-vaginal penetration (*ie*, rape) was the most serious, and this was reflected in the substantial sentences for Charges 1 and 6, which involved rape. Fellatio or penetration of the mouth was next followed by penile-anal penetration. Digital-anal penetration was the least severe of the offences (Charges 4 and 10). The sentences which the Judge imposed reflected that approach. As the Appellant was found guilty of three distinct charges, at least two of the sentences had to be run consecutively pursuant to s 307(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC"). The Judge chose the imprisonment terms for Charges 1 and 9 to run consecutively with effect from 16 March 2010, the date the Appellant was arrested and remanded in custody, with all other imprisonment terms to run concurrently with those two. The total imprisonment term imposed on the Appellant was therefore 22 years, plus 24 strokes of the cane, the maximum allowed by s 328 of the CPC.

Criminal Motion 15 of 2015

27 After taking on the brief of the Appellant, Mr Pillai filed Criminal Motion No 15 of 2015 to amend the Petition of Appeal. The proposed amendments clarified that the Appellant appeals against both conviction and sentence (which was not apparent on the papers filed by the Appellant personally), and also set out the grounds on which the Appellant asserts that the convictions are unsafe and the sentences imposed are manifestly excessive. In the same motion, Mr Pillai also applied to rely on certain documents which were not included in the Record of Proceedings ("RoP") but were referred to during the trial, including the psychiatric report on the Appellant's wife dated 28 June 2010 issued by Dr Rajesh Jacob of the Institute of Mental Health ("IMH") and the DNA Report. The Prosecution did not object to these prayers. We granted the orders prayed for.

The parties' arguments on appeal

The Appellant's arguments

28 The Appellant argues that the convictions were unsound for a number of reasons. First, there is a shortage of physical evidence for the alleged offences, and the police had failed to gather certain pieces of evidence that were crucial to the charges or the defence. The Appellant also contends that the Judge erred in accepting the victim's account, as she is not a credible source; further, the Judge should also not have substituted the Appellant's wife's statements to the police as her evidence pursuant to s 147(3) of the Evidence Act. The Appellant also asserts that the victim's account is

inherently incredible. For instance, the Appellant, his wife, the stepson and the victim could not all be sleeping on the same mattress at the same time and the stepson would have woken up if the offences really occurred. It is also highly improbable that the victim would have sexual intercourse with a stranger after two nights of severe physical and mental trauma, and, based on the Appellant's reading of the DNA Report, she might actually have had sex with not just one but *two* persons afterwards. Moreover, there is also the question mark as to why the DNA Report did not show the presence of the Appellant's DNA if he did in fact have sex with the victim.

29 As for sentence, the Appellant submits that it is manifestly excessive as the Judge erred in considering that the present case concerned familial rapes because while the parties are related, they hardly had any interaction with each other prior to the present incidents – the Appellant and the victim did not know each other well at all.

The Prosecution's arguments

30 The Prosecution's reply is that there is physical evidence of sexual assault, and that the Judge had considered all the evidence carefully, especially the testimony of the Appellant, his wife and the victim. In particular, the Prosecution argues that it is entirely possible for the acts to have taken place on the mattress, and for the victim to have had consensual sex even after the offences had been committed against the victim.

Our decision

The conviction

The medical evidence and the DNA Report

31 We begin with the medical report dated 12 July 2010 by Dr Matthew Lau from KK Women's and Children's Hospital. Dr Lau had seen the victim on 19 March 2010, and the report stated that:

> General clinical examination was unremarkable. Genital examination revealed erthyematous vulva and swollen anus with fissures. Pus was seen draining from anus.

32 Dr Lau stated that the injuries described could be caused by infection, and while sexual intercourse is one of the possible causes of the infection, it was not the only possibility.

33 Another doctor, Dr Anupriya Agarwal, who examined the victim earlier at 4.30am on 16 March 2010, testified that the victim had swelling in the genital region and that the anal opening was patulous and swollen, or more open than usual, consistent with recent sexual intercourse, but she was unable to comment on whether the intercourse was consensual. However, it was recorded in Dr Agarwal's notes that the victim had multiple longitudinal bruises, circumferential over the right arm, which were about 14cm above the elbow joint, and a 1cm by 0.2cm bruise over the right upper quadrant of the right breast. The victim had told Dr Agarwal that she sustained those injuries when she was held down. In Dr Agarwal's opinion, the arm injury was unlikely to be self-inflicted. The victim could not remember getting any marks on her body when questioned on this at trial, but this is unsurprising considering that these events happened some time ago.

34 The medical evidence thus shows that the victim had suffered injuries consistent with penetration of her vagina and anus, and that there was bruising consistent with being held down. However, this does not mean that the *Appellant* had sex with the victim, and inflicted the aforementioned injuries on her. It could have been someone else. For purposes of identification,

samples were taken from the victim's mouth, anus and vagina for DNA analysis, which results were set out in the DNA Report, a document dated 15 December 2010 prepared by an analyst at the HSA's DNA Profiling Laboratory. The result was surprising. While DNA belonging to at least one other person was found, none from the Appellant was discovered. When confronted with this fact, the victim revealed that she had sex with an Indian man after the alleged offences occurred (see [12] above).

35 Before we turn to the implications of the result, we pause to deal with Mr Pillai's new argument on appeal that the DNA Report disclosed the presence of *two* separate persons and not just one, which means that there is the possibility that the victim had sex with more than one person after the alleged offences, for which no explanation was proffered. The basis for this submission is that, in a column in a table marked "External Vaginal Swab 2", the DNA analysis found matches for "Unknown Male 1" (who is likely the Indian man) as well as an "Unknown Person". In a related vein, Mr Pillai also submits that it is odd that the Appellant's DNA did not appear on the DNA Report, since it was Dr Agarwal's evidence that sperm can survive up to three days in the vagina, and the sperm that is detected could be from any sexual partner who had intercourse with the woman within the previous 72 hours, although it is most likely that the last partner's sperm is picked up. This meant that, if the Appellant had had sex with the victim, it is possible (albeit not necessarily likely) that this would have resulted in the presence of traces of the Appellant's DNA when the swabs were taken – a point which, Mr Pillai says, was never examined by the Judge.

36 In reply, the Prosecution contends that Mr Pillai's arguments relate to a layperson's comprehension of a highly technical document, and we agree that great care should be taken in accepting a non-specialist's assessment of this type of evidence. Most lawyers are not forensic scientists. Although the DNA Report had not been admitted into evidence by the Judge, it had been disclosed to the Appellant's counsel before trial, and there was therefore no question of inadequate disclosure on the part of the Prosecution or surprise. Despite this, the Appellant did not call the maker of the DNA Report to be examined on it or seek to adduce expert evidence on the same report. In any event, this "Unknown Person" only appears in one column, and not for External Vaginal Swab 1 or Internal Vaginal Swab 1 or 2, or in any of the columns for the swabs taken from the anus or the mouth. It is not even clear if this Unknown Person is male or female. There could be numerous innocuous explanations for this anomaly. The closest we had to expert evidence was the testimony of Dr Agarwal, who was questioned in a general way on DNA testing but not on the specifics in the DNA Report. Without the assistance of expert testimony, the Appellant's postulation that the victim had sex with more than one person after the alleged offences was at best conjecture.

37 What is essential is that the Judge was aware of the material facts disclosed by the said report. More precisely, the Judge knew that the Appellant's DNA was not found in the swabs taken from the victim; it was someone else's. He had also heard Dr Agarwal's testimony, which was at best equivocal as to why the Appellant's DNA was not found on the victim. While we accept that the absence of the Appellant's DNA on the victim may be said to be in the Appellant's favour, in that it would have been decisive of his guilt if his DNA had been so found, such absence is, in the circumstances here, far from determinative. Again, while the DNA Report was not sighted by the Judge we are satisfied that he had properly applied his mind to the key facts before deciding whether the Appellant is guilty of the charges.

The Indian man

38 It is beyond question that there was at least one intervening act of sexual intercourse between the time of the alleged offences and the hospitalisation of the victim, which the victim says took place in a Pasir Panjang hotel with an Indian man. The Appellant submits that the fact that she could have vaginal and anal sex soon after the alleged offences strongly indicated that the offences never

took place. The Appellant relies on evidence from Dr Jacob and Dr Agarwal, who indicated that it was *unlikely* (and not *impossible*) for a victim to have consensual sex a short time after being raped. Although it is acknowledged that the doctors gave their evidence with the knowledge of the circumstances of the victim, we should caution that the unlikelihood posited by them is still only an unlikelihood in the *general* sense – unlikely things happen to individuals all the time. Even an event that occurs once in a blue moon *does* happen – the task of the court is to assess on the evidence in the *particular case* whether the blue moon has indeed occurred. In the circumstances, we do not think that it is impossible or even highly improbable that a young woman of her unusual intellect and personality could have had consensual sex with a man who gave her food, shelter and comfort in a time of grave need, despite her pain and discomfort.

39 After hearing all the evidence, the Judge determined that the victim's description of her encounter with the Indian man was true, and also believed her explanation as to why she did not reveal these facts until she was informed about the results of the DNA Report. This relates to his assessment of the credibility of the victim, as well as the other witnesses, a point which we will come to in the following paragraphs.

The credibility of the witnesses

40 It is apparent that the Judge's finding of guilt rested on the credibility of the following key sources of evidence regarding the events on the nights in question:

(a) The victim's testimony in court;

(b) The Appellant's testimony in court;

(c) The Appellant's wife's testimony in court; and

(d) The Appellant's wife's prior (inconsistent) statements given to the police as well as to the psychiatrist Dr Liew.

41 In coming to his decision, the Judge accepted sources (a) and (d) and rejected sources (b) and (c). We had no difficulty accepting the Judge's view that the Appellant's testimony was hard to believe, for the reasons he gave. The Appellant's evidence was unreliable: it was evasive and self-serving and there were a number of internal inconsistencies. We need not tarry on this point. We will, however, examine the Judge's assessment on the credibility of the other three sources of evidence.

The victim's evidence

42 It is trite that where no other evidence is available, a complainant's testimony can constitute proof beyond reasonable doubt – but only when it is so "unusually convincing" as to overcome any doubts that might arise from the lack of corroboration: see *AOF v Public Prosecutor* [2012] 3 SLR 34 ("*AOF*") at [111]. The general rule of practice is that the evidence of child witnesses is not taken at face value (see *Lee Kwang Peng v Public Prosecutor and another appeal* [1997] 2 SLR(R) 569 ("*Lee Kwang Peng*") at [62]), the reason being that (per Thomson CJ in *Chao Chong & Ors v Public Prosecutor* [1960] MLJ 238):

> … children at times find it difficult to distinguish between reality and fantasy. They find it difficult after a lapse of time to distinguish between the results of observation and the results of imagination.

43 This rule is not applied with equal severity to all testimonies by children, but is instead calibrated to the circumstances of each case. As Yong CJ noted in *Lee Kwang Peng* at [64]:

> Naturally, this rationale applies to different children in different degrees. Where, therefore, evidence is given by older children whose intellectual faculties are more developed, the danger in convicting without corroboration is diminished. The rationale of the rule makes it very difficult to lay down a guideline as to the point at which a maturing individual, in his progress towards adulthood, crosses the line past which the judicial process considers his testimony credible without independent evidence in support of it and this must therefore be a matter for the judge's assessment in each case.

44 Arguably, this rule should also apply to witnesses of less than average intelligence; while their evidence should not be discounted as a matter of course, it should be scrutinised minutely, before arriving at the conclusion that, in the words of Yong CJ in *Lee Kwang Peng* at [67], "corroboration is not required because of the maturity and reliability of the witness".

45 There is no dispute that the victim is mildly retarded. The Judge had considered that the victim was "not intelligent" and not a person "capable of cooking up evil schemes" (see the GD at [57]). It is also relevant to note that the victim's evidence in examination-in-chief came in May 2013, almost three years after the offences. It is therefore important for this court to examine the victim's testimony carefully, without losing sight of the advantages which the trial judge had in assessing the credibility of the individuals involved.

46 We start with the argument that the victim's testimony is inherently incredible due to the lack of struggle and screaming by the victim. The Appellant's counsel accepted that the victim might have been unable to react if the Appellant was on top of the victim, but for a number of the charges the victim was on all fours. She could have put up a fight or tried to escape.

47 The victim was cross-examined on the question of what compelled her to obey and the Prosecution had also addressed the point in oral closing submissions to the Judge. In fact, it seemed to us that this was at the forefront of Judge's mind, as can be seen from his questions to the victim at trial:

Court:	Why do you keep saying that you were forced to do all these things and you were in fear?
Witness:	I do not know what to do, I do not know what to say, I was in fear, I was forced to do.
Court:	Did he threaten you in any way?
Witness:	He told me to keep quiet. I do not know what to do and I do not know what to say. It was just like that.
Court:	Did you tell him you didn't want to do any of these things?
Witness:	I wanted to tell him. I do not what to say. I couldn't---I couldn't say it, I was in fear. I wanted to push his body but he firmed up his body.

48 The Appellant argues that there was no reason for the victim to fear the Appellant since the Appellant was not in a true familial relationship with the victim and not in a position of trust and authority over her. While we understand the point which the Appellant is attempting to make, that

although they are related they hardly had any contact, this does not necessarily support the contention that the Appellant was not in a dominating position over the victim on those two eventful nights, or that the Judge failed to consider the basis of the victim's fear. Fear is an emotional response and emotions are not always rational even in persons of ordinary intellect; moreover, it was not irrational for a young woman in the victim's shoes to have been scared of the Appellant, a man who was quick to anger and not shy to resort to physical abuse. In the Appellant's own account, he barely knew the victim yet he slapped her at their first meeting after a long time on 12 March 2010. The Judge also observed, first hand, that the Appellant was a hot-tempered man whose shouting from the prisoners' dock caused the victim to become "visibly shaken" (see [59] of the GD). This assessment of the Appellant's character is consistent with the wife's statements to the police that the Appellant would beat her and to Dr Liew that the Appellant had kicked her while he was angry and had even thrown a glass at her after he had drunk alcohol. Seen in this light, there is nothing unbelievable about the victim's explanation that she had complied out of her fear of the Appellant.

49 The Appellant also alleges that it was physically impossible for the sexual acts described by the victim to have taken place on the mattress. This is because the mattress, which appears to be queen-sized, is too small for three adults and a child. Moreover, the Judge had erred in saying that the boy was two years old (see the GD at [11]) when he was in fact six at the time of the offences – and it is very unlikely that a boy of that age would not have woken up when a woman was being raped near him.

50 In our judgment, the size of the mattress could not have rendered the commission of the offences physically impossible. We note that the investigation officer, SI Azman Bin Mohd Hussin, had said that everyone could have slept on the mattress if they squeezed. As the Judge noted (at [13] of the GD) the stepson was sleeping at the edge of the mattress. According to the wife's testimony in court, she (*ie*, the wife) had sex with the Appellant on the second night after watching a blue film and the stepson was already asleep by the time. She also said she had thrown an ashtray at the Appellant later that night after she saw the victim straddling the Appellant. There was no mention of the boy waking up at any time. Thus, even on the account favouring the Appellant, the stepson was capable of staying asleep despite his parents watching pornography and having sex afterwards, the victim straddling the Appellant, and even when an ashtray was being used as a projectile. Given the circumstances, the Appellant's argument falls away because any attack on the plausibility of the victim's account on the basis of the stepson's presence on the mattress must apply equally to the Appellant's version of events. We think it is hardly impossible that the stepson could have slept through the rapes as there was no screaming or violent resistance from the victim. The critical fact is not so much the size of the bed but whether the victim had screamed which conceivably could have woken up the sleeping stepson; the evidence before us is that the victim did not scream. She froze out of fear of the Appellant's dominant personality.

51 The Appellant also sought to undermine the victim's credibility on the basis that she did not reveal that she had sex with the Indian man until she was confronted by the results of the DNA Report, and also for the inconsistencies in how she recounted the alleged offences to various other persons not long after the alleged offences had taken place. For example, Dr Agarwal had recorded that the victim had "claimed that she was raped 24 times between 12th to 13th [March 2010] and about 20 times between 13th to the 14th of March 2010". Dr Agarwal had presumed that, as the victim was someone who had sexual intercourse before, the victim would understand what "rape" meant. Dr Agarwal also said that she was not surprised by the number – she has seen women who have been raped many times. It should be emphasised that Dr Agarwal's opinion that the victim was referring to the number of times intercourse took place was based on a *presumption* – she did not actually clarify with the victim on this point. There was every possibility of a misunderstanding or miscommunication. Could the victim have intended to say that there were 24 sexual thrusts on the

part of the Appellant into her vagina? The point is that it is wholly unclear what constituted one discrete or distinct rape in the victim's mind, and so it would not be right to ascribe much importance to the precise numbers that she used.

52 The Judge was aware of these issues, but nevertheless accepted the evidence of the victim. In the first place, the victim had little or no reason to frame the Appellant, and she appeared completely candid despite her initial failure to disclose her encounter with the unknown Indian man. In the Judge's view, she was an "unusual person" in "unusual circumstances" (at [61]) and her behaviour, particularly in having sex with the unknown Indian man the day after she was allegedly raped, was explicable on that basis. The Judge therefore accepted the victim's word as truth for the following reasons (at [62]):

> Despite the minor discrepancies in the accounts given by [the victim] to different people after the incidents in the accused's flat and her seemingly promiscuous behaviour, I had absolutely no doubt that she was telling the truth in court. The said incidents were real. It would be absurd to expect a female who had undergone such assaults to recall with exactitude the sequence and details of all the events. It could also be argued that [the victim] had many opportunities to run away from the flat and to seek help from others on 13 March 2010. However, as indicated earlier, the events must be viewed through her eyes and processed with her mind. She was thrust into a new place suddenly and made to live with people she hardly met. She was not someone who could think quickly and plan ahead.

53 In this respect, the Appellant argues that the Judge was wrong to say that the victim was being honest. He had been too indulgent with the victim. Instead, the Appellant contends that the Judge should have found that the victim was being deliberately evasive and thereby "cleverly preventing her evidence from being adequately tested during cross-examination".

54 We see no reason to disagree with the findings of the Judge, who had the benefit of observing the victim at trial. In this respect, the Privy Council in *The Queen v Crawford (Cayman Islands)* [2015] UKPC 44 ("*Crawford*") articulated a timely reminder in the following terms (at [10]):

> … The judge had been immersed in the evidence in a way which could not be replicated in the Court of Appeal. He did not have merely the written words of the witnesses. He had seen the way in which the words were spoken and challenges were met, and he had been able to read the faces and body language as well as what could be put on a page. That sometimes exaggerated general claims may be made for the ability of experienced judges to determine the truth solely by assessing the demeanour of witnesses does not alter the fact that part of the judicial function is to read the witness as a whole, nor that the demeanour may sometimes contribute very significantly to the correct conclusion. A transcript cannot provide the same opportunity. …

55 We recognise that it is possible for a fake rape victim to put on a show and seek to pull wool over the eyes of the trial judge. He could be taken in by the alleged victim's false pretences. However, that having been said, it remains the task of the trial judge to carefully scrutinise the evidence of the victim, as well as all the surrounding circumstances, including any corroborative evidence from other witnesses, to determine where the truth lies. He is not to enter into a credibility assessment exercise with any pre-conceived notions; neither should he speculate. He is better-placed than the appellate court to carry out this fact-finding exercise. In the GD, the Judge has shown that he was scrupulously cautious in examining the evidence; he even highlighted certain incidents that were not captured on transcript, for instance, the tone of voice of the Appellant, the fear of the victim when the Appellant shouted at her, the ponderousness of her answers, and the suddenness and violence of the wife's outburst in court, and that the wife had also walked away from

the witness stand. The RoP clearly did not give the full flavour of the proceedings at trial, and as Lord Reid stated in *Benmax v Austin Motor Co Ltd* [1955] AC 370 ("*Benmax*") at 375 (approved in *Crawford* at [9]), the judge may be led to a conclusion about a witness's credibility "by material not available to an appeal court". Indeed, we think that an appellate court should exercise particular caution when considering findings made by a trial judge on the credibility of a witness like the victim, who is a person of abnormal intellect and character, and who may have real difficulty in using words to express her feelings and experiences, and for which reason her evidence might "read badly in print" but to which the Judge might rightly attach importance (see *Benmax* at 375). After considering the evidence in its totality, we are satisfied that the Judge did not err in his estimation of the victim's veracity.

56 Even so, we are mindful that a generally trustworthy witness might give inaccurate testimony in parts, perhaps due to the efflux of time or the shakiness of the memory, which could therefore render a conviction unsafe, and this danger would be more acute where a witness is mentally deficient. After all, honesty is not the same as accuracy. We would therefore consider the degree to which the victim's evidence finds corroboration in the evidence, and as for what amounts to corroboration in law, it is not the case that only independent evidence implicating the accused person in a material particular amounts to corroboration (the so-called *Baskerville* standard: see *The King v Baskerville* [1916] 2 KB 658 at 667); instead a liberal approach is taken in deciding what constitutes corroboration:

> What is important is the substance as well as the relevance of the evidence, and whether it is supportive or confirmative of the weak evidence which it is meant to corroborate.

See *AOF* at [173], citing *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 at [43].

57 It is the Appellant's argument that the police had failed to gather all possible evidence to corroborate the evidence of the victim and to investigate all possible leads to ascertain whether the victim is telling the truth. For instance, the victim had testified that the Appellant had taken photographs of her anus and so the police could have seized the Appellant's handphone to see if there were any such photographs stored on the handphone; the victim tested positive for two sexually transmissible diseases and so the Appellant could have been tested for the same diseases; and the police could also have done more to try to trace the Indian man who slept with the victim after the alleged offences. While the investigative process could have been more thorough, we accept the Prosecution's argument that, to an extent, the Appellant's submission cuts both ways. Just as any evidence that was uncovered could have supported the Appellant's case, they could also have corroborated the victim's account. We would add that even if the evidence had resolved in the Appellant's favour they would not necessarily exonerate the Appellant. What is crucial is that the Judge was aware that there was little in the way of physical evidence that corroborated the victim's narrative (such as her injuries and even so only to a limited extent), and some evidence that might weigh against the case of the Prosecution (the fact that the Appellant's DNA was not discovered despite DNA testing).

58 That said, this is not a case where it was purely the victim's word against the Appellant's. There is an eyewitness – the Appellant's wife – who gave corroborating statements to the police and to Dr Liew. We must therefore examine whether the Judge was right to reject the testimony of the Appellant's wife and to place significant weight on her statements instead.

The Appellant's wife's evidence

59 As already noted above at [23], the Appellant's wife was a witness for the Prosecution, but her

credit was successfully impeached and the Judge substituted her statements to the police as her evidence pursuant to section 147(3) of the Evidence Act. Admissibility was challenged on the basis that the statements were made involuntarily, and it was initially argued in the Appellant's written submissions that the Judge erred in admitting the statements without conducting a *voir dire* (or a "trial-within-a-trial"). This argument is untenable as there is no requirement under s 147 of the Evidence Act for the party seeking to admit the evidence to prove that a witness (as opposed to an accused person) made the statement voluntarily. The issue only goes to the weight to be placed on the statements. It is therefore unnecessary to conduct a *voir dire* to determine that the statement was made voluntarily before it is admitted for cross-examination or as substantive evidence under s 147 of the Evidence Act: see *Thiruselvam s/o Nagaratnam v Public Prosecutor* [2001] 1 SLR(R) 362 (at [45]–[47]). That being so, the Appellant's then-counsel at trial had properly conceded that there was no need to conduct a *voir dire*, and at the hearing before us Mr Pillai also accepted that no such requirement existed in law. The Judge did not err on this point.

60 As for the voluntariness of the statements themselves, the crux of the Appellant's submissions is that the Appellant's wife was of a lower intellect herself, and therefore susceptible to robust interrogation by the investigating officer, SI Azman, whom the Appellant described as having "played the role of interrogator, interpreter and recorder". The Appellant also pointed to the detailed nature of the statements, and argued that it was therefore possible that SI Azman had "led" the wife on certain details.

61 The Judge did not believe that the statements were extracted from the wife involuntarily. Based on the wife's behaviour in court and the evidence that the wife could hold on to jobs in the past, the Judge determined that she was not someone who could be easily cowed and that she was a person who functioned at a higher level than what her IQ would suggest. These findings were entirely consistent with the report dated 28 June 2010 by Dr Jacob of IMH on the wife's mental capacity, which was not admitted in court but was shown to the Appellant's then counsel, who cross-examined both Dr Jacob and the wife on it. Whilst the report stated that the wife's full-scale IQ was 56, it also indicated that her lower IQ score might be partially caused by her inattention and impulsive answers. In court, Dr Jacob confirmed that the wife actually functions at "at a high level, the borderline range", and borderline means about 70 to 90 IQ points.

62 It is also telling that the wife was not even consistent as to whether she made the statements in the first place. Initially, she insisted that *nothing* in the statements came from her mouth and that the various statements were made up by SI Azman, alleging that SI Azman had forced her to sign the statements by saying that her son would be taken away and that she would be in prison if she did not sign the statements, and that he banged his hand on the table. In cross-examination by the Appellant's then-counsel, her evidence was somewhat different, as it would appear she was saying she did make the statements, albeit under duress. The DPP subsequently pressed her on the point, which is that there is a difference between the police making up the statements and afterwards forcing her to sign, and the allegation that she actually did make the statements because she felt threatened. She could not account for this inconsistency except to say that she was confused and had migraine while testifying in court.

63 In short, both the wife and SI Azman were extensively cross-examined on the statements. We see no reason to disagree with the Judge's conclusion, which was made with the benefit of seeing the witnesses at trial. In particular, the Judge was entitled to come to the view that the wife was not so mentally deficient that she could not give detailed and honest statements to the police of her own free will.

64 Furthermore, the statements are largely consistent with the psychiatric report dated 12 April

2010 by Dr Liew of IMH. Dr Liew had interviewed the Appellant on 25 March and 1 April 2010 and the wife on 29 March and 5 April 2010. The wife was recorded as saying that the Appellant was tipsy on 12 March 2010 and he had told the wife and the victim to take off their clothes, and the Appellant then had sex with the victim, *etc*. The wife also informed Dr Liew that, the next evening, the Appellant might have had sex with the victim but she was not sure. In court, the wife claimed she never said anything of the sort to Dr Liew and alleged that the doctor was lying.

65 The Judge could find no reason for the police or Dr Liew to fabricate evidence to frame the Appellant and neither could we. On the other hand, the wife had every reason to tailor her testimony at trial to favour the Appellant as she had a vested interest in keeping her husband, the sole breadwinner, out of jail. In our judgment, the Judge was entirely correct in substituting the wife's prior statements as her evidence and consequently placing significant weight on them.

66 Finally, we have carefully compared the wife's version of the facts as set out in the statements with the evidence given by the victim in court. There was consensus on the key points: both the victim and the wife said that the Appellant raped the victim, both mentioned that penile-vaginal penetration, digital-anal penetration, penile-anal penetration and fellatio took place over two nights, and that these acts were against the will and consent of the victim. While there are a number of variations in the accounts, as helpfully illustrated by Mr Pillai in his submissions, this was not unexpected. Indeed, if the accounts had been identical, the Appellant would doubtless have made the argument that such exact correspondence had to suggest that the statements had a single source and were actually drafted by SI Azman and not based on accounts given by the Appellant's wife. We accept the view proffered by the Prosecution, which is that the varying account by the wife indicates she was actually trying to tell her version of the events as best as she could remember. We are therefore satisfied that the wife's evidence, as found in her police statements as well as in her statement to Dr Liew, are corroborative of the victim's account.

Conclusion on conviction

67 It is a well-established principle of law that an appellate court should be slow to disturb findings of fact by a trial judge which are dependent on oral evidence. The key finding of fact – that the sexual acts alleged to have been committed by the Appellant against the victim *did* take place without her consent – was primarily based on the Judge's findings on the credibility of the witnesses. He was well aware of the state of the physical evidence but, after having heard all the testimonies, still favoured the victim's account. He was not plainly wrong in doing so. While there were certain gaps in the objective evidence, we are not satisfied that they raise a reasonable doubt. The Judge's assessment of the facts is in no way against the weight of the evidence. We therefore dismiss the appeal against the convictions.

The sentence

68 It remains for us to consider whether the sentences meted out by the Judge against the Appellant are manifestly excessive or otherwise. The Judge had ordered the sentence for Charge 1 (15 years' imprisonment and 12 strokes of the cane) and Charge 9 (7 years' imprisonment and 6 strokes of the cane) to run consecutively, with all other imprisonment terms to run concurrently, with effect from 16 March 2010.

69 The Appellant's primary case is that the sentences for Charges 1 and 6 are manifestly excessive because they are category 1 rapes and not category 2 rapes as found by the Judge (see the GD at [70]) under the benchmark introduced in *Public Prosecutor v NF* [2006] 4 SLR(R) 849. To summarise, category 1 rapes are rapes that feature no aggravating or mitigating circumstances while category 2

rapes are rapes where there had been exploitation of a particularly vulnerable victim. The Appellant says that these cannot be category 2 rapes because the Appellant and the victim were not in a true familial relationship given the minimal contact between the Appellant and the victim prior to the offences.

70 We are unable to accept the Appellant's submission. In the first place, category 2 rapes are not limited to familial rapes. Charges 1 and 6 are undoubtedly category 2 rapes: this is a case in which the victim had been assaulted by both the Appellant *and* the wife (albeit acting under duress); the Appellant in effect was standing *in loco parentis* to the victim; the victim was of low mental acuity; and there were repeated sexual assaults over two nights. The Judge had also identified other aggravating factors: there were acts of perversion and gross indignities forced on the victim; no condom was used in the rapes; the degree of emotional harm caused to the victim; and the lack of remorse and the conduct of the Appellant during the trial (see the GD at [70]). The benchmark prescribed for category 2 rape is 15 years' imprisonment and 12 strokes of the cane and this was indeed the sentence imposed for each of the rape charges. It cannot be said that the sentences taken either as a whole or individually were manifestly excessive.

Conclusion

71 For the above reasons, we dismiss the appeal against both conviction and sentence.

72 It remains for us to express our deep appreciation to Mr Pradeep Pillai and Ms Sujatha Selvakumar for taking up this brief of the Appellant on a *pro bono* basis. While we are not able to accept their submissions, they have put forth all possible arguments which are in their client's favour and to which we have given careful consideration.