IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 213

Criminal Case No 45 of 2015

Between

Public Prosecutor

And

Pram Nair

JUDGMENT

[Criminal procedure and sentencing] — [Sentencing] — [Rape]

[Criminal procedure and sentencing] — [Sentencing] — [Sexual assault by penetration]

Public Prosecutor
v
Pram Nair

[2016] SGHC 213

High Court — Criminal Case No 45 of 2015
Woo Bih Li J
18 July; 4 August 2016

3 October 2016 Judgment reserved.

Woo Bih Li J:

Introduction

1 The accused, Pram Nair ("the Accused"), was convicted on 18 July 2016 in respect of the following two charges:

(a) one charge of rape under s 375(1)(*a*) punishable under s 375(2) of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code"); and

(b) one charge of sexual assault by penetration (with his finger, also referred to as digital penetration) under s 376(2)(*a*) punishable under s 376(3) of the Penal Code.

2 The circumstances as to how the Accused committed the offences are set out in my judgment dated 18 July 2016 (*Public Prosecutor v Pram Nair* [2016] 4 SLR 880). I now have to address the issue of the appropriate

sentences. I will refer to the victim in the present case as "the Victim". She was intoxicated due to alcohol at the time of the offences. She was 20 years of age at the time of the offences while the Accused was 23 years of age then.

The offence of rape

3 In so far as the offence of rape is concerned, both the defence and the prosecution relied on the case of *Public Prosecutor v NF* [2006] 4 SLR(R) 849 ("*NF*"), a decision by V K Rajah J. In that case, Rajah J referred (at [19]) to the decision of the English Court of Appeal in *R v William Christopher Millberry* [2003] 2 Cr App R (S) 31, in which the court accepted the continued relevance and validity of the four broad categories of rape first articulated in *R v Keith Billam* (1986) 8 Cr App R (S) 48. Rajah J elaborated (at [20]–[21]) as follows:

> 20 At the lowest end of the spectrum are rapes that feature no aggravating or mitigating circumstances. The second category of rapes includes those where any of the following aggravating features are present:
>
> (a) The rape is committed by two or more offenders acting together.
>
> (b) The offender is in a position of responsibility towards the victim (*eg*, in the relationship of medical practitioner and patient, teacher and pupil); or the offender is a person in whom the victim has placed his or her trust by virtue of his office of employment (*eg*, a clergyman, an emergency services patrolman, a taxi driver or a police officer).
>
> (c) The offender abducts the victim and holds him or her captive.
>
> (d) Rape of a child, or a victim who is especially vulnerable because of physical frailty, mental impairment or disorder or learning disability.
>
> (e) Racially aggravated rape, and other cases where the victim has been targeted because of his or her membership of a vulnerable minority (*eg*, homophobic rape).

> (f) Repeated rape in the course of one attack (including cases where the same victim has been both vaginally and anally raped).
>
> (g) Rape by a man who is knowingly suffering from a life-threatening sexually transmissible disease, whether or not he has told the victim of his condition and whether or not the disease was actually transmitted.
>
> 21 The third category of cases involves those in which there is a campaign of rape against multiple victims. The fourth category deals with cases where the offender "has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time": see *Billam* at 50–51.

4 Rajah J also said (at [24]) that the benchmark sentence for Category 1 rapes, without mitigating or aggravating factors, should be ten years' imprisonment and not less than six strokes of the cane as a starting point. Rajah J observed that this was already determined by the Court of Appeal in *Chia Kim Heng Frederick v Public Prosecutor* [1992] 1 SLR(R) 63 ("*Frederick Chia*"). I should also point out that this benchmark applies to a contested case.

5 For Category 2 rapes, Rajah J cited a number of precedents. In many of these precedents, the accused was the father or stepfather of the victim. In one other precedent, the victim was a 13-year old neighbour of the accused while in yet another precedent, the accused raped the nine-year old daughter of his girlfriend. Rajah J noted (at [36]) that the cases meted out sentences ranging from 12 to 18 years' imprisonment with a majority of them imposing 12 strokes of the cane. He then suggested that the appropriate starting point for Category 2 rapes is 15 years' imprisonment and 12 strokes of the cane.

6 The defence submitted that the present case came within the lowest category (*ie*, Category 1) and urged the court to impose a minimal sentence

(for each of the two offences). The prosecution submitted that it was a Category 2 rape as the victim was particularly vulnerable because of her intoxication due to alcohol. The prosecution also submitted that there were various other aggravating factors and urged the court to impose a sentence of 16 years' imprisonment and 12 strokes of the cane for the rape offence. It seems to me that the prosecution was relying on sub-category (d) of Category 2 which refers to rape of a child, or a victim who is especially vulnerable because of physical frailty, mental impairment or disorder or learning disability. Rajah J did not say whether the mental impairment is permanent or temporary for this sub-category. In any event, it would be fair to say that Rajah J did not intend the sub-categories to be exhaustive. Hence, it is arguable that victims who are intoxicated due to alcohol come within the sub-category of victims who are especially vulnerable. For simplicity, I will refer to them as intoxicated victims.

7 The prosecution referred to a few cases to submit that an intoxicated victim comes within Category 2.

8 The first was *Public Prosecutor v Ow Siew Hoe @ Ow-Yong Siew Hoe* (Criminal Case No 36 of 2015), which was an unreported decision of the High Court. In that case, a 49-year old accused had pleaded guilty to one count of rape. The victim was a 35-year old female whom he had preyed upon at his house after giving her some "holy water" containing sedatives to drink. The accused then brought the victim to his bedroom where he sexually assaulted her. The prosecution submitted that the High Court had accepted the prosecution's classification of the case as a Category 2 rape as the accused had taken advantage of the weakened and drowsy state of the victim to commit the offence. However, as the accused had indicated some remorse and pleaded

guilty, the High Court sentenced him to 12 years' imprisonment and 12 strokes of the cane.

9 As there are no written reasons in that case, I am unable to say whether the prosecution's explanation of the reasons for the sentence is correct or not. The sentence could be supported for other reasons, for example, that the assault had been planned and that the victim had trusted the accused. Accordingly, I do not think that that case assists the prosecution in the present case.

10 The next two cases which the prosecution relied on are also decisions of the High Court. They are *Public Prosecutor v Muhammad Hazly Bin Mohamad Halimi* (Criminal Case No 34 of 2016) ("*Hazly*") and *Public Prosecutor v Muhammad Fadly Bin Abdull Wahab* (Criminal Case No 38 of 2016) ("*Fadly*"). The prosecution again submitted that the High Court had accepted that the rapes fell within Category 2 as the accused persons had exploited the vulnerability of the victim's intoxicated state. However, the court imposed a sentence of 11 years' imprisonment and six strokes of the cane on the accused in *Hazly* and 13 years' imprisonment and eight strokes of the cane on the accused in *Fadly* (who was more culpable). These sentences do not suggest that the High Court had treated the offences as Category 2 rapes, for which the benchmark suggested by Rajah J in *NF* is 15 years' imprisonment and 12 strokes of the cane. Indeed, they may even support the defence's submission that the present case is a Category 1 rape.

11 As I was drafting my judgment on sentencing for the present case, the High Court released its grounds of decision for the sentence in *Fadly* (see *Public Prosecutor v Muhammad Fadly Bin Abdull Wahab* [2016] SGHC 160)

An *ex tempore* judgment was also delivered in another case, *Public Prosecutor v Ong Jack Hong* [2016] SGHC 182 ("*Jack Hong*").

12 From the grounds of decision in respect of *Fadly*, I learnt that the prosecution had sought a sentence of 14 years' imprisonment with nine strokes of the cane whereas the defence had sought a sentence of 12 years' imprisonment with three strokes of the cane. Given the range of sentences sought, the High Court sentenced the accused in *Fadly* to 13 years' imprisonment and eight strokes of the cane.

13 It should also be borne in mind that in *Fadly*, the accused had planned to get the victim drunk at a birthday party. Presumably, he had also planned to rape her. Furthermore, he and another co-accused (*ie*, the accused in *Hazly*) were supposed to look after the victim who had passed out when the other persons at the party left for a nightclub. The accused also took a photograph of the victim's exposed breasts and sent it to one of his friends. In the circumstances, the court was of the view that the accused's conduct was insufficiently mitigated by his youth, his plea of guilt and the fact that that was his first offence. I note that although the prosecution in *Fadly* had submitted that the accused had exploited a particularly vulnerable victim and abused his position of trust, the court did not elaborate on whether the rape of an intoxicated victim should be considered a Category 2 rape.

14 In *Jack Hong*, the Statement of Facts stated that the victim was in a drunk and vulnerable state at the time of the offence. Sundaresh Menon CJ expressed the view (at [8]) that the victim "was not only vulnerable by reason of her age, but further, because she was drunk". Menon CJ also said (at [18]) that the fact that the victim was drunk and vulnerable was, by itself, sufficient

to aggravate the offence of sexual penetration of a minor under s 376A(1)(*a*) of the Penal Code.

15 The defence did not cite any case for the proposition that the rape of an intoxicated victim is a Category 1 rape.

16 However, in *Sentencing Practice in the Subordinate Courts* (LexisNexis, 3rd Ed, 2013), some cases involving an unconscious or intoxicated victim are cited under Category 1 rapes.

17 In *Seow Choon Meng v Public Prosecutor* [1994] 2 SLR(R) 338, the accused raped an unconscious victim. The court of first instance imposed a sentence of ten years' imprisonment and four strokes of the cane. The accused appealed against conviction and sentence. However, the Court of Appeal said (at [39]) that it was not addressed on the sentence although it considered the sentence to be most appropriate in all the circumstances of the case. It appears that this case was listed under Category 1 rapes in *Sentencing Practice in the Subordinate Courts* simply because the term of imprisonment imposed was ten years. I do not think that the decision of the Court of Appeal is authority for the proposition that the rape of an unconscious victim is a Category 1 rape.

18 The Court of Appeal's decision in *V Murugesan v Public Prosecutor* [2006] 1 SLR(R) 388 ("*Murugesan*") was also listed in *Sentencing Practice in the Subordinate Courts* under Category 1 rapes. In that case, the victim was tipsy and was abducted. The court cited (at [28]) the case of *Frederick Chia* only to state that ten years' imprisonment was the starting point in a contested rape case. The court was not discussing the various categories of rape. Therefore, *Murugesan* is also not an authority to suggest that the rape of a victim in a tipsy state is a Category 1 rape.

19 I come now to two cases which were listed under Subordinate Courts cases for Category 1 rapes in *Sentencing Practice in the Subordinate Courts*, and which have an element of intoxication.

20 In *Juraimi bin Mohd Sharif v PP* (MA 519/1993), the accused claimed trial to one charge of rape. The accused met the victim who was tipsy and could not find her friends. The victim accepted the accused's invitation to a party. She was brought to a flat belonging to the accused's sister. The victim consumed a glass of beer. She became more tipsy and sleepy and she tried to sleep in the master bedroom. While she was sleeping, she felt someone disturbing her. She opened her eyes. The accused was trying to pull down her bermudas and panties. The victim tried to get up but the accused was too strong for her. The accused then raped the victim. The District Court sentenced the accused to five years' imprisonment and six strokes of the cane after noting that the maximum term of imprisonment that the court could impose was seven years. Appeals by the accused and the prosecution were withdrawn. There was no discussion by the District Judge as to whether the intoxication of the victim was an aggravating factor or not. It appears that this case was listed under Category 1 rapes simply because the term of imprisonment imposed was five years.

21 In *Rizal bin Abdul Razak v Public Prosecutor* [2000] SGHC 148, there were three charges of rape and one charge of abetment of rape against the accused. The victim was drunk. The accused was sentenced to seven years' imprisonment and six strokes of the cane for each of the four charges and two of the sentences were ordered to run consecutively. The appeal against conviction was dismissed. Again, it appears that this case was listed as a Category 1 rape simply because the term of imprisonment imposed for each charge was seven years.

22 It seems to me that there is no local precedent expressly discussing whether the rape of an intoxicated victim is a Category 1 or 2 rape and the reason(s) why that should be so.

23 In the United Kingdom, there are sentencing guidelines. In the guidelines for offenders sentenced on or after 14 May 2007 (see *Sexual Offences Act 2003: Definitive Guideline* <http://webarchive.nationalarchives.gov.uk/+/http:/www.sentencingcouncil.org.uk/docs/web_SexualOffencesAct_2003.pdf> (accessed 1 September 2016)), there is no specific category dealing with intoxicated victims. However, the use of alcohol to facilitate the offence is listed as an aggravating factor.

24 In *R v Alan Nightingale* [2010] 2 Cr App R (S) 59, the victim apparently had consensual sex with a man in a room. Thereafter, the man telephoned a son of the accused to clean up the room. Various persons came to the room to clean up and eventually the accused was left in the room to complete the clean-up. The victim was still in the room in a comatose state due to alcohol intoxication. The accused took advantage of the situation and raped the victim. The trial court placed the case in a higher category due to a purported abuse of trust. This was reversed by the Court of Appeal which was of the view (at [14]) that the abuse of trust was not sufficiently serious to push the case into a higher category of rape. However, while the Court of Appeal considered the case to be of the lowest category, it nevertheless considered (at [15]) the abuse of trust to be an aggravating factor. Accordingly, using the starting point of five years' imprisonment for the lowest category, it was inclined to adjust the sentence to seven years and made a further adjustment because of some delay so that the eventual sentence was six and a half years' imprisonment. The intoxicated state of the victim was apparently not

considered as an aggravating factor. Perhaps this was because the accused did not use alcohol to facilitate the offence.

25 In the guidelines which took effect from 1 April 2014 (see *Sexual Offences: Definitive Guideline* <https://www.sentencingcouncil.org.uk/wp-content/uploads/Sexual-Offences-Definitive-Guideline-web3.pdf> (accessed 1 September 2016)), there are two types of categories for sentencing. One is based on harm, *ie*, Categories 1 to 3. The other is based on culpability, *ie*, Categories A and B. Where the victim is particularly vulnerable due to personal circumstances, this comes under Category 2 of the harm category, with Category 3 being the lowest category.

26 In *Regina v Daniel Rak* [2016] EWCA Crim 882, the victim was a 19-year old student. She attended a family barbeque and eventually went to and sat at a tram station. She was drunk and unconscious. The accused was a passerby who took advantage of her. He pleaded guilty to an offence of assault by penetration. The Court of Appeal agreed with the court of first instance that this was a Category 2B offence as the victim was particularly vulnerable due to her personal circumstances. She was in effect comatose due to drink. It is interesting that the courts reached this conclusion even though the accused did not use alcohol to facilitate the offence. Presumably, if he had done so, he would have been placed under Category 2A instead of 2B.

27 In Australia, there are no unified sentencing guidelines. Some cases suggest that the victim's intoxicated state due to drink is an aggravating factor.

28 Coming back to the principles enunciated by Rajah J in *NF*, it seems to me that the views of Menon CJ in *Jack Hong* support the view that intoxicated victims are especially vulnerable because of their physical and mental state

even though this is a temporary state and, in many instances, is also self-induced. I agree with such a view as such persons would be in less of a condition to resist any sexual assault.

29 However, even though intoxicated victims are more vulnerable than victims who are not intoxicated, would this necessarily bring such cases within Category 2 rapes? Looking at the various sub-categories under Category 2 again, I note that this category covers a wide spectrum of sub-categories. It may not be right to treat all the sub-categories as always coming under the same category and perhaps there should be more calibration. For example, where the accused is in a position of trust (*eg*, he is a father or stepfather), this would be a sub-category which is one of the most serious of all the sub-categories and quite different in severity from the rape of an intoxicated victim by a stranger.

30 Also, bearing in mind that the suggested benchmark imprisonment term for Category 2 rapes is 50% higher than that for Category 1 rapes and that the suggested number of strokes for caning for Category 2 rapes is twice that for Category 1 rapes, I hesitate to place all rapes of intoxicated victims automatically under Category 2. Rather, I would place them somewhere between Category 1 and 2 and consider all the other facts of each case before deciding on the sentence. This is not to suggest that the rape of an intoxicated victim is to be treated lightly. On the contrary, it is to be considered as a more serious crime than Category 1 rape.

31 I will now address the prosecution's submissions on the following aggravating factors aside from the fact of intoxication:

(a) abuse of quasi-position of trust;

(b) calculated and deliberate nature of the offences;

(c) egregious nature of the offences;

(d) accused's lack of remorse; and

(e) degree of harm occasioned to the victim.

32 First, the prosecution submitted that the Accused had placed himself in a quasi-position of trust when he assumed the responsibility of taking the Victim out of the Wavehouse. What I understood the prosecution to be saying was that although the Accused was trusted to bring the Victim home, he had instead brought her out of the Wavehouse to an area of the beach and proceeded to commit the two offences. Bearing in mind that the Victim and the Accused had only just become acquainted and that she had not spent as much time with him as he would have the court believe, I do not think that it would be correct to treat the Accused as having placed himself in a quasi-position of trust.

33 Second, the prosecution submitted that the offences were calculated and deliberate. The Accused had acted deliberately from the very beginning. He was physically attracted to the Victim when he was first introduced to her at the Wavehouse and it was a calculated act when he plied her with alcohol to get her drunk. It was the Accused who proposed playing the "drinking game" where he poured alcohol into the Victim's mouth for 20 seconds to get her even more drunk. Thereafter, he deliberately separated the Victim from [S] and took the Victim out of the Wavehouse.[1] The prosecution also referred to the Accused's subsequent conduct to submit that the Accused had acted with cold and calculated premeditation. For example, the Accused did not say

[1] Para 23 of Prosecution's Written Submissions ("PWS").

anything to [S] when he answered the Victim's handphone initially when [S] was trying to contact the Victim. When he eventually did answer on a subsequent occasion, he told [S] not to come out to look for them. He lied to the police officers when he said that he did not know what had happened to the Victim.

34 I am of the view that the Accused's subsequent conduct does not show that he had planned to sexually assault the Victim.

35 As for the Accused's conduct before the commission of the offences, it must be borne in mind that the Accused was a stranger to the Victim and *vice versa*. They had each gone to the Wavehouse to attend a party. It is true that the Accused made the suggestion to pour alcohol into the Victim's mouth for 20 seconds as she had just passed her 20th birthday. However, this must be considered in the context that they were all there for drinks. Furthermore, the Victim had taken other drinks which were not necessarily offered by the Accused. It is an exaggeration to say that he had acted deliberately from the very beginning or that he had plied her with alcohol to get her drunk. In my view, he was opportunistic when he saw her uninhibited behaviour, but his conduct was not premeditated.

36 Third, as for the egregious nature of the offences, the heinous nature of the offence of rape speaks for itself. It is not an aggravating factor of the offence. I do not think that the fact that the Accused did not use a condom is an aggravating factor. As for the digital penetration, this is the subject of a second charge which I will consider later in this judgment.

37 Fourth, the prosecution submitted that the Accused showed no remorse in putting the Victim through the trauma of testifying against him and reliving

her ordeal.[2] The prosecution also said that the Accused had cast spurious aspersions on the Victim as he was suggesting that she was flirting with him and other men at the Wavehouse. Also, the Accused had suggested that [S] was lying in her evidence against him as he had spurned her interest in him.

38 The prosecution, citing *Lee Foo Choong Kelvin v Public Prosecutor* [1999] 3 SLR(R) 292 ("*Kelvin Lee*") (at [36]), further submitted that the Accused had acted in a defiant manner. The prosecution elaborated on the Accused's conduct as follows.

39 First, the prosecution submitted that although two of the Accused's statements to the police had been included in an agreed bundle of documents, the Accused had unexpectedly challenged the voluntariness of the statements.

40 Secondly, the prosecution submitted that the Accused also did an about-turn in relation to the admission of a medical report on the Victim which was to have been admitted by consent. Consequently, the prosecution had to call the examining doctor as a witness even though the doctor was on training in Korea at the material time. The prosecution submitted that such conduct was unreasonable, had unnecessarily prolonged the trial and was a clear indication of the Accused's lack of remorse.

41 It is undisputed that an accused person may claim trial. The fact that he does so is not an aggravating factor *per se*. Although the prosecution accepted this point, the prosecution submitted, for the reasons stated above, that the Accused's conduct of his defence in the trial was an aggravating factor. I do not agree for the reasons elaborated on below.

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[2] Para 28 of PWS.

42 Firstly, whether or not the Victim was flirting specifically with the Accused, I had described her overall behaviour at the Wavehouse as uninhibited. To suggest that the Accused is precluded from referring to the Victim's behaviour is to tie his hands in his submissions on sentencing.

43 As for the Accused's suggestion that [S] was lying because he had spurned her interest in him, this is an allegation which I did not accept. However, this does not mean that the Accused's conduct of the trial was particularly irresponsible.

44 As regards the Accused's challenge on the voluntariness of his statements, I agree that the challenge was unexpected since the statements were part of an agreed bundle of documents. However, a change in an accused's position does not necessarily amount to an aggravating factor. Otherwise, each time there is a change in an accused's position, that would, in and of itself, be an aggravating factor. Also, the fact of a challenge on voluntariness is not, in and of itself, conduct that is aggravating.

45 As for the need for the prosecution to call the examining doctor to testify about his report on the Victim, it is not fair to say that the Accused had done an about-turn in relation to the admission of that report. What happened was that the prosecution had called another doctor to give evidence on the substantive content of the report. However, that doctor was not the one who had examined the Victim. This in turn raised the spectre of hearsay evidence. In view of that, the prosecution itself elected to call the examining doctor as a witness even though the original intention was to have his medical report admitted by consent.

46 In the circumstances, I do not find the Accused's conduct in respect of the trial to be defiant, even when such conduct is considered in its entirety. The facts before me are quite different from those in *Kelvin Lee*, which was a cheating case. I need not elaborate on the facts in that case.

47 Finally, the prosecution submitted that the degree of harm occasioned to the Victim was another aggravating factor. However, the prosecution was not relying on any specific violence or emotional or mental trauma over and above that which is often associated with such an ordeal. The Victim's evidence on the impact of the offences on her also did not add much more to the already heinous nature of the offences.

48 Accordingly, notwithstanding the prosecution's attempts to raise aggravating factors, I find that there was none.

49 The accused has no antecedents. He was 23 years of age at the time of the offences and was working part-time as a beach patroller. I consider these facts as neutral factors in the circumstances and there is no mitigating factor.

50 In my view, a sentence of 12 years' imprisonment and six strokes of the cane would be appropriate for the offence of rape in the circumstances. This would be subject to other considerations, which I will elaborate on below (at [59]–[60]).

The offence of sexual assault by penetration

51 For the offence of sexual assault by penetration, the defence referred to two cases as sentencing precedents.

52 In *Public Prosecutor v GBA (B1) and BAV (B2)* [2015] SGDC 168 ("*GBA*"), the District Court was of the view (at [210]) that an appropriate sentence for sexual assault by penetration under s 376(2)(*a*) of the Penal Code would be in the region of five years' imprisonment with caning where there are no aggravating factors. In the case before that court, there were aggravating factors and hence the court imposed a sentence of six years' imprisonment and five strokes of the cane. In reaching its conclusion, the court was of the view (at [208]) that there was a dearth of directly relevant precedents in respect of the offence of sexual assault by penetration *simpliciter*. The court also noted (at [198]) the decision in *Public Prosecutor v Shamsul Bin Sa'at* [2010] 3 SLR 900 ("*Shamsul*"), where Chan Seng Onn J had stressed (at [25]) that the general sentencing norm for the offence of *aggravated* sexual assault by digital penetration under s 376 of the Penal Code was about ten years' imprisonment and 12 strokes of the cane. I understand from the prosecution that in *GBA*, each side filed an appeal to the High Court and the sentence was enhanced to eight years' imprisonment and six strokes of the cane for the offence of sexual assault by penetration.

53 In *Public Prosecutor v Ng Jun Xian* [2015] SGDC 317 ("*Ng Jun Xian*"), the prosecution submitted that sexual assault by digital penetration was akin to a Category 1 rape and that the prescribed punishment for both offences was identical. The prosecution also relied on the observation by Tay Yong Kwang J in *Public Prosecutor v AUB* [2015] SGHC 166 ("*AUB*") (at [7]) that:

> Victims of sexual penetration experience the same emotional scars as rape victims. The sentencing considerations that apply to rape should therefore be applied to victims of sexual penetration as well. …

54 However, the District Court in *Ng Jun Xian* also noted (at [28]) the observations of Chan J in *Shamsul* (at [23]–[25]), where Chan J appeared to equate the punishment for *aggravated* sexual assault by digital penetration with Category 1 rape as he was of the view (at [25]) that the normal imprisonment term for this offence was about ten years, as is the case for Category 1 rape. The District Court drew a distinction (at [55]–[56]) between penile rape and aggravated sexual assault by digital penetration, on the one hand, and sexual assault by digital penetration *simpliciter*, on the other, and concluded that an appropriate sentence for sexual assault by penetration *simpliciter* under s 376(2)(*a*) of the Penal Code, without aggravating factors, would be in the region of six years' imprisonment with caning. As there were aggravating factors, the District Court imposed a sentence of seven years' imprisonment with three strokes of the cane for that offence. Upon the prosecution's appeal to the High Court, the sentence was increased to eight years and six months' imprisonment and six strokes of the cane. Apparently, no written reasons were given by the High Court.

55 In the present case, therefore, the defence was suggesting that the sentence for the offence of sexual assault by penetration should be lower than that for rape. On the other hand, the prosecution submitted that the offence was, broadly speaking, analogous to rape and that this was consistent with the architecture of ss 375 and 376 of the Penal Code. However, the prosecution did seek a lower sentence of ten years' imprisonment and three strokes of the cane for the second offence since there was minimal risk of the transmission of a sexual disease and no risk of pregnancy.

56 Like Tay J in *AUB*, 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.

Conclusion

59 I take into account the fact that the Accused was in remand from 13 January 2014 to 23 December 2014 (*ie*, 11 months and 11 days) before he was released on bail. Furthermore, after I delivered my judgment on 18 July 2016 to convict him in respect of the two charges, I increased his bail amount. As he was unable to provide the increased bail, he remained in remand from 18 July 2016.

60 In the circumstances, I sentence the Accused to 11 years and 19 days' imprisonment and six strokes of the cane for each of the two offences. In view

of the one transaction rule, the sentences of imprisonment will run concurrently from 18 July 2016.

61 The aggregate sentence is 11 years and 19 days' imprisonment and 12 strokes of the cane.

Woo Bih Li
Judge

Bhajanvir Singh, Kavita Uthrapathy and Kenneth Chin (Attorney-General's Chambers) for the prosecution;
Peter Ong Lip Cheng (Templars Law LLC) for the accused.